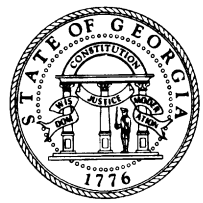
OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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Volume 20

2023 Edition

Title 24. Evidence

(Chapters 1 through 7)

Including Acts of the 2023 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of July, in the year of our Lord Two Thousand and Twenty-three and of the Independence of the United States of America the Two Hundred and Forty-Seventh.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume, along with the 2023 edition of Volume 20A, replaces the 2013 edition of Volume 20 of the Official Code of Georgia Annotated, as supplemented by the 2022 Cumulative Supplement. The 2013 Volume 20 and its 2022 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 24, Chapters 1 through 7, by the General Assembly through the 2023 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 19, 2023. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2021, 2022, and 2023 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2021 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Appendix. American Experience Mortality Table; The Commissioners 1958 Standard Ordinary Mortality Table; Annuity Mortality Table for 1949, Ultimate.

Editor's notes.

Ga. L. 2011, p. 99, § 1/HB 24, not codified by the General Assembly, provides that: "It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is con-

sistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained."

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Ga. L. 2011, p. 99, § 2/HB 24, and Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this title and enacted the current title. The former title consisted of §§ 24-1-1 through 24-1-5 (Chapter 1); 24-2-1 through 24-2-4 (Chapter 2); 24-3-1 through 24-3-18 (Article 1 of Chapter 3); 24-3-30 through 24-3-38 (Article 2 of Chapter 3); 24-3-50 through 24-3-53 (Article 3 of Chapter 3); 24-4-1 through 24-4-9 (Article 1 of Chapter 4); 24-4-20 through 24-4-27 (Article 2 of Chapter 4); 24-4-40 through 24-4-48 (Article 3 of Chapter 4); 24-4-60 through 24-4-65 (Article 4 of Chapter 4); 24-5-1 through 24-5-5 (Article 1 of Chapter 5); 24-5-20 through 24-5-33 (Article 2 of Chapter 5); 24-6-1 through 24-6-10 (Chapter 6); 24-7-1 through 24-7-9 (Article 1 of Chapter 7); 24-7-20 though 24-7-27 (Article 2 of Chapter 7); 24-8-1 through 24-8-6 (Article 1 of Chapter 8); 24-8-20 through 24-8-30 (Article 2 of Chapter 8); 24-9-1 through 24-9-7 (Article 1 of Chapter 9); 24-9-20 through 24-9-30 (Part 1, Article 2 of Chapter 9); 24-9-40 through 24-9-47 (Part 2, Article 2 of Chapter 9); 24-9-60 through 24-9-70 (Article 3 of Chapter 9); 24-9-80 through 24-9-85 (Article 4 of Chapter 9); 24-9-100 through 24-9-108 (Article 5 of Chapter 9); 24-10-1 through 24-10-7 (Article 1 of Chapter 10); 24-10-20 through 24-1-29 (Part 1, Article 2 of Chapter 10); 24-10-40 through 24-10-45 (Part 2, Article 2 of Chapter 10); 24-10-60 through 24-10-62 (Article 3 of Chapter 10); 24-10-70 through 24-10-76 (Article 4 of Chapter 10); 24-10-90 through 24-10-97 (Article 5 of Chapter 10); 24-10-110 through 24-10-116 (Article 6 of Chapter 10); 24-10-130 through 24-10-139 (Article 7 of Chapter 10); 24-10-150 through 24-10-154 (Article 8 of Chapter 10) and was based on Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Laws 1799, Cobb's 1851 Digest, p. 277; Laws 1799, Cobb's 1851 Digest, p. 463; Laws 1819, Cobb's 1851 Digest, p. 272; Laws 1829, Cobb's 1851 Digest, p. 278; Laws 1830, Cobb's 1851 Digest, p. 273; Laws 1836, Cobb's 1851 Digest, p. 273; Ga. L. 1841, p. 144, § 1; Laws 1841, Cobb's 1851 Digest, p. 465; Laws 1842, Cobb's 1851 Digest, p. 280; Laws 1850, Cobb's 1851 Digest, p. 280; Ga. L. 1855-56, p. 138, § 2; Ga. L. 1855-56, p. 143, § 1; Ga. L. 1855-56, p. 238, §§ 1 — 8; Ga. L. 1855-56, p. 255, § 1; Ga. L. 1858, p. 53, § 1; Ga. L. 1859, p. 18, § 1; Orig. Code 1863, §§ 3035, 3041 — 3044, 3051, 3437 — 3442, 3444, 3446, 3447, 3670 — 3699, 3701 — 3717, 3719, 3720, 3723 — 3731, 3737 — 3740, 3742 — 3745, 3747, 3749, 3753 — 3755, 3757 — 3766, 3768 — 3776, 3784 — 3800, 3888 — 3891, 3894, 3928, 4094; Code 1863, §§ 3721, 3741, 3744, 3745, 3765, 3767, 3768, 3772; 3884 — 3888, 3890, 3891; Ga. L. 1866, p. 138, §§ 1 — 4; Ga. L. 1866, p. 139, § 1; Ga. L. 1868, p. 24, § 1; Code 1868, §§ 3047, 3053 — 3056, 3063, 3446, 3457 — 3464, 3467, 3694 — 3723, 3725 — 3741, 3743 — 3745, 3747 — 3755, 3761 — 3769, 3771 — 3773, 3777 — 3779, 3781 — 3820, 3887, 3901, 3904 — 3911, 3914, 3916, 3951, 4123; Ga. L. 1873, p. 25, § 1; Ga. L. 1873, p. 35, § 1; Code 1873, §§ 3102, 3108, 3109, 3111, 3118, 3508 — 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796 — 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3833, 3835 — 3845, 3849 — 3876, 3980 — 3987, 3990, 3992, 4027, 4182, 4637; Ga. L. 1874, p. 22, § 1; Ga. L. 1876, p. 101, §§ 1,

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Former Code Sections to New Code Sections

This table lists each Code section of former Title 24 (as effective prior to January 1, 2013) and comparable provisions in current Title 24 (as effective on January 1, 2013).

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24-9-70	none
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24-9-84	24-6-608
24-9-84.1	24-6-609
24-9-85	none
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24-9-101	24-6-651
24-9-102	24-6-652
24-9-103	24-6-653
24-9-104	24-6-654
24-9-105	24-6-655
24-9-106	24-6-656
24-9-107	24-6-657
24-9-108	24-6-658
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24-10-28	24-13-29
24-10-29	24-13-20
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24-10-40	none
24-10-41	none
24-10-42	none
24-10-43	none
24-10-44	none
24-10-45	none
Article 3	
24-10-60	24-13-60
24-10-61	24-13-61
24-10-62	24-13-62
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24-10-70	none
24-10-71	none
24-10-72	none
24-10-73	none
24-10-74	none
24-10-75	none
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24-10-90	24-13-90
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24-10-92	24-13-92
24-10-93	24-13-93
24-10-94	24-13-94
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24-10-110	none
24-10-111	none
24-10-112	none
24-10-113	none
24-10-114	none
24-10-115	none
24-10-116	none
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24-10-130	24-13-130
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24-10-134	24-13-134
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New Code Sections to Former Code Sections

This table lists each Code section of Title 24 (as effective on January 1, 2013) and comparable provisions in the former version of Title 24, and in the Federal Rules of Evidence (as effective prior to January 1, 2013).

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24-1-102	none
24-1-103	FRE 103
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24-3-6	24-6-6
24-3-7	24-6-7
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24-4-403	FRE 403, 24-2-1
24-4-404	FRE 404, 24-2-2
24-4-405	FRE 405, 24-2-2
24-4-406	FRE 406
24-4-407	FRE 407
24-4-408	FRE 408, 24-3-37
24-4-409	FRE 409
24-4-410	FRE 410
24-4-411	FRE 411
24-4-412	24-2-3
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24-4-414	FRE 414, U.S.C.R. 31.3, 24-2-2
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24-5-503	24-9-23
24-5-504	24-9-26
24-5-505	24-9-27
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24-5-507	24-9-28
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24-5-509	none
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24-6-607	FRE 607, 24-9-81
24-6-608	FRE 608, 24-9-83, 24-9-84
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24-6-613	FRE 613, 24-9-83
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24-13-22	24-10-21
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24-13-97	24-10-97
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24-13-110	none
24-13-111	none
24-13-112	none
24-13-113	none
24-13-114	none
24-13-115	none
24-13-116	none
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24-13-130	24-10-130
24-13-131	24-10-131
24-13-132	24-10-132
24-13-133	24-10-133
24-13-134	24-10-134
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24-13-136	24-10-136
24-13-137	24-10-137
24-13-138	24-10-138
24-13-139	24-10-139
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Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012).

For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

For article, "The Best Evidence Rule Made Better: A Glimpse into Georgia's New Evidence Code," see 19 Ga. St. B.J. 12 (Aug. 2013).

For article, "Williams v. Illinois: Confronting Experts, Science, and the Constitution," see 64 Mercer L. Rev. 805 (2013).

For annual survey on evidence law, see 64 Mercer L. Rev. 929 (2013).

For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Article: Evidence," see 65 Emory L.J. 945 (2014).

For article, "Eleventh Circuit Survey: January 1, 2014 — December 31, 2014: Evidence," see 66 Mercer L. Rev. 965 (2015).

For annual survey of evidence law, see 67 Mercer L. Rev. 907 (2016).

For annual survey on evidence law, see 68 Mercer L. Rev. 121 (2016).

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence law, see 69 Mercer L. Rev. 1149 (2018).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For article, "Where Do We Go From Here? Transformation and Acceleration of Legal Analytics in Practice," see 35 Ga. St. U.L. Rev. 1245 (2019).

For annual survey on evidence, see 70 Mercer L. Rev. 1023 (2019).

For annual survey on evidence, see 71 Mercer L. Rev. 103 (2019).

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

For annual survey of criminal law, see 71 Mercer L. Rev. 967 (2020).

For comment, "The Reasonableness and Unreasonableness of Delays in Obtaining Search Warrants," see 71 Mercer L. Rev. 1149 (2020).

For annual survey on evidence, see 73 Mercer L. Rev. 111 (2021).

For article with Eleventh Circuit survey, see 73 Mercer L. Rev. 1215 (2022).

CHAPTER 1

GENERAL PROVISIONS

Article 1

Purpose and Applicability of Rules of Evidence

Sec.
24-1-1. Purpose and construction of the rules of evidence.
24-1-2. Applicability of the rules of evidence.

Article 2

General Evidentiary Matters

24-1-101. [Reserved].
24-1-102. [Reserved].
24-1-103. Rulings on evidence.
24-1-104. Preliminary questions.
24-1-105. Limited admissibility.
24-1-106. Contemporaneous consideration of other writings or recorded statements.

Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

PURPOSE AND APPLICABILITY OF RULES OF EVIDENCE

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-1-1. Purpose and construction of the rules of evidence.

The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

History.
Code 1981, § 24-1-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.
Cross references.
Purpose, Fed. R. Evid. 102.
Law reviews.
For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957).
For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).
For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).
For article, "Symposium on Evidence Reform," see 47 Ga. L. Rev. 657 (2013).
For article, "Symposium on Evidence Reform: Searching for Truth in the American Law of Evidence and Proof," see 47 Ga. L. Rev. 801 (2013).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 3670, former Code 1868, § 3694, former Code 1873, § 3747, former Code 1882, § 3747, former Civil Code 1895, § 5142, former Penal Code 1895, § 982, former Civil Code 1910, § 5728, former Penal Code 1910, § 1008, former Code 1933, § 38-101, and former O.C.G.A. § 24-1-2 are included in the annotations for this Code section.

Former O.C.G.A. § 24-1-2 capsulized the raison d'etre for the rules which govern trials. It was not limited by the statute's terms to civil trials. Holcomb v. State, 198 Ga. App. 547, 402 S.E.2d 520, 1991 Ga. App. LEXIS 213 (1991) (decided under former O.C.G.A. § 24-1-2).

Balancing of competing rights. — Trial court must weigh in balance the right of the state as society's representative to obtain the truth in the purest and simplest form against the right of a defendant to a trial as free as possible from improper influences. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72, 1980 Ga. App. LEXIS 3062 (1980) (decided under former Code 1933, § 38-101).

Basic axiom of justice set forth in the former provisions obtained in all cases except when "it would be more unjust and productive of more evil to hear the truth than to forbear the investigation." Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354, 1974 Ga. App. LEXIS 1010 (1974) (decided under former Code 1933, § 38-101).

Courts allowed broad discretion. — Pursuant to the liberal rule granting the trial courts very broad discretion in permitting parties to offer additional evidence at any stage of the trial, and because leniency in this area was very unlikely to constitute an abuse of the court's discretion, the defendant failed to show that the trial court abused the court's discretion in permitting the state to reopen the evidence after the state had presented the state's case-in-chief and rested. Taylor v. State, 282 Ga. 502, 651 S.E.2d 715, 2007 Ga. LEXIS 717 (2007) (decided under former O.C.G.A. § 24-1-2).

Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellishment for fear that there may be those in attendance who could call the testimony into question if not truthful. As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72, 1980 Ga. App. LEXIS 3062 (1980) (decided under former O.C.G.A. § 24-1-2).

Narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is "the object of all legal investigation." Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441, 2000 Ga. LEXIS 855 (2000) (decided under former O.C.G.A. § 24-1-2).

Impeachment evidence. — Trial court's refusal to permit the introduction of a complaint in another proceeding to impeach a party was at odds with the principle in former O.C.G.A. § 24-1-2 (see now O.C.G.A. § 24-1-1) that the object of all legal investigation was the discovery of the truth, since the statute authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged; clearly, the subordination of the discovery of the truth to a mere procedural device was erroneous. Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572, 2002 Ga. LEXIS 1006 (2002) (decided under former O.C.G.A. § 24-1-2).

Reopening case to admit impeachment evidence. — Trial court did not abuse the court's discretion in reopening the evidence in a defendant's marijuana possession trial to allow the prosecutor to present impeachment witnesses who disproved a defense witness's claim that the witness did not know the defendant by showing that the witness was the defen-

dant's girlfriend and the mother of the defendant's child. Sirmans v. State, 301 Ga. App. 756, 688 S.E.2d 669, 2009 Ga. App. LEXIS 1437 (2009) (decided under former O.C.G.A. § 24-1-2).

Admission of doubtful evidence. — State policy was to admit evidence, even if the admissibility of the evidence was doubtful, because it was more dangerous to suppress the truth than to allow a loophole for falsehood. Gibbons v. Maryland Cas. Co., 114 Ga. App. 788, 152 S.E.2d 815, 1966 Ga. App. LEXIS 919 (1966) (decided under former Code 1933, § 38-101).

When the admissibility of evidence is in doubt, the Georgia rule favored admission and submission to the jury with any needed instructions. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735, 1979 Ga. App. LEXIS 2682 (1979) (decided under former Code 1933, § 38-101).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring with the existence of other facts" from predicate evidence. Bruno's Food Stores, Inc. v. Taylor, 228 Ga. App. 439, 491 S.E.2d 881 (decided under former O.C.G.A. § 24-1-2).

Reception of perjured evidence was never justice, no matter how salutary the end in view. Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354, 1974 Ga. App. LEXIS 1010 (1974) (decided under former Code 1933, § 38-101).

Experiments made in and out of court sometimes make a practical demonstration of the question in issue, and are often the best evidence in elucidating the truth; there should be substantial and reasonable similarity in the facts proved in the case and the facts upon which the experiment is based, but the facts need not be exactly or in every particular similar; if the experiments are sufficiently similar to accomplish the purpose of assisting the jury to intelligently consider the issue of fact presented in regard to the special point in controversy, the evidence is admissible. Miller v. State, 53 Ga. App. 275, 185 S.E. 372, 1935 Ga. App. LEXIS 1 (1935) (decided under former Code 1933, § 38-101).

On cross-examination opposing party was entitled to a thorough and sifting examination of the witness and, when the defendant's alibi witnesses were under cross-examination, the trial court correctly refused to grant a mistrial with reference to an effort to impeach the witnesses as to whether or not the testimony was fabricated before trial since the object of all legal investigation was the discovery of truth. Mitchell v. State, 157 Ga. App. 683, 278 S.E.2d 192, 1981 Ga. App. LEXIS 1967 (1981) (decided under former Code 1933, § 38-101).

Refusal to allow a witness to testify is a matter within the discretion of the trial court. Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 387 S.E.2d 898, 1989 Ga. App. LEXIS 1459 (1989) (decided under former O.C.G.A. § 24-1-2).

Failure of the trial court to allow a witness to testify in a slip and fall premises liability suit constituted an abuse of discretion requiring reversal and a new trial since the exercise of discretion was based upon a misapprehension of the facts of the case, namely, the trial court's belief that the witnesses' existence had not been revealed to the opposing party. Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 387 S.E.2d 898, 1989 Ga. App. LEXIS 1459 (1989) (decided under former O.C.G.A. § 24-1-2).

Blood test admitted in rebuttal. — Ruling of the trial court to allow blood test to be admitted in rebuttal was entirely consistent with the statutorily recognized object of the rules of evidence. Gregg v. State, 216 Ga. App. 135, 453 S.E.2d 499, 1995 Ga. App. LEXIS 39 (1995) (decided under former O.C.G.A. § 24-1-2).

Compliance with a subpoena implicit in a confidential settlement agreement. — Provision that a party to a confidential settlement agreement may nevertheless testify or otherwise comply with a subpoena, court order, or applicable law is an implicit term in such a confidential settlement agreement. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499

S.E.2d 737, 1998 Ga. App. LEXIS 413 (1998), cert. denied, No. S98C1508, 1998 Ga. LEXIS 1025 (Ga. Oct. 23, 1998), superseded by statute as stated in Johns v. Suzuki Motor of Am., Inc., 310 Ga. 159, 850 S.E.2d 59, 2020 Ga. LEXIS 760 (2020) (decided under former O.C.G.A. § 24-1-2).

Trial court erred in concluding that a confidential settlement agreement, even if incorporated as another court's final order, can operate to preclude discovery by Georgia litigants of the parties to that confidential settlement agreement. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737, 1998 Ga. App. LEXIS 413 (1998), cert. denied, No. S98C1508, 1998 Ga. LEXIS 1025 (Ga. Oct. 23, 1998), superseded by statute as stated in Johns v. Suzuki Motor of Am., Inc., 310 Ga. 159, 850 S.E.2d 59, 2020 Ga. LEXIS 760 (2020) (decided under former O.C.G.A. § 24-1-2).

District attorney request for declaratory judgment on admissibility of hearsay evidence. — Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401, 2012 Ga. LEXIS 771 (2012) (decided under former O.C.G.A. § 24-1-2).

RESEARCH REFERENCES

ALR.

Admissibility of experimental evidence to show visibility or line of vision, 78 A.L.R.2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 A.L.R.2d 218.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 A.L.R.3d 1082.

24-1-2. Applicability of the rules of evidence.

(a) The rules of evidence shall apply in all trials by jury in any court in this state.

(b) The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) of this Code section.

(c) The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;

(2) Criminal proceedings before grand juries;

(3) Proceedings for extradition or rendition;

(4) Proceedings for revoking parole;

(5) Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;

(6) Proceedings with respect to release on bond;

(7) Dispositional hearings and custody hearings in juvenile court; or

(8) Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.

(d)(1) In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.

(2) In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.

(3) In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.

(4) In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.

(e) Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial.

History.
Code 1981, § 24-1-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Applicability of the rules, Fed. R. Evid. 1101.

Law reviews.
For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Application of rules of evidence. — Under Georgia's new Evidence Code, unless a fact-finding proceeding involves one of the 12 situations enumerated in O.C.G.A. § 24-1-2(c) and (d), the rules of evidence fully apply; similarity to one or more of the enumerated situations is insufficient to limit the applicability of the evidence rules. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Error in application of hearsay rules in determining material witness status. — Trial court erred in applying the hearsay rules to exclude the appellant's proffered documents from the evidence the court considered in ruling on a motion for material witness certificates as to the Kentucky-based manufacturer of the breathalyzer because an exception under O.C.G.A. § 24-1-2(c)(1) applied. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Long standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

Admissibility of prior testimony of disabled witness. — Trial court did not err in relying in part on a letter from a physician treating a prior victim, who

wrote that the victim's medical condition left the victim unable to travel to Chatham County, and in admitting the victim's prior testimony about a robbery because, whether the Screven County victim was unavailable presented a question of fact to be determined by the trial court as a preliminary to the admissibility of the victim's prior testimony, and there was no error in its consideration of the physician's letter in resolving that question. Scott v. State, 309 Ga. 95, 844 S.E.2d 785, 2020 Ga. LEXIS 445 (2020).

RESEARCH REFERENCES

ALR.

Applicability of rules of evidence in juvenile delinquency proceeding, 43 A.L.R.2d 1128.

Applicability of rules of evidence to juvenile transfer, waiver, or certification hearings, 37 A.L.R.5th 703.

ARTICLE 2

GENERAL EVIDENTIARY MATTERS

24-1-101. [Reserved].

Editor's notes.

Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

24-1-102. [Reserved].

Editor's notes.

Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

24-1-103. Rulings on evidence.

(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

(b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the

ruling thereon. The court may direct the making of an offer of proof in question and answer form.

(c) Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court.

History.

Code 1981, § 24-1-103, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Rulings on evidence, Fed. R. Evid. 103.

Law reviews.

For article with annual survey on trial practice and procedure, see 73 Mercer L. Rev. 265 (2021).

JUDICIAL DECISIONS

Analysis

General Consideration
Plain Error
Harmless Error
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Application

General Consideration

Renewal of objection not required as prior objection preserved issue for review. — Trial counsel was not ineffective for failing to renew prior objections to other acts evidence, as the objection had been preserved for appeal. Bell v. State, 366 Ga. App. 743, 884 S.E.2d 129, 2023 Ga. App. LEXIS 74 (2023).

Contemporaneous objection required for violation of ruled-upon motion in limine. — Because O.C.G.A. § 24-1-103 is specifically patterned after Fed. R. Evid. 103(b), and the Eleventh Circuit interprets that provision, based on the Advisory Committee Notes, as requiring a contemporaneous objection when a ruled-upon motion in limine regarding the admissibility of evidence is allegedly violated at trial, it is clear that the adoption of this Code section abrogated the contrary holding announced in Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94 (1982), that no contemporaneous objection is required to preserve the alleged error when a party violates such a ruled-upon motion in limine. Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021).

Substance of the evidence apparent from the context. — Although a drug distribution defendant failed to make an offer of proof as to the evidence regarding a detective's credibility that was excluded, the court found that the substance of the evidence was sufficiently apparent from the attorneys' discussion to preserve the defendant's argument for appellate review as permitted under O.C.G.A. § 24-1-103(a)(2). Williams v. State, 332 Ga. App. 546, 774 S.E.2d 126, 2015 Ga. App. LEXIS 353 (2015).

Plain Error

Plain error standard applies to evidence but not closing arguments. — Georgia has adopted the plain error standard with respect to rulings on evidence; however, this rule does not apply to a prosecutor's closing statements, which are not evidence, and are reviewed under prior case law providing for waiver of issues that were not objected to at trial.

Gates v. State, 298 Ga. 324, 781 S.E.2d 772, 2016 Ga. LEXIS 68 (2016).

Under a plain error review, since the defendant failed to object at trial, the trial court did not abuse the court's discretion by allowing various autopsy photographs to be admitted into evidence at trial because the photos were not particularly gory or gruesome and were relevant to show the nature and location of the victim's injuries, which corroborated the account of the shooting given by the eyewitnesses who saw the defendant. Benton v. State, 301 Ga. 100, 799 S.E.2d 743, 2017 Ga. LEXIS 326 (2017).

In a malice murder case, pretermitting whether the trial court erred in admitting a statement that the victim had made to the victim's wife before the shooting, any error in the admission of the statement was harmless as the evidence of the defendant's guilt was overwhelming, and it was highly probable that the admission of the victim's hearsay statement did not contribute to the verdict because, prior to the shooting, the defendant had the victim's name stored as "the dead man" in the defendant's cell phone; the defendant told an employee at the tire shop where the victim worked to tell the victim that the defendant was going to kill the victim; and, after the shooting, the defendant told officers that the defendant shot the victim. Perez v. State, 303 Ga. 188, 811 S.E.2d 331, 2018 Ga. LEXIS 146 (2018).

Plain error review forfeited. — Trial court did not abuse the court's discretion in declining to allow the appellant to impeach the accomplice's hearsay statements to a friend with other, inconsistent hearsay statements that were later made to an investigator and with the plea bargain that the accomplice later made with the state because the appellant did not object at trial to the court not charging the jury on that point, thus, the appellant forfeited the claim. Cross v. State, 309 Ga. 705, 848 S.E.2d 455, 2020 Ga. LEXIS 534 (2020).

Admission of no contest plea not plain error. — After the defendant was found guilty of driving under the influence of alcohol to the extent that the defendant was less safe to drive (DUI), the defendant could not show error, much less plain error, in the admission of evidence pertaining to the administrative license suspension (ALS) stipulation because the stipulation entered in the ALS hearing that the defendant would plead guilty to DUI in exchange for the return of the defendant's driver's license was relevant to, though certainly not dispositive of, the charge that the defendant was driving under the influence of alcohol, and its probative value was not substantially outweighed by its prejudicial effect. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87, 2017 Ga. App. LEXIS 589 (2017), aff'd, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

Admission of other crimes, wrongs, or acts did not constitute plain error. — First defendant could not show plain error in the admission of the second defendant's prior conviction for burglary and possession of tools of a crime as the trial court gave a limiting instruction that the evidence was relevant only to the charges against the second defendant; and the fact that the conviction had been overturned did not preclude the conviction's admission. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132, 2019 Ga. App. LEXIS 254 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. Dec. 23, 2019), cert. denied, No. S19C1275, 2019 Ga. LEXIS 890 (Ga. Dec. 23, 2019).

Informing jury that witnesses were held in contempt for failing to testify not plain error. — Trial court did not plainly err by informing the jury that two witnesses were held in contempt for refusing to testify on behalf of the state because, even if the trial court's remarks did give rise to some suggestion that the witnesses would point to the defendant as the perpetrator in the shooting of the victim, that suggestion was not at odds with the defense at trial as the defendant did not point to another perpetrator but claimed that the victim was accidentally shot while tussling with the defendant. Wallace v. State, 303 Ga. 34, 810 S.E.2d 93, 2018 Ga. LEXIS 75 (2018).

Testimony as to hospital's certification not plain error. — Testimony as to the hospital's certification could not be said to have affected the appellant's substantial rights by affecting the outcome of

Plain Error (Cont'd)

the trial as the certification inspection took place two years before the events at issue, and the fact that the glide scope was not in its regular location, when it was presumably located during the earlier inspection, mitigated against a conclusion that the evidence that the hospital was inspected and certified resulted in a defense verdict. Thomas v. Alligood, 358 Ga. App. 703, 856 S.E.2d 80, 2021 Ga. App. LEXIS 113 (2021).

Plain error review not available. — Because the appellant failed to seek any investigation into or hearing about the juror communication or its effect on other jurors before the trial court acceded to the appellant's request to excuse the juror and seat an alternate, the asserted error by the appellant was not preserved for ordinary appellate review and plain error review did not apply since no statutory basis existed for application of that review standard. Miller v. State, 309 Ga. 549, 847 S.E.2d 344, 2020 Ga. LEXIS 522 (2020).

Comment by trial court not plain error. — Trial court's statements regarding the location of the shooting did not improperly express the court's opinion about whether venue and the shooting had been proven and the defendant did not show plain error because the trial court framed the court's statement in terms of allegations and never mentioned the venue for the charge; and the defendant did not show that the court's statement orienting the prospective jurors to the case had any effect on the outcome of the defendant's trial as the state presented evidence that the victim was shot, including the surveillance recording showing the shooting and expert testimony from a medical examiner; and the prosecutor elicited undisputed testimony from several witnesses that the crimes occurred in Fulton County. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Expert testimony in child molestation case not plain error. — Trial court did not commit plain error by allowing the testimony of the state's expert witnesses on forensic interviewing as the descriptions by both witnesses were not tied to the substance of the victim's interview as a whole or used to describe the substance of the victim's allegations. Hamby v. State, 358 Ga. App. 105, 853 S.E.2d 874, 2021 Ga. App. LEXIS 11 (2021).

Failure to play entire recording of police interview not plain error. — Defendant did not show that the trial court plainly erred by not allowing the defendant to play the entire recording of a witness's police interview because the trial court allowed the defendant to play an additional segment of the recording to show that the witness's prior statements to the police might have been affected by medication; and the defendant did not identify any other specific statements in the portions of the recording that the state played for the jury which needed to be explained by playing the rest of the witness's interview. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Replaying audiovisual recording of traffic stop not plain error. — Following the trial court admitting audiovisual recordings of the traffic stop, parts of which were played for the jury, playing the recording again during deliberations did not violate the continuing-witness rule because the continuing-witness rule did not apply since the audiovisual recording was replayed to the jury a single time in a controlled environment, the courtroom, with all parties and the trial judge present. Riley v. State, 356 Ga. App. 290, 846 S.E.2d 617, 2020 Ga. App. LEXIS 431 (2020), overruled, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

Admitting evidence of witness's compensation not plain error. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Exclusion of evidence of victim's gang membership not plain error. — Trial court did not commit plain error by excluding evidence that the first victim

was a member of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134, 2018 Ga. LEXIS 71 (2018).

Detective's testimony not plain error. — Detective's answers to the defendant's questions regarding the surveillance recording of the shooting did not violate the ultimate issue rule, and the defendant could not show harm because evidence of the defendant's guilt was compelling; and the defendant could not show that the complained-of comments likely affected the outcome of the defendant's trial as, although it might have been improper for the detective to share the detective's subjective belief that the defendant was the shooter seen on the surveillance recording with the jury explicitly, that the detective believed the defendant was the shooter seen on the surveillance recording would have come as no surprise to the jury. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Admission of other crimes, wrongs, or acts did not constitute plain error. — In an armed robbery case, pretermitting whether admission of evidence of the defendant's prior armed robbery conviction amounted to clear or obvious error, the admission of that evidence did not constitute plain error that affected the defendant's substantial rights because the defendant testified and admitted that the defendant pled guilty to the prior charge; although the defendant claimed the defendant acted in self-defense, eyewitnesses testified that they saw no weapons on the victims, saw the defendant rifling the victims' pockets, and heard one of the victims pleading with the defendant not to kill the victim; and the evidence indicated that both victims were shot from behind, undermining the defendant's claim of self-defense. Nations v. State, 303 Ga. 221, 811 S.E.2d 292, 2018 Ga. LEXIS 137 (2018).

Admission of racism and racial slurs not plain error. — Court did not err in admitting into evidence testimony concerning the defendant's bad character for racism and the defendant's use of racial slurs since defense counsel made the decision to use strategically this evidence to bolster the defendant's claim of self-defense and to undermine the state's case. The record shows that the defendant, by choosing to incorporate the evidence of the defendant's racism into the defendant's defense theory instead of objecting to it, intentionally relinquished any claim that the trial court erred in admitting that evidence and, therefore, any claim of error failed at the first step of plain error review. Griffin v. State, 309 Ga. 860, 849 S.E.2d 191, 2020 Ga. LEXIS 661 (2020).

Statement firearm pulled in manner akin to armed robbery not plain error. — Assuming that the trial court clearly erred in admitting into evidence testimony that the manner the firearm was pulled was akin to that used in armed robbery, there was no plain error because it was a brief statement and the evidence against the defendant was strong and, thus, the defendant failed to show that the reference affected the defendant's substantial rights or likely affected the outcome of the trial. Huff v. State, 315 Ga. 558, 883 S.E.2d 773, 2023 Ga. LEXIS 21 (2023).

Testimony defendant held gun "gangster style" did not amount to plain error. — Assuming that the trial court clearly erred in admitting into evidence testimony that the defendant held the gun "gangster style," the defendant could not show plain error because the defendant could not satisfy the third prong, requiring the defendant to demonstrate that the outcome of the trial court proceedings likely was affected. given that the comment was brief and the jury viewed the video recording of the entire incident. Huff v. State, 315 Ga. 558, 883 S.E.2d 773, 2023 Ga. LEXIS 21 (2023).

Use of prior inconsistent statements did not constitute plain error. — Defendant did not establish plain error because the recording of the witness's police interview was admitted to impeach the witness, not to bolster the detective; the defendant did not identify any admitted prior statements that were outside the scope of the witness's direct examination;

Plain Error (Cont'd)

the witness had some recollection of the relevant events; and, in light of the compelling evidence presented at trial, the defendant did not establish that the errors probably affected the outcome of the defendant's trial. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Psychologist's testimony on whether defendant knew right from wrong not plain error. — Trial court did not commit plain error allowing a psychologist's testimony because the defendant failed to make an affirmative showing that a different outcome would have occurred in light of the presumption of sanity as the admissible evidence showed the defendant could distinguish right from wrong at the relevant time and the defendant failed to draw any connection between the defendant's mental illness and an (asserted) inability to distinguish right from wrong. Croyle v. State, 360 Ga. App. 157, 860 S.E.2d 844, 2021 Ga. App. LEXIS 314 (2021).

Harmless Error

Admission of medical records harmless. — Even if the trial court erred by admitting the medical records of a non-party treating physician during the medical malpractice claim against the patient's oncologist, the error was harmless because the altered medical record alleging that the patient was noncompliant had no bearing on the claims that the oncologist breached the standard of care by failing to follow up on the abnormal PET scan and noting in the record that there was no evidence of disease. Ross-Stubblefield v. Weakland, 359 Ga. App. 523, 859 S.E.2d 502, 2021 Ga. App. LEXIS 231 (2021).

Exclusion of evidence on spousal abuse constituted harmless error. — Pretermitting whether the trial court erred in ruling that the defendant's family members' statements regarding the victim's abuse of the defendant were inadmissible, any error was harmless as it was highly probable that the exclusion of the statements did not contribute to the verdicts because the defendant offered a substantial amount of evidence that clearly showed the victim, the defendant's husband, had abused the defendant quite severely on numerous occasions; and the state presented evidence that substantially undermined the defendant's battered person syndrome defense. Smith v. State, 309 Ga. 240, 845 S.E.2d 598, 2020 Ga. LEXIS 463 (2020).

Admission of rape shield evidence harmless error. — In the defendant's trial for child molestation against three victims, the trial court erred in allowing the state to introduce evidence of one victim's prior sexual activity involving the victim's molestation of the victim's two step-sisters; this evidence was inadmissible under the Rape Shield Statute, O.C.G.A. § 24-4-412, even if introduced by the state for the purpose of showing the effects of the defendant's molestation on the victim. However, the error was harmless. White v. State, 305 Ga. 111, 823 S.E.2d 794, 2019 Ga. LEXIS 66 (2019).

Harmless error when cumulative evidence admitted. — Trial court did not abuse the court's discretion by admitting evidence from a witness that the defendant had put a hit out on the witness because the evidence was cumulative of other evidence and, thus, any error in the admission of the evidence was harmless. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573, 2017 Ga. LEXIS 890 (2017).

In the defendant's trial for violating the defendant's oath of office as coroner and theft by deception, the admission of a death certificate of one of the nursing home patients whose death the defendant had falsely billed the county for investigating was harmless because it was cumulative of the pronouncement of death that was admitted as part of another exhibit. Fortner v. State, 350 Ga. App. 226, 828 S.E.2d 434, 2019 Ga. App. LEXIS 273 (2019).

Given that the medical examiner's challenged testimony was largely cumulative of the state's expert's testimony as to the effects of alcohol consumption, the defendant could not establish that the medical examiner's testimony likely affected the outcome of the defendant's trial; thus, the defendant did not meet the defendant's burden of showing plain error in that

regard. Butler v. State, 363 Ga. App. 753, 871 S.E.2d 902, 2022 Ga. App. LEXIS 189 (2022).

Any error in admitting the gun and the bloody clothes evidence was harmless as that physical evidence tying the defendant to the crimes would have been merely cumulative of the defendant's admission that the defendant shot the victims and had no bearing on the defendant's claim that the defendant shot the victims in self-defense; and it was highly probable that its admission did not contribute to the verdicts. Wheeler v. State, 314 Ga. 484, 877 S.E.2d 565, 2022 Ga. LEXIS 229 (2022).

No plain error as to trial court allowing testimony by the lead detective that a person who died before trial had made a positive identification of defendant from a photographic lineup as any error was harmless beyond a reasonable doubt since other witnesses also selected defendant in a photographic lineup and identified him at trial as the shooter. Williams v. State, No. S23A0203, 2023 Ga. LEXIS 106 (Ga. May 16, 2023).

Harmless error in admission of investigator's testimony. — Assuming that the lead investigator's testimony about the direction in which one of the bullets that struck the victim traveled was erroneously admitted, the error was harmless as the jury reasonably rejected the defendant's claims of self-defense and voluntary manslaughter because the evidence of the defendant's guilt showed that the defendant, who was jealous of the victim and had threatened to make the victim disappear, approached the victim, pulled out a gun, and fired four shots at the victim, who turned to run and pulled out a gun only after the victim had been shot. Furthermore, the defendant did not contend that the prosecutor emphasized or even mentioned in the objected to testimony during closing argument. Saxton v. State, 313 Ga. 48, 867 S.E.2d 130, 2021 Ga. LEXIS 732 (2021), cert. denied, 142 S. Ct. 1461, 212 L. Ed. 2d 548, 2022 U.S. LEXIS 1805 (2022).

Admission of detective's comment that "defendant was going to prison" was harmless error. — Even assuming that the detective's comment that the detective thought the defendant was going to prison should have been redacted from the video recording of the defendant's interview by the police, its admission was harmless because, considering the strength of the properly admitted evidence of the defendant's guilt and the context of a police interview in which the defendant claimed that the defendant had nothing to do with the victim's death, the jury was highly unlikely to have been swayed by the detective's passing comment; and the jury could not have believed that the defendant had already been tried and convicted based on a statement made during a police interview played for the jury during the defendant's trial. Tanner v. State, 303 Ga. 203, 811 S.E.2d 316, 2018 Ga. LEXIS 141 (2018).

Harmless error in allowing state's demonstration. — Even if the trial court abused the court's discretion in allowing the state's demonstration in which one of the prosecutors beat a punching bag at the direction of the detective 100 times (the number of blows the detective estimated the victim had received), any error was harmless as any effect the demonstration might have had on the jury would have been minimal compared to the effect of the properly-admitted evidence before the jury because the evidence of the defendant's guilt was overwhelming; the placement and extent of the victim's bruises were well-documented by the medical examiner's diagrams and multiple photographs; and the jury heard extensive medical and law enforcement testimony about the bruises. Williams v. State, 302 Ga. 147, 805 S.E.2d 873, 2017 Ga. LEXIS 816 (2017).

Admission of bribery evidence constituted harmless error. — Improper admission of the testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place was harmless because it was highly probable that the error did not contribute to the jury's verdict as, in addition to the victim's testimony, the state presented evidence that a witness overheard the defendant say that the defendant wanted to rob someone; party guests looked at a co-defendant's phone and saw text mes-

Harmless Error (Cont'd)

sages that referenced a plan to commit a robbery; the defendant was seen with the co-defendant at the party by multiple witnesses; the ATM machine photographed the co-defendant making withdrawals; and the defendant lied about the defendant's alibi. Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018).

Harmless error in admission of out of court statement. — Statement of a co-defendant, who did not testify at trial, did not violate Bruton because the statement did not incriminate the defendant and, thus, the trial court did not err, much less plainly err, in admitting the statement as rather than implicate the defendant, the co-defendant instead refused to acknowledge having any information about who attacked and robbed the victim. Shelton v. State, 350 Ga. App. 774, 830 S.E.2d 335, 2019 Ga. App. LEXIS 401 (2019).

Any error in admitting the adult son's out-of-court statement that the defendant had previously threatened to kill the victim, the defendant's wife, over bills was harmless because it was reasonable to expect jurors in deciding whether the defendant's state of mind at the time of the shooting was consistent with malice, or was instead consistent with voluntary manslaughter, to have reached the same conclusion, even without the evidence of a single verbal threat on an unspecified date, based on the much stronger evidence of the defendant's actions of following the victim from room to room as the victim attempted to flee and firing a gun at least eight times, hitting the victim six times. Clarke v. State, 308 Ga. 630, 842 S.E.2d 863, 2020 Ga. LEXIS 331 (2020).

Admission of video recording from officers' body cameras was harmless error. — After the defendant murdered the defendant's two infant daughters by drowning the children, the last four minutes of the second video-recording from the officer's body camera showing the officer's effort to revive one of the children was unfairly prejudicial based on the video's emotionally charged content; however, the error in admitting the evidence was harmless as the video-recordings played a minor role in both the state's case and the defendant's insanity defense; and there was no likelihood that the jury would have weighed the case differently had the trial court excluded that last portion of the second video-recording. Morgan v. State, 307 Ga. 889, 838 S.E.2d 878, 2020 Ga. LEXIS 102 (2020).

Admitting evidence of co-defendant's prior arrest was harmless. — Given the evidence of the defendant's guilt, the appellate court held that it was highly probable that the trial court's error in admitting evidence of the co-defendant's prior arrest did not contribute to the verdict against the defendant. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162, 2019 Ga. App. LEXIS 494 (2019).

Admission of other acts evidence in murder trial constittued harmless error. — Trial court abused the court's discretion admitting 2005 shooting evidence of the appellant's firing a handgun, but that error was harmless in light of the array of other strong evidence demonstrating the appellant's guilt and considering it was an evidentiary error and not of constitutional dimensions; given the overall strength of the other evidence of the appellant's guilt, the Georgia Supreme Court held that it was highly probable that erroneously admitted evidence of the 2005 shooting did not contribute to the jury's verdict. Jackson v. State, 306 Ga. 69, 829 S.E.2d 142, 2019 Ga. LEXIS 392 (2019).

Waiver

Affirmative waiver of error. — Under a plain error review, the trial court did not err by allowing the detective to give hearsay testimony, without objection, regarding the specific location at which the victim's purse was found as assuming a cognizable hearsay argument existed and the trial court erred, the defendant failed to show error affecting substantial rights considering an overwhelming evidence of guilt, including the defendant's admission of throwing the victim over the bridge into a creek where the victim drowned. Tyner v. State, 305 Ga. 326, 825 S.E.2d 129, 2019 Ga. LEXIS 145 (2019).

When the defendant was found guilty of, inter alia, driving under the influence

of alcohol to the extent that the defendant was less safe to drive, the defendant affirmatively waived any claim of error from the admission of the administrative license suspension agreement at the defendant's criminal trial, so there was no plain error. Adams v. State, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

Trial court did not commit plain error by admitting an individual's prior testimony from a preliminary hearing into evidence since the individual was unavailable and gave previous testimony because the defendant's trial counsel intentionally relinquished any objection to the trial court's ruling when counsel agreed with the state's analysis and asked that all of the individual's previous testimony be admitted. Davis v. State, 311 Ga. 225, 857 S.E.2d 207, 2021 Ga. LEXIS 132 (2021).

Waiver based on failure to object. — Because the defendant's only objection to the messages on a social media website was that they were prejudicial and not probative, the defendant waived any objection that the messages were not properly authenticated; however, even if the defendant did not waive the authentication objection, the victim's mother properly authenticated the messages as the mother knew the defendant went by the name "Bucky Raw" because the mother had seen videos that the defendant had posted — and in which the defendant appeared — on another website using that alias; and the mother was able to discern the defendant's identity through the conversations the mother had with the defendant on the accounts that the mother and the mother's friend had set up. Cotton v. State, 297 Ga. 257, 773 S.E.2d 242, 2015 Ga. LEXIS 362 (2015).

Application

Admissibility of character evidence. — In a case in which the defendant was convicted of malice murder arising out of the beating death of a child, any error by the trial court in limiting the witnesses' testimony about whether the defendant was good around children or about specific instances of good character was harmless because the jury heard testimony from seven character witnesses, and most of them testified to numerous specific examples of the defendant's conduct with children, including the deceased child and the child's brother as well as the witnesses' own children or grandchildren; the evidence presented by the witnesses on the defendant's motion for new trial was largely cumulative of their trial testimony; and the evidence of the defendant's guilt was very strong. Truett v. State, 311 Ga. 313, 857 S.E.2d 690, 2021 Ga. LEXIS 152 (2021).

Admission of evidence of fighting at school. — Pretermitting whether the second defendant showed that the admission of the evidence of the second defendant's no contest plea to disrupting a public school and affray was obviously erroneous, the second defendant did not even allege that the outcome of the trial was likely affected by its admission, especially considering that other, independent evidence was presented that the second defendant was involved in fighting at the second defendant's public school. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399, 2018 Ga. LEXIS 184 (2018).

Decision to use prior convictions improper. — In a child molestation case, the trial court erred in denying the defendant's motion for new trial because it was an abuse of discretion to allow the prosecution to question the victim's mother listing the defendant's prior arrests for four offenses after the mother had already testified that the mother was aware of the defendant's prior arrests and that the arrets did not change the mother's opinion of the defendant's character; further, the admission of specific instances of conduct was not harmless as the victim's description of the defendant's improper conduct varied over time, and the appellate court could not say that the defendant's prior arrests did not enter into the jury's evaluation of the defendant's testimony and credibility. Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426, 2015 Ga. App. LEXIS 725 (2015).

When the defendant was convicted of three counts of computer or electronic pornography and child exploitation, the trial court did not plainly err in admitting a retired police officer's testimony during the trial about the retired officer's investigation of an alleged similar transaction

Application (Cont'd)

in 2008 because it was undisputed that the relevant videos and photographs from the 2008 investigation were destroyed when the hard drive used in that investigation crashed; there was no evidence that the state intentionally destroyed the videos and photographs in bad faith; and the admission of the retired officer's identification testimony did not affect the outcome of the trial as the evidence of the defendant's guilt was overwhelming. Patch v. State, 337 Ga. App. 233, 786 S.E.2d 882, 2016 Ga. App. LEXIS 302 (2016).

Evidence of serious violent acts improperly admitted to show intent. — Appellant's convictions for felony murder, aggravated assault, and knife-possession offenses were reversed because the Georgia Supreme Court could not say that the trial court's erroneous admission of the voluminous evidence that the appellant had previously committed multiple serious violent acts did not contribute to the guilty verdicts that the jury returned. Strong v. State, 309 Ga. 295, 845 S.E.2d 653, 2020 Ga. LEXIS 467 (2020).

Admission of crime of aggravated assault. — There was no harm in admitting evidence that the defendant committed an aggravated assault in 1998 with the same gun that was used to kill the victim as there was overwhelming evidence that the defendant shot the victim and did not act in self-defense because there was a dispute between the defendant and the victim a few weeks before the shooting, and an argument between them on the day of the shooting; the witnesses testified that the victim did not have a gun; one eyewitness testified that the eyewitness saw the defendant keep shooting the victim even as the victim lay on the ground; and another witness testified that the defendant left the scene with something in the defendant's hand, apologizing for what had just happened. Troy v. State, 312 Ga. 860, 866 S.E.2d 394, 2021 Ga. LEXIS 709 (2021).

Admission of prior criminal activity to show involvement in criminal street gang. — Trial court did not commit plain error by permitting the state to introduce evidence that the third defendant had been involved in prior criminal activity, including battery, theft of a vehicle, and disorderly conduct, for the limited purpose of showing the third defendant's involvement in a criminal street gang. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399, 2018 Ga. LEXIS 184 (2018).

Evidence of gang beating of murder victim. — Trial court did not abuse the court's discretion by admitting into evidence a video recording of gang members beating the murder victim, who was a person that left the gang, despite the appellant not appearing in the video because the video of the gang beat-in was highly probative to establish the appellant's motive for the murder and its relationship to gang activity. Carston v. State, 310 Ga. 797, 854 S.E.2d 684, 2021 Ga. LEXIS 19 (2021).

Exclusion of alleged false accusation of child molestation. — In the defendant's trial for child molestation arising out of viewing a pornographic video with the defendant's four-year-old daughter, the trial court did not err in refusing to allow the defendant to cross-examine the child's mother pursuant to O.C.G.A. § 24-6-608 regarding her own accusations of molestation against her stepfather, who had been acquitted, because the charges were not shown to be false. Further, any error was harmless. Douglas v. State, 340 Ga. App. 168, 796 S.E.2d 893, 2017 Ga. App. LEXIS 33 (2017).

Exclusion of forensic toxicologist evidence. — In a malice murder case, the trial court did not commit plain error in excluding evidence from the forensic toxicologist regarding the drugs found in the victim's system because, given that the defendant offered no evidence to support the defendant's theory that the victim, the defendant's wife, died because drugs in the victim's system made the victim more susceptible to asphyxiation, the defendant could not show that there was a reasonable probability that, if the proffered testimony about drugs in the victim's system had been admitted, the outcome of the trial would have been more favorable to the defendant. Williams v. State, 302 Ga.

147, 805 S.E.2d 873, 2017 Ga. LEXIS 816 (2017).

Admission of nude photographs of mother in child custody case. — Although the trial court erred in admitting into evidence the nude photographs of the parent as those pictures were irrelevant, and there was no evidence that the children were aware of or exposed to the photographs or the production of the photographs, the parent could not show that the parent suffered prejudice as a result of their admission because the trial court did not reference or otherwise rely on the photographs or the parent's conduct in making its factual findings in the child custody case. Mashburn v. Mashburn, 353 Ga. App. 31, 836 S.E.2d 131, 2019 Ga. App. LEXIS 662 (2019).

Testimony regarding defendant's failure to contact police. — In the defendant's murder and rape trial, admission of testimony about the defendant's failure to contact police after the victim's death despite the defendant admittedly having sex with the victim, arguing with the victim, and pushing the victim the night of the victim's death was not plain error because the defendant failed to point to clear controlling authority that admission of the testimony was a clear and obvious legal error. Simmons v. State, 299 Ga. 370, 788 S.E.2d 494, 2016 Ga. LEXIS 455 (2016).

Reversible error occurred by admitting character evidence. — It was not plain error for the trial court to admit evidence of the acts of molestation committed against the first victim in a trial for offenses against the second and third victims because all three were sisters, the sisters all disclosed the defendant's abuse to each other and tried to protect each other from the defendant, and the sisters jointly disclosed the abuse to their mother on more than one occasion. Vaughn v. State, 352 Ga. App. 32, 833 S.E.2d 723, 2019 Ga. App. LEXIS 536 (2019).

Trial court committed reversible error by admitting character evidence and holding that the evidence was intrinsic to the alleged crimes of robbery as the defendant did not testify as to character and the character trait was not an essential element of a charge, claim, or defense; the text introduced a specific bad act, possible fraud, which was not allowed and the fact that the defendant may have attempted to defraud an apartment complex a week earlier did not arise out of the same transaction. Holt v. State, 352 Ga. App. 504, 835 S.E.2d 336, 2019 Ga. App. LEXIS 593 (2019).

Admission of photographs. — Admission of one photograph of a murder victim in life with the victim's spouse and grandchildren, as well as 15 photographs of the victim after the victim's death from being hit and dragged by the defendant's truck, was not plain error. Bozzie v. State, 302 Ga. 704, 808 S.E.2d 671, 2017 Ga. LEXIS 975 (2017).

Admission of mall surveillance video. — Under plain error review, admission of mall surveillance video recordings was not in error because the state presented testimony of eyewitnesses to events to authenticate two mall surveillance video recordings. Moore v. State, 305 Ga. 251, 824 S.E.2d 377, 2019 Ga. LEXIS 95 (2019).

Exclusion of evidence of victim's drug use. — Trial court did not plainly err in granting the state's motion to exclude evidence of the victim's drug dealing and drug use as the jury heard testimony from multiple witnesses and the defendant that the victim tended toward violence and frequently directed that violence at the defendant; and, whether the victim's drug use exacerbated such violence would be of marginal value to a jury that was aware of the victim's violence toward the defendant. Thus, the trial court did not violate the defendant's right to present a full and fair defense by excluding evidence of the victim's drug use and related criminal history. Martin v. State, 306 Ga. 747, 833 S.E.2d 122, 2019 Ga. LEXIS 604 (2019).

24-1-104. Preliminary questions.

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of

evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury.

(d) The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

(e) This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

History.

Code 1981, § 24-1-104, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Preliminary questions, Fed. R. Evid. 104.

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Error in application of hearsay rules in determining material witness status. — Trial court erred in applying the hearsay rules to exclude the appellant's proffered documents from the evidence the court considered in ruling on a motion for material witness certificates as to the Kentucky-based manufacturer of the breathalyzer because an exception under O.C.G.A. § 24-1-2(c)(1) applied. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Application of rules of evidence. — Under Georgia's new Evidence Code, unless a fact-finding proceeding involves one of the 12 situations enumerated in O.C.G.A. § 24-1-2(c) and (d), the rules of evidence fully apply; similarity to one or more of the enumerated situations is insufficient to limit the applicability of the evidence rules. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Trial court did not err in relying in part on a letter from a physician treating a prior victim, who wrote that the victim's medical condition left the victim unable to travel to Chatham County, and in admitting the victim's prior testimony about a robbery because, whether the Screven County victim was unavailable presented a question of fact to be determined by the trial court as preliminary to the admissibility of the victim's prior testimony, and there was no error in its consideration of the physician's letter in resolving that

question. Scott v. State, 309 Ga. 95, 844 S.E.2d 785, 2020 Ga. LEXIS 445 (2020).

Rules of evidence applicable to issuance of material witness certificate. — Under O.C.G.A. § 24-1-2(b), the rules of evidence apply to a proceeding for issuance of a material witness certificate under the out-of-state witness act unless one of the exceptions in § 24-1-2(c) or (d) applies. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

No pretrial motion on admissibility required. — Defendant's contention that the state "should" have filed a pretrial motion for a preliminary ruling on the admissibility of defendant's alibi witness' testimony was rejected because the state's challenge to the testimony, the witness's statement to the trial court that the witness would invoke the witness's right against self-incrimination, and the defendant's proffer of the witness' proposed testimony all took place outside the presence of the jury. Defendant also could have sought a preliminary ruling on the admissibility of the witness's proposed testimony, but the defendant did not. Hampton v. State, 308 Ga. 797, 843 S.E.2d 542, 2020 Ga. LEXIS 356 (2020).

Hearsay rule did not apply at hearing on motion to suppress. — Roadblock approval form introduced into evidence at a hearing on a motion to suppress sobriety tests performed at a roadblock, which was signed by a state patrol corporal and which stated that the corporal served in a supervisory capacity and was authorized to establish roadblocks, along with the arresting trooper's testimony to the same effect, was sufficient to show that the corporal was authorized to set up the roadblock; the hearsay rule did not apply in a suppression hearing. Turner v. State, 352 Ga. App. 122, 833 S.E.2d 299, 2019 Ga. App. LEXIS 500 (2019), cert. denied, No. S20C0368, 2020 Ga. LEXIS 301 (Ga. Apr. 20, 2020).

24-1-105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

History.

Code 1981, § 24-1-105, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Limiting evidence that is not admissible against other parties or for other purposes, Fed. R. Evid. 105.

JUDICIAL DECISIONS

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290, 2014 Ga. App. LEXIS 845 (2014).

24-1-106. Contemporaneous consideration of other writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in

fairness, should be considered contemporaneously with the writing or recorded statement.

History.

Code 1981, § 24-1-106, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-2-4, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Monroe v. Phillips, 64 Ga. 32 (1879); Dowling v. Feeley, 72 Ga. 557 (1884); and Jones v. Grantham, 80 Ga. 472, 5 S.E. 764 (1888).

Cross references.

Remainder of or related writings or recorded statements, Fed. R. Evid. 106.

Administrative rules and regulations.

Fire Safety Information to Be Furnished in Hotels, Motels, Dormitories, Apartments and Personal Care Homes, Official Compilation of the Rules and Regulations of the State of Georgia, Comptroller General, Safety Fire Commissioner, State Minimum Fire Safety Standards, Rule 120-3-3-.06.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5241, former Civil Code 1910, § 5830, former Code 1933, § 38-703, and former O.C.G.A. § 24-2-4 are included in the annotations for this Code section.

Brief of evidence. — In the preparation of the brief of evidence after trial, only such portions of documents should be embraced therein as were actually read or considered at the trial. Crawford v. Roney, 126 Ga. 763, 55 S.E. 499, 1906 Ga. LEXIS 537 (1906) (decided under former Civil Code 1895, § 5241).

Violation of rule of completeness. — Because the earlier exculpatory portions of the defendant's transcribed statement were relevant as to both whether the defendant committed the rape and whether the defendant's statement was voluntary, the trial court violated the rule of completeness and abused the court's discretion when the court excluded those earlier portions of that statement; however, the error was harmless because the admitted and improperly excluded evidence showed overwhelmingly that the defendant was guilty of rape, whether principally or as a party to the crime, rendering it highly probable that any error in failing to admit the earlier portions of the defendant's statement did not contribute to the jury's verdict. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535, 2016 Ga. App. LEXIS 381 (2016).

No violation of rule of completeness. — State's introduction of a partial recording of a phone call that the defendant made to the defendant's mother did not violate the rule of completeness because the portion of the call in which the defendant told the mother about a potential plea offer was unrelated to the later conversation about the defendant's uncle, who was an eyewitness to the shooting. Jackson v. State, 301 Ga. 866, 804 S.E.2d 367, 2017 Ga. LEXIS 702 (2017).

Defendant did not show that the trial court plainly erred by not allowing the defendant to play the entire recording of a witness's police interview because the trial court allowed the defendant to play an additional segment of the recording to show that the witness's prior statements to the police might have been affected by medication; and the defendant did not identify any other specific statements in the portions of the recording that the state played for the jury which needed to be explained by playing the rest of the witness's interview. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Entry on back of deed. — When the plaintiff relies on a deed coming from the plaintiff's own possession, the opposite party may without proof of the deed's

execution, rely upon an endorsement, memorandum, or entry on the back of the deed. McBrayer v. Walker, 122 Ga. 245, 50 S.E. 95, 1905 Ga. LEXIS 161 (1905) (decided under former Civil Code 1895, § 5241).

Foreign state code. — When one party offers a section of the code of another state as proof of the law of that state on a given subject, that party is not required to introduce all cognate sections. If there are other sections applicable the opposite party may offer those sections, but cannot complain that one's adversary has not done so. Southern Ry. v. Robertson, 7 Ga. App. 154, 66 S.E. 535, 1909 Ga. App. LEXIS 567 (1909) (decided under former Civil Code 1895, § 5241).

Real estate valuations. — It would be a misconception of the principle invoked by the former statute to allow the several valuations as stated by the real estate board in a document together with their arguments and reasons therefor, to be introduced in evidence by the plaintiff merely because the plaintiff's witness on cross-examination had stated a single valuation from this paper, when the entire document was otherwise absolutely inadmissible as hearsay. City of Atlanta v. Atlanta Title & Trust Co., 45 Ga. App. 265, 164 S.E. 224, 1932 Ga. App. LEXIS 276 (1932) (decided under former Civil Code 1910, § 5830).

Victim's testimony. — After the defense counsel was allowed to pursue the inconsistencies between a witness's trial testimony and the witness's statement to a detective, pursuant to former O.C.G.A. § 24-2-4, the state was entitled to rebut the defense's implication that a robber was not the defendant by reading the entire statement to the jury; consequently, the trial court did not err in allowing the detective to read part of a victim's statement to the jury. Houston v. State, 270 Ga. App. 456, 606 S.E.2d 883, 2004 Ga. App. LEXIS 1471 (2004) (decided under former O.C.G.A. § 24-2-4).

Photos of victim. — Trial court properly admitted one of three photographs of the victim's body which showed an exterior mark of strangulation as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim's wounds were admissible as both relevant and material. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127, 2006 Ga. LEXIS 463 (2006) (decided under former O.C.G.A. § 24-2-4).

Letters. — Trial court did not err by refusing the defendant's request to admit only the portions of letters written by the codefendant that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant's role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant's state of mind without waiving the defendant's objections to the state's introduction of the remainder of the letters. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, 2010 Ga. LEXIS 186, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385, 2010 U.S. LEXIS 8606 (2010) (decided under former O.C.G.A. § 24-2-4).

Returned 9-1-1 call after emergency abated. — At the defendant's trial for DUI and battery, the trial court did not err in excluding admission of the sheriff's return call to the homeowner, who then admitted that punching the defendant's spouse was accidental, as hearsay, because the emergency leading to the homeowner's two 9-1-1 calls had then abated, making the statement testimonial, and the homeowner had later died. Further, the defendant was acquitted of the battery charge. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851, 2017 Ga. App. LEXIS 306 (2017), overruled in part, McClure v. State, 306 Ga. 856, 834 S.E.2d 96, 2019 Ga. LEXIS 643 (2019).

Log sheet with handwritten intoxilyzer results admissible. — Log sheet with handwritten intoxilyzer results was not excluded because the state had provided everything it had with regard to the intoxilyzer results and there was nothing left in the state's possession to complete that evidence; to the extent that the state failed to provide information in the detail provided on an intoxilyzer printout, those omissions went to the weight and not the admissibility of the intoxilyzer results.

Cross-examination of the officer who administered the test would allow the defendant's counsel the opportunity to test the nature of the state's evidence, and the trial court indicated that the court would revisit the motion in limine admitting the log sheet should the state not offer the testimony of that officer. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337, 2018 Ga. App. LEXIS 169 (2018).

Mental health records. — Trial counsel was not ineffective for failing to present available evidence corroborating the defendant's testimony about the defendant's mental health because trial counsel correctly recognized that under the rule of completeness, the state could have sought to admit portions of the medical records from prison, as well as medical records from other facilities, that were unfavorable to the defendant. Castillo-Velasquez v. State, 305 Ga. 644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 926 et seq., 1198 et seq.

C.J.S.

32A C.J.S., Evidence, §§ 1020, 1083 et seq.

CHAPTER 2

JUDICIAL NOTICE

Article 1

Adjudicative Facts

Sec.
24-2-201. Judicial notice of adjudicative facts.

Article 2

Legislative Facts; Ordinances or Resolutions

24-2-220. Judicial notice of legislative facts.

Sec.
24-2-221. Judicial notice of ordinance or resolution.

Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

ADJUDICATIVE FACTS

24-2-201. Judicial notice of adjudicative facts.

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

(f) Judicial notice may be taken at any stage of the proceeding.

(g)(1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

(2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

History.

Code 1981, § 24-2-201, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Taking of judicial notice of agency rules, § 50-13-8.

Judicial notice of adjudicative facts, Fed. R. Evid. 201.

Law reviews.

For comment on Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949), see 12 Ga. B.J. 476 (1950).

For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Analysis

General Consideration
Judicial Notice Proper
Judicial Notice Improper

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1819, Cobb's 1851 Digest, p. 272, former Code 1863, §§ 3674, 3738, 3747, former Code 1868, §§ 3698, 3762, 3771, former Code 1873, §§ 3751, 3815, 3824, former Code 1882, §§ 3751, 3815, 3824, former Civil Code 1895, §§ 5148, 5210, 5231, former Civil Code 1910, §§ 5734, 5797, 5818, former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are included in the annotations for this Code section.

Notice of intention to take judicial notice. — If a trial court intends to take judicial notice of any fact, the court must first announce the court's intention to do so on the record and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111, 1997 Ga. App. LEXIS 874 (1997)) (decided under former O.C.G.A. § 24-1-4).

Customs. — To be judicially recognized, custom must be one about which there is and can be no dispute and which is known to all men. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691, 1955 Ga. App. LEXIS 824 (1955) (decided under former Code 1933, § 38-112).

Uncertified copies of pleadings and orders from other Georgia courts were not competent evidence to show that landlord, a Tennessee corporation, was an ousted mortgagor, out of possession and not in control of premises at the time of the incident. Commerce Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769, 1993 Ga. App. LEXIS 1024 (1993), cert. denied, No. S93C1802, 1993 Ga. LEXIS 1040 (Ga. Oct. 28, 1993) (decided under former O.C.G.A. § 24-1-4).

Matters of public knowledge. — Court will take judicial cognizance of matters of common and public knowledge. McGraw v. State, 85 Ga. App. 857, 70 S.E.2d 141, 1952 Ga. App. LEXIS 843 (1952) (decided under former Code 1933, § 38-112).

Test of public knowledge is whether the fact is one of common, everyday knowledge that all persons of average intelligence are presumed to know, and whether it is certain and indisputable.

Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36, 1964 Ga. App. LEXIS 768 (1964) (decided under former Code 1933, § 38-112).

Judicial notice must be requested. — Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. Reserve Life Ins. Co. v. Peavy, 98 Ga. App. 268, 105 S.E.2d 465, 1958 Ga. App. LEXIS 565 (1958) (decided under former Code 1933, § 38-112).

Judicial Notice Proper

Judicial notice of federal summary judgment order. — In a legal malpractice case based on the attorneys' representation in a 42 U.S.C. § 1983 action brought in federal court, the trial court properly took judicial notice of the federal district court's summary judgment order. The federal order was published in a case reporter and thus was "published by authority" under former O.C.G.A. § 24-1-4, and the very nature of the present action meant that all parties and the trial court necessarily had notice that the federal court's opinion would be relied upon. Kramer v. Yokely, 291 Ga. App. 375, 662 S.E.2d 208, 2008 Ga. App. LEXIS 510 (2008), cert. denied, No. S08C1556, 2008 Ga. LEXIS 695 (Ga. Sept. 8, 2008), cert. denied, 556 U.S. 1152, 129 S. Ct. 1671, 173 L. Ed. 2d 1037, 2009 U.S. LEXIS 2406 (2009) (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held proper in the following cases. — See Davis v. Bank of Fulton, 31 Ga. 69, 1860 Ga. LEXIS 297 (1860) (bank charter) (decided under former Laws 1819, Cobb's 1851 Digest, p. 272); Abrams v. State, 121 Ga. 170, 48 S.E. 965, 1904 Ga. LEXIS 70 (1904) (who is a public officer; abbreviation constituting officer's official designation) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Towler v. Carithers, 4 Ga. App. 517, 61 S.E. 1132, 1908 Ga. App. LEXIS 460 (1908) (abbreviation for public officer's title) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); O'Connell v. State, 5 Ga. App. 234, 62 S.E. 1007, 1908 Ga. App. LEXIS 78 (1908) (what is an intoxicating beverage) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Whatley v. Virginia-Carolina Chem. Co., 31 Ga. App. 226, 120 S.E. 436, 1923 Ga. App. LEXIS 860 (1923) (crops not mature in May) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Skinner v. Stewart Plumbing Co., 42 Ga. App. 42, 155 S.E. 97, 1930 Ga. App. LEXIS 233 (1930) (recording of mortgages) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Marshall v. Walker, 47 Ga. App. 195, 170 S.E. 267, 1933 Ga. App. LEXIS 342 (1933) (public officers appointed by Governor) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Watkins v. Augusta Chronicle Publishing Co., 49 Ga. App. 43, 174 S.E. 199, 1934 Ga. App. LEXIS 251 (1934) (election dates) (decided under former Code 1933, § 38-112); Daniel v. Citizens & S. Nat'l Bank, 182 Ga. 384, 185 S.E. 696, 1936 Ga. LEXIS 373 (1936) (public officers commissioned by Governor; legality of suspending such officers) (decided under former Code 1933, § 38-112); Thacker v. Morris, 196 Ga. 167, 26 S.E.2d 329, 1943 Ga. LEXIS 322 (1943) (computation of time) (decided under former Code 1933, § 38-112); Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171, 1949 Ga. App. LEXIS 840 (1949) (normal periods of gestation) (decided under former Code 1933, § 38-112); McGraw v. State, 85 Ga. App. 857, 70 S.E.2d 141, 1952 Ga. App. LEXIS 843 (1952) (primary physical laws) (decided under former Code 1933, § 38-112); Wright Contracting Co. v. Waller, 89 Ga. App. 827, 81 S.E.2d 541, 1954 Ga. App. LEXIS 591 (1954) (primary physical laws; holding power of automobile brakes) (decided under former Code 1933, § 38-112); Peggy Ann of Ga., Inc. v. Scoggins, 90 Ga. App. 18, 81 S.E.2d 859, 1954 Ga. App. LEXIS 615 (1954) (holding power of automobile brakes) (decided under former Code 1933, § 38-112); Jordon v. State, 212 Ga. 337, 92 S.E.2d 528, 1956 Ga. LEXIS 362 (1956) (land lots and location as shown in state survey) (decided under former Code 1933, § 38-112); McGowans v. Speed Oil Co., 94 Ga. App. 35, 93 S.E.2d 597, 1956 Ga. App. LEXIS 456 (1956) (corporate name and existence) (decided under former Code 1933, § 38-112); Williams v. Lawler Hosiery Mills, Inc., 212

Judicial Notice Proper (Cont'd)

Ga. 617, 94 S.E.2d 699, 1956 Ga. LEXIS 467 (1956) (public officers commissioned by Governor) (decided under former Code 1933, § 38-112); Daniels v. State, 95 Ga. App. 862, 99 S.E.2d 292, 1957 Ga. App. LEXIS 935 (1957) (definition of moonshine liquor) (decided under former Code 1933, § 38-112); Williams v. State, 96 Ga. App. 833, 101 S.E.2d 747, 1958 Ga. App. LEXIS 916 (1958) (highways approved by State Highway Board are public highways) (decided under former Code 1933, § 38-112); Browne v. Snipes, 97 Ga. App. 149, 102 S.E.2d 634, 1958 Ga. App. LEXIS 726 (1958) (dates and times) (decided under former Code 1933, § 38-112); Jones v. Mills, 216 Ga. 616, 118 S.E.2d 484, 1961 Ga. LEXIS 295 (1961) (public officers commissioned by Governor) (decided under former Code 1933, § 38-112); Purcell v. Hill, 107 Ga. App. 85, 129 S.E.2d 341, 1962 Ga. App. LEXIS 577 (1962) (sunrise and sunset) (decided under former Code 1933, § 38-112); Clark v. Rich's, Inc., 114 Ga. App. 242, 150 S.E.2d 716, 1966 Ga. App. LEXIS 695 (1966) (customary department store hours) (decided under former Code 1933, § 38-112); Melton v. State, 149 Ga. App. 506, 254 S.E.2d 732, 1979 Ga. App. LEXIS 1911 (1979) (currency denomination in circulation on certain date) (decided under former Code 1933, § 38-112); Price v. State, 155 Ga. App. 206, 270 S.E.2d 203, 1980 Ga. App. LEXIS 2528 (1980), rev'd, 247 Ga. 58, 273 S.E.2d 854, 1981 Ga. LEXIS 607 (1981) (state agency list of dangerous substances) (decided under former Code 1933, § 38-112).

Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice (O.C.G.A. § 24-2-201(b)(2)) that the bank had acquired the company's assets. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536, 2014 Ga. App. LEXIS 815 (2014), cert. denied, No. S15C0632, 2015 Ga. LEXIS 169 (Ga. Mar. 2, 2015).

Judicial Notice Improper

Judicial notice was taken. — Judicial notice was taken of the deaths of the trial judge and the court reporter handling the case below, which, alone, satisfied O.C.G.A. § 50-2-21(b)(5). Triguero v. ABN AMRO Bank N.V., 273 Ga. App. 92, 614 S.E.2d 209, 2005 Ga. App. LEXIS 418 (2005) (decided under former O.C.G.A. § 24-1-4).

Pleadings in a related action. — Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress because the trial court considered matters outside the pleadings. The trial court could not properly make factual findings based on the pleadings in the divorce action under former O.C.G.A. § 24-1-4 because such issues are a matter of proof that could not be judicially noticed. Fitzpatrick v. Harrison, 300 Ga. App. 672, 686 S.E.2d 322, 2009 Ga. App. LEXIS 1243 (2009) (decided under former O.C.G.A. § 24-1-4).

Courts cannot judicially know whether or not a defendant has actually been convicted, unless that fact is verified by the answer of the magistrate. Rutland v. City of Dublin, 50 Ga. App. 242, 177 S.E. 819, 1934 Ga. App. LEXIS 722 (1934) (decided under former Code 1933, § 38-112).

Notice of intent to seek attorney's fees. — Judicial notice could be taken that the exhibit purported to be a notice of intent to seek attorney's fees under O.C.G.A. § 13-1-11; however, judicial notice cannot be taken that the attached notice was, in fact, what it purported to be, because such issues are a matter of proof that cannot be judicially noticed. NationsBank v. Tucker, 231 Ga. App. 622, 500 S.E.2d 378 (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held improper in the following cases. — See Causey v. Swift & Co., 57 Ga. App. 604, 196 S.E. 228, 1938 Ga. App. LEXIS 347 (1938) (location of city streets and distances between streets) (decided under former Code 1933, § 38-112); Matheson v. Brady, 202 Ga. 500,

43 S.E.2d 703, 1947 Ga. LEXIS 482 (1947); (inclusion of a certain high school in the state school system) (decided under former Code 1933, § 38-112); Harmon v. Harmon, 209 Ga. 474, 74 S.E.2d 75, 1953 Ga. LEXIS 293 (1953); (location of city street) (decided under former Code 1933, § 38-112); Shirley v. Woods, 98 Ga. App. 111, 105 S.E.2d 399, 1958 Ga. App. LEXIS 515 (1958); (meaning of yellow curb under traffic laws) (decided under former Code 1933, § 38-112); Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600. (standards of the National Pest Control Association) (decided under former O.C.G.A. § 24-1-4).

Unfiled depositions. — Trial court was authorized by law to take judicial notice only of certain narrowly prescribed categories of information, none of which includes deposition testimony. Therefore, the trial court committed reversible error when the court based the court's conclusions on depositions never filed with the court during the proceedings. Buchanan v. City of Clayton, 180 Ga. App. 740, 350 S.E.2d 320, 1986 Ga. App. LEXIS 2273 (1986) (decided under former O.C.G.A. § 24-1-4).

Building Code violation. — In a negligence action, plaintiffs based their contention regarding the construction of a stairwell on a claimed violation of the Georgia State Building Code, in that there was no landing on the stairway as required by the Code for exit stairways. Since the only reference to the Code in the record, however, was its quotation in the brief submitted by the plaintiffs in opposition to a motion for summary judgment, such a quotation was not evidence, nor was such a rule or regulation a matter of which a court could take judicial notice. Joel Properties, Inc. v. Reed, 203 Ga. App. 257, 416 S.E.2d 570, 1992 Ga. App. LEXIS 491 (1992), overruled in part, State v. Ponce, 279 Ga. 651, 619 S.E.2d 682, 2005 Ga. LEXIS 518 (2005) (decided under former O.C.G.A. § 24-1-4).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 28 et seq., 45 et seq., 146 et seq.

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 5.

C.J.S.

31A C.J.S., Evidence, § 5 et seq.

ALR.

Judicial notice of the coincidence of the days of the week with the days of the month, 8 A.L.R. 63.

Effect of absence of seal from execution, 28 A.L.R. 936.

Judicial notice of banking customs or other matters relating to banks or trust companies, 89 A.L.R. 1336.

Judicial notice of municipal ordinances where action originates in a municipal court, 111 A.L.R. 959.

Distinction between judicial notice and judicial knowledge, 113 A.L.R. 258.

Presumption of regular passage of statute as affected by legislative records showing that bill was defeated, 119 A.L.R. 460.

Admissibility, upon issue of negligence, of evidence of custom or practice of others, 137 A.L.R. 611.

Propriety of instructions on matters of common knowledge, 144 A.L.R. 932.

Uniform Judicial Notice of Foreign Law Act, 23 A.L.R.2d 1437.

Reception of evidence to contradict or rebut matters judicially noticed, 45 A.L.R.2d 1169.

Blood grouping tests, 46 A.L.R.2d 1000.

Judicial notice of matters relating to public thoroughfares and parks, 48 A.L.R.2d 1102; 86 A.L.R.3d 484.

Judicial notice of diseases or similar conditions adversely affecting human beings, 72 A.L.R.2d 554.

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles travelling at various speeds, 84 A.L.R.2d 979.

Choice of law in application of automobile guest statutes, 95 A.L.R.2d 12.

Judicial notice as to assessed valuations, 42 A.L.R.3d 1439.

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, 47 A.L.R.3d 822.

Admissibility of evidence of neutron activation analysis, 50 A.L.R.3d 117.

Judicial notice as to location of street address within particular political subdivision, 86 A.L.R.3d 484.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 A.L.R.4th 229.

Judicial notice of attorney customs and practices, 61 A.L.R.5th 707.

ARTICLE 2

LEGISLATIVE FACTS; ORDINANCES OR RESOLUTIONS

24-2-220. Judicial notice of legislative facts.

The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201.

History.

Code 1981, § 24-2-220, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Analysis

General Consideration
Judicial Notice Proper
Judicial Notice Improper

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1819, Cobb's 1851 Digest, p. 272, former Code 1863, §§ 3674, 3738, 3747, former Code 1868, §§ 3698, 3762, 3771, former Code 1873, §§ 3751, 3815, 3824, former Code 1882, §§ 3751, 3815, 3824, former Civil Code 1895, §§ 5148, 5210, 5231, former Civil Code 1910, §§ 5734, 5797, 5818, former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are included in the annotations for this Code section.

Presumption that law in force. — When it appeared in the manner indicated by the former statute that a particular law had been of force in another state, until the contrary was shown it was presumed that such law was still of force. Seaboard

Air-Line Ry. v. Phillips, 117 Ga. 98, 43 S.E. 494, 1903 Ga. LEXIS 161 (1903) (decided under former Civil Code 1895, §§ 5210, 5231).

Attention of court called to change in law. — While the common law was presumed to be of force in most of the American states, if either party claimed that the former statute or common law obtaining in such state was different from the law laid down in the Code, the party must, by pleading, evidence, or a request to charge, call the attention of the court to such difference. Wells v. Gress, 118 Ga. 566, 45 S.E. 418, 1903 Ga. LEXIS 620 (1903) (decided under former Civil Code 1895, §§ 5148, 5210, 5231).

Three methods of proof of foreign laws have been recognized. One was by proof of witnesses, testifying as to their familiarity with the law in reference to a certain subject. A second method was by certified copy of the statute in question. Finally, the third method of proof was clearly authorized by which the former statutory provisions was judicial recognition. Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93, 1907 Ga. App. LEXIS 260 (1907) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); see also Simms v. Southern Express Co., 38 Ga. 129, 1868 Ga. LEXIS 57 (1868).

Notice of foreign law from nature of litigation. — No issue of foreign law pertaining to sufficiency of long arm process service will arise during the course of litigation, unless the defendant timely raised such issue as prescribed by law. Thus, the defendant will always have actual knowledge when an issue of foreign law, pertaining to the adequacy of service of long arm process, will be litigated and will therefore have a reasonable opportunity to prepare for such litigation. Askari v. Dolat, 240 Ga. App. 633, 524 S.E.2d 310 (decided under former O.C.G.A. § 24-1-4).

Responsibility on party wishing to raise foreign law issue. — Notice of intent was required to raise an issue of foreign law, to establish such law by compliance with statutory means, or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230, 1994 Ga. App. LEXIS 737 (1994), cert. denied, No. S94C1694, 1994 Ga. LEXIS 1132 (Ga. Oct. 28, 1994) (decided under former O.C.G.A. § 24-1-4); P.G.L. & C.C. Employees Credit Union v. Kimball, 221 Ga. App. 108, 470 S.E.2d 501 (decided under former O.C.G.A. § 24-1-4); Askari v. Dolat, 240 Ga. App. 633, 524 S.E.2d 310 (decided under former O.C.G.A. § 24-1-4).

Laws published by authority. — Judicial cognizance of the laws of another state will be taken only when presented in some form that shows the law was "published by authority." Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917, 1949 Ga. LEXIS 457 (1949) (decided under former Code 1933, § 38-112).

Under former O.C.G.A. § 24-1-4, a trial court had a duty to take judicial notice of foreign law if "published by authority," without introduction of any proof of that law. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475, 1993 Ga. App. LEXIS 544 (1993) (decided under former O.C.G.A. § 24-1-4).

Proof of authority. — Volume of state laws, purporting on the title page to have been printed by order of the Governor, sufficiently shows publication by authority for purpose of judicial recognition of foreign state laws without proof. Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 584, 32 S.E.2d 540 (1944) (decided under former Code 1933, § 38-112).

Law must be pled. — Former statute did not dispense with the necessity of pleading a foreign law. On the contrary, this provision merely meant that when the public laws of a foreign state were published by that state's authority, the authenticity of its publications need not be shown by the introduction of proof of their genuineness, but will be judicially recognized by the courts without proof, and given the same effect as though its public laws were proved by the introduction in evidence of a duly certified copy thereof, properly authenticated under the

General Consideration (Cont'd)

great seal of that state. Savannah, Fla. & W. Ry. v. Evans, 121 Ga. 391, 49 S.E. 308, 1904 Ga. LEXIS 168 (1904) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); but see Harris v. Harris, 16 Ga. 217, 1854 Ga. LEXIS 191 (1854).

Municipal ordinances. — In a trial before a municipal court, the recorder may take judicial notice of the ordinances of the city, defining offenses against the city, but neither the Supreme Court, nor any other court than the municipal court, can take judicial cognizance of a municipal ordinance. Slaughter v. City of La Grange, 60 Ga. App. 555, 4 S.E.2d 410, 1939 Ga. App. LEXIS 80 (1939) (decided under former Code 1933, § 38-112).

Superior and appellate courts do not take judicial notice of a municipal ordinance. Police Benevolent Ass'n v. Brown, 268 Ga. 26, 486 S.E.2d 28 (decided under former O.C.G.A. § 24-1-4).

Plaintiffs' argument that a city's procedures for allocating funds violated the city code could not be considered on appeal because the relevant ordinances were not properly made a part of the record, and courts could not take judicial notice of municipal ordinances. Bailey v. City of Atlanta, 296 Ga. App. 679, 675 S.E.2d 564, 2009 Ga. App. LEXIS 306 (2009) (decided under former O.C.G.A. § 24-1-4).

County ordinances. — Court could not review the merits of a developer's arguments as to a county ordinance when there was no evidence in the record demonstrating that the ordinance was properly proven below. County ordinances constituted foreign law, and a court could not take judicial notice of those ordinances under former O.C.G.A. § 24-1-4. Prime Home Props., LLC v. Rockdale County Bd. of Health, 290 Ga. App. 698, 660 S.E.2d 44, 2008 Ga. App. LEXIS 314 (2008), cert. denied, No. S08C1330, 2008 Ga. LEXIS 685 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-1-4).

Judicial Notice Proper

Statutory provisions need not be set out in full. — Courts are bound to take judicial cognizance of an Act of the General Assembly, and it is not essential that a pleader should set out an entire Act in the pleadings in order to insist upon some paragraph or provision of the Act. Heard v. Pittard, 210 Ga. 549, 81 S.E.2d 799, 1954 Ga. LEXIS 371 (1954) (decided under former Code 1933, § 38-112).

Tennessee "slip opinions" were not "published by authority" and were, therefore, not binding on the trial court, with or without introduction of proof. Swafford v. Globe Am. Cas. Co., 187 Ga. App. 730, 371 S.E.2d 180, 1988 Ga. App. LEXIS 812 (1988) (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held proper in the following cases. — See Ragland v. Barringer, 41 Ga. 114, 1870 Ga. LEXIS 40 (1870) (Governor's proclamation) (decided under former Code 1868, §§ 3698, 3762, 3771); Stafford v. Hightower, 68 Ga. 394, 1882 Ga. LEXIS 17 (1882) (federal court districts) (decided under former Code 1873, §§ 3751, 3815, 3824); Wells v. Gress, 118 Ga. 566, 45 S.E. 418, 1903 Ga. LEXIS 620 (1903) (foreign state statutes) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Jossey v. Brown, 119 Ga. 758, 47 S.E. 350, 1904 Ga. LEXIS 353 (1904) (judge's tenure of office) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Taylor v. State, 123 Ga. 133, 51 S.E. 326, 1905 Ga. LEXIS 398 (1905) (existence of county as corporate body) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93, 1907 Ga. App. LEXIS 260 (1907) (foreign state statutes) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Central of Ga. Ry. v. Gwynes, 153 Ga. 606, 113 S.E. 183, 1922 Ga. LEXIS 131 (1922) (congressional Acts and presidential proclamations) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569, 1938 Ga. App. LEXIS 496 (1938) (state statutes) (decided under former Code 1933, § 38-112); Decatur County v. Tampa Whsle. Liquor Co., 62 Ga. App. 716, 9 S.E.2d 701, 1940 Ga. App. LEXIS 413 (1940) (state statutes) (decided under former Code 1933, § 38-112); Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424, 1943 Ga. LEXIS 331 (1943) (county location and territory) (decided under former Code

1933, § 38-112); Leonard v. State ex rel. Lanier, 204 Ga. 465, 50 S.E.2d 212, 1948 Ga. LEXIS 468 (1948) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Thigpen v. Town of Davisboro, 81 Ga. App. 610, 59 S.E.2d 522, 1950 Ga. App. LEXIS 954 (1950) (incorporation of town) (decided under former Code 1933, § 38-112); Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653, 1950 Ga. App. LEXIS 1048 (1950) (state agency seal) (decided under former Code 1933, § 38-112); Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562, 1951 Ga. LEXIS 404 (1951) (county and municipal location) (decided under former Code 1933, § 38-112); Brown v. State, 87 Ga. App. 244, 73 S.E.2d 502, 1952 Ga. App. LEXIS 658 (1952) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Peebles v. State, 96 Ga. App. 836, 101 S.E.2d 726, 1958 Ga. App. LEXIS 917 (1958) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79, 1959 Ga. LEXIS 525 (1959) (federal laws) (decided under former Code 1933, § 38-112); City of Atlanta v. Gower, 216 Ga. 368, 116 S.E.2d 738, 1960 Ga. LEXIS 474 (1960) (state statutes) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); South Am. Managers, Inc. v. Reeves, 220 Ga. 493, 140 S.E.2d 201, 1965 Ga. LEXIS 545 (1965) (court's records in case at bar) (decided under former Code 1933, § 38-112); Kelly v. Kelly, 115 Ga. App. 700, 155 S.E.2d 732, 1967 Ga. App. LEXIS 1212 (1967) (foreign state statutes and court cases) (decided under former Code 1933, § 38-112); Dye v. State, 118 Ga. App. 570, 165 S.E.2d 183, 1968 Ga. App. LEXIS 1461 (1968) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Irwin v. Busbee, 241 Ga. 567, 247 S.E.2d 103, 1978 Ga. LEXIS 1049 (1978) (incumbent holding office on certain date) (decided under former Code 1933, § 38-112); Thompson v. Cheatham, 244 Ga. 117, 259 S.E.2d 62, 1979 Ga. LEXIS 1141 (1979) (state statutes; organization and terms of court) (decided under former Code 1933, § 38-112); Brown v. Citizens & S. Nat'l Bank, 245 Ga. 515, 265 S.E.2d 791, 1980 Ga. LEXIS 841 (1980) (court records in case at bar) (decided under former Code 1933, § 38-112); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13, 1986 Ga. App. LEXIS 1498 (1986) (county of location of incorporated city) (decided under former O.C.G.A. § 24-1-4); Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (rules and regulations of the Georgia Department of Argiculture, Pest Control Commission) (decided under former O.C.G.A. § 24-1-4); Enchanted Valley RV Resort, Ltd. v. Weese, 241 Ga. App. 415, 526 S.E.2d 124, 1999 Ga. App. LEXIS 1558 (1999), cert. denied, No. S00C0668, 2000 Ga. LEXIS 414 (Ga. May 5, 2000) (rules and regulations of the Department of Human Resources) (decided under former O.C.G.A. § 24-1-4).

Judicial Notice Improper

In pleading the statute of a foreign state, it is not necessary that it should be set forth in haec verba, but the substance of those portions that are relied on should be stated with sufficient distinctness to enable the court to judge the meaning and effect of the law. Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954) (decided under former Code 1933, § 38-112).

Judicial notice was held improper in the following cases. — See Clifton v. State, 53 Ga. 241, 1874 Ga. LEXIS 453 (1874) (previous proceedings before court); Crouch v. Fisher, 43 Ga. App. 484, 159 S.E. 746, 1931 Ga. App. LEXIS 440 (1931) (adoption of agency rules pursuant to statute) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190, 1940 Ga. App. LEXIS 202 (1940) (municipal ordinance not pled) (decided under former Code 1933, § 38-112); Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917, 1949 Ga. LEXIS 457 (1949); Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536, 1953 Ga. App. LEXIS 1059 (1953) (rules and regulations of state agency) (decided under former Code 1933, § 38-112); Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954) (foreign state statutes) (decided under former Code 1933, § 38-112); Davis v. General Gas Corp., 106 Ga. App. 317, 126 S.E.2d 820, 1962 Ga. App. LEXIS 697 (1962) (state agency regula-

Judicial Notice Improper (Cont'd)

tions) (decided under former Code 1933, § 38-112); Leger v. Ken Edwards Enters., Inc., 223 Ga. 536, 156 S.E.2d 651, 1967 Ga. LEXIS 599 (1967) (city or county ordinances) (decided under former Code 1933, § 38-112); Staggers v. State, 119 Ga. App. 85, 166 S.E.2d 411, 1969 Ga. App. LEXIS 989 (1969) (state agency, municipal, or private agency rules or regulations affecting start of school year) (decided under former Code 1933, § 38-112); Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705, 1980 Ga. App. LEXIS 2954 (1980) (local practice rules) (decided under former Code 1933, § 38-112); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13, 1986 Ga. App. LEXIS 1498 (1986) (county of location of incorporated city) (decided under former O.C.G.A. § 24-1-4).

Trial court was not authorized to take judicial notice of the judgment in a federal suit since it was material not included in the actual court record and the error was not harmless because, without admitting into evidence the duly certified copies of the prior judgment, the defendants could not establish that collateral estoppel barred the plaintiff's wrongful foreclosure suit. Garner v. US Bank Nat'l Ass'n, 329 Ga. App. 86, 763 S.E.2d 748, 2014 Ga. App. LEXIS 625 (2014).

City ordinance. — In an appeal from the denial of a subdivision application, the trial court could not take judicial notice of city ordinances; city ordinances have to be alleged and proven. City of St. Marys v. Fulford, 286 Ga. App. 506, 649 S.E.2d 807, 2007 Ga. App. LEXIS 814 (2007) (decided under former O.C.G.A. § 24-1-1).

Venue. — Prerequisites for judicial notice of venue were not satisfied by reference to ambiguous Uniform Traffic Citations. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111, 1997 Ga. App. LEXIS 874 (1997) (decided under former O.C.G.A. § 24-1-1).

24-2-221. Judicial notice of ordinance or resolution.

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body.

History.

Code 1981, § 24-2-221, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001).

For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are in-

cluded in the annotations for this Code section.

Judicial notice was held improper in the following cases. — See Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190, 1940 Ga. App. LEXIS 202 (1940) (municipal ordinance not pled) (decided under former Code 1933, § 38-112); Leger v. Ken Edwards Enters., Inc., 223 Ga. 536, 156 S.E.2d 651, 1967 Ga. LEXIS 599 (1967) (city or county ordinances) (decided under former Code 1933, § 38-112).

City ordinance. — In an appeal from the denial of a subdivision application, the trial court could not take judicial notice of city ordinances; city ordinances have to be alleged and proven. City of St. Marys v. Fulford, 286 Ga. App. 506, 649 S.E.2d 807, 2007 Ga. App. LEXIS 814 (2007) (decided under former O.C.G.A. § 24-1-1).

CHAPTER 3

PAROL EVIDENCE

Sec.		Sec.	
24-3-1.	Parol evidence contradicting writing inadmissible generally.	24-3-6.	Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.
24-3-2.	Proof of unwritten portions of contract admissible where not inconsistent.	24-3-7.	Proof of mistake in deed or written contract.
24-3-3.	Contemporaneous writings explaining each other; parol evidence explaining ambiguities.	24-3-8.	Original or subsequent voidness of writing.
24-3-4.	Circumstances surrounding execution of contracts.	24-3-9.	Explanation or denial of receipts.
24-3-5.	Known usage.	24-3-10.	Explanation of blank endorsements.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-3-1. Parol evidence contradicting writing inadmissible generally.

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument.

History.

Code 1981, § 24-3-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "The Parol Evidence Rule in Georgia," see 17 Ga. B.J. 49 (1954).

For article discussing the advantages of contract rescission as a remedy for fraud, with respect to the parol evidence rule and the statute of frauds, in light of City Dodge, Inc. v. Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975).

For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

For article, "Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Analysis

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Evidence Admissible
1. In General

2. Notes
3. Real Estate Transactions
4. Other Agreements

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3723, former Code 1868, § 3747, former Code 1873, § 3800, former Code 1882, § 3800, former Civil Code 1895, § 5201, former Civil Code 1910, § 5788, former Code 1933, § 38-501, and former O.C.G.A. § 24-6-1 are included in the annotations for this Code section.

Purpose of the rule that the terms of a valid written agreement which is complete and the terms of which are not ambiguous cannot be contradicted, added to, altered, or varied by parol agreements is to establish the finality of written contracts. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13, 1936 Ga. LEXIS 145 (1936) (decided under former Code 1933, § 38-501).

Parol evidence rule is matter of substantive law and no amount of oral testimony contradicting the legal consequence of a written instrument can avail to destroy or weaken that legal consequence. Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20, 1944 Ga. LEXIS 365 (1944) (decided under former Code 1933, § 38-501); Almon v. R.H. Macy & Co., 106 Ga. App. 123, 126 S.E.2d 641, 1962 Ga. App. LEXIS 643 (1962) (decided under former Code 1933, § 38-501).

Parol evidence cannot add to, take from, or vary writing itself. Buice Grading & Pipeline, Inc. v. Bales, 187 Ga. App. 263, 370 S.E.2d 26, 1988 Ga. App. LEXIS 632 (1988) (decided under former O.C.G.A. § 24-6-1); Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242, 1990 Ga. App. LEXIS 26 (1990) (decided under former O.C.G.A. § 24-6-1).

Parol evidence rule should not be relaxed. Howard & Soule v. Stephens, 52 Ga. 448, 1874 Ga. LEXIS 313 (1874) (decided under former Code 1882, § 3800).

Test for admissibility of oral agreement. — Test to determine whether an oral agreement is one which the law will permit to be plead and proved is whether the oral agreement constitutes a part of the written contract or whether, instead, it is a separate and distinct oral contract which is not inconsistent with the written contract. If the latter, it admits of pleading and proof. S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777, 1964 Ga. LEXIS 323 (1964) (decided under former Code 1933, § 38-501); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-501).

Court will not ignore clear language of written contract between the parties to enforce an alleged oral contract in contradiction thereto. Johnson v. Ford Motor Credit Co., 142 Ga. App. 547, 236 S.E.2d 527, 1977 Ga. App. LEXIS 1692 (1977) (decided under former Code 1933, § 38-501).

Oral agreement that contradicts written agreement inadmissible. — Evidence that attorney verbally agreed to keep fees at the low end of the range specified in the attorney's written agreement with plaintiff and to complete the project within two weeks was inadmissible since that evidence contradicted the parties written agreement. Schluter v. Perrie, Buker, Stagg & Jones, 230 Ga. App. 776, 498 S.E.2d 543 (decided under former O.C.G.A. § 24-6-1).

All previous negotiations are merged in the subsequent written contract. Freeman v. Bass, 34 Ga. 355, 1866 Ga. LEXIS 101 (1866) (decided under former Code 1863, § 3723); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398, 1922 Ga. LEXIS 304 (1922) (decided under former Civil Code 1910, § 5788); Wynn v. First Nat'l Bank, 176 Ga. 218, 167 S.E. 513, 1933 Ga. LEXIS 49 (1933) (decided under former Civil Code 1910, § 5788); Allison v. United Small-Loan Corp., 54 Ga. App. 820, 189 S.E. 263, 1936 Ga. App. LEXIS 767 (1936) (decided under former Code 1933, § 38-501); Thompson v. Riggs, 193 Ga. 632, 19 S.E.2d 299, 1942 Ga. LEXIS 441 (1942) (decided under for-

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mer Code 1933, § 38-501); Heisley v. Allied Am. Mut. Fire Ins. Co., 71 Ga. App. 107, 30 S.E.2d 285, 1944 Ga. App. LEXIS 292 (1944) (decided under former Code 1933, § 38-501); Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20, 1944 Ga. LEXIS 365 (1944) (decided under former Code 1933, § 38-501); Thompson v. Arrington, 209 Ga. 343, 72 S.E.2d 293, 1952 Ga. LEXIS 534 (1952) (decided under former Code 1933, § 38-501); Simmons v. Wooten, 241 Ga. 518, 246 S.E.2d 639, 1978 Ga. LEXIS 1032 (1978) (decided under former Code 1933, § 38-501).

Evidence admitted without objection. — Parol evidence as to the terms of the agreement, and as to statements of the defendant made previously to the execution of the paper was ineffectual to vary the terms of the written instrument, even though admitted without objection. Cleghorn v. Shields, 165 Ga. 362, 141 S.E. 55, 1927 Ga. LEXIS 396 (1927) (decided under former Civil Code 1910, § 5788).

Determination of timeliness of objection to parol evidence was unnecessary, since parol evidence, by its nature, was incompetent and without probative value to alter the terms or conditions of a written contract. Lyon v. Patterson, 138 Ga. App. 816, 227 S.E.2d 423, 1976 Ga. App. LEXIS 2647 (1976) (decided under former Code 1933, § 38-501).

Uncertainty in contract. — There can be no admission of parol evidence unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represent the true intention of the parties. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839, 1945 Ga. LEXIS 344 (1945) (decided under former Code 1933, § 38-501).

Violation of parol agreement not fraud. — Making and violating a contemporaneous parol agreement if inconsistent with the writing would not be such fraud as would permit a varying of the written instrument, even if plead as fraud, no sufficient reason appearing why the agreement was not incorporated in the writing. Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625, 1936 Ga. App. LEXIS 251 (1936) (decided under former Code 1933, § 38-501).

Invoices. — Invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253, 653 S.E.2d 835, 2007 Ga. App. LEXIS 1185 (2007) (decided under former O.C.G.A. § 24-6-1).

Jury question. — It is for the jury to decide whether an independent collateral oral agreement was made and, if so, whether the oral agreement was part of the inducement to the written agreement. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-501).

Attempt to invoke rule on appeal. — When a party who was entitled to the benefit of the rule prohibiting the admission of parol evidence to vary or contradict a writing waived the benefit thereof by allowing such evidence to be received without objection and without any effort to have the evidence stricken and disregarded by the trial judge or the jury, the party cannot, after the trial terminated and the case had been decided against the party, invoke the parol evidence rule in order to obtain a reversal of such verdict and judgment in the appellate court. Southern Envelope Co. v. Adamson Printing Co., 51 Ga. App. 475, 180 S.E. 770, 1935 Ga. App. LEXIS 376 (1935) (decided under former Code 1933, § 38-501); Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566, 1938 Ga. App. LEXIS 459 (1938) (decided under former Code 1933, § 38-501).

Evidence Inadmissible

1. In General

Prior and contemporaneous statements or agreements cannot be shown to vary, contradict, or change the terms of a valid written contract purporting on the contract's face to contain all the terms of an agreement between the parties. Campbell v. Alkahest Lyceum Sys., 10 Ga. App. 839, 74 S.E. 443, 1912 Ga. App. LEXIS 722 (1912) (decided under former Civil Code 1910, § 5788); Roberts

v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398, 1922 Ga. LEXIS 304 (1922) (decided under former Civil Code 1910, § 5788); Eaves v. Georgian Co., 47 Ga. App. 37, 169 S.E. 519, 1933 Ga. App. LEXIS 281 (1933) (decided under former Civil Code 1910, § 5788); Hardin v. Atlanta Gas Light Co., 71 Ga. App. 63, 30 S.E.2d 121, 1944 Ga. App. LEXIS 280 (1944) (decided under former Code 1933, § 38-501); Owensby v. Byrd, 75 Ga. App. 729, 44 S.E.2d 452, 1947 Ga. App. LEXIS 627 (1947) (decided under former Code 1933, § 38-501); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938, 1975 U.S. Dist. LEXIS 13112 (N.D. Ga. 1975); (decided under former Code 1933, § 38-501); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765, 1976 Ga. App. LEXIS 2021 (1976) (decided under former Code 1933, § 38-501); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-501).

When the contract was complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E.2d 1, 1982 Ga. LEXIS 1078 (1982) (decided under former O.C.G.A. § 24-6-1).

In absence of fraud, accident, or mistake, parol evidence is not admissible to vary an unambiguous written agreement. Freeman v. Bass, 34 Ga. 355, 1866 Ga. LEXIS 101 (1866) (decided under former Code 1863, § 3723); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398, 1922 Ga. LEXIS 304 (1922) (decided under former Civil Code 1910, § 5788); Holloway v. Brown, 171 Ga. 481, 155 S.E. 917, 1930 Ga. LEXIS 484 (1930) (decided under former Civil Code 1910, § 5788); Long v. Sullivan, 52 Ga. App. 318, 183 S.E. 71, 1935 Ga. App. LEXIS 156 (1935) (decided under former Code 1933, § 38-501); Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20, 1944 Ga. LEXIS 365 (1944) (decided under former Code 1933, § 38-501); Gilleland v. Welch, 199 Ga. 341, 34 S.E.2d 517, 1945 Ga. LEXIS 427 (1945) (decided under former Code 1933, § 38-501); McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839, 1945 Ga. LEXIS 344 (1945) (decided under former Code 1933, § 38-501); Smith v. Standard Oil Co., 227 Ga. 268, 180 S.E.2d 691, 1971 Ga. LEXIS 669 (1971) (decided under former Code 1933, § 38-501); Vulcan Materials Co. v. Douglas, 131 Ga. App. 21, 205 S.E.2d 84, 1974 Ga. App. LEXIS 1309 (1974) (decided under former Code 1933, § 38-501); Wilson v. Sheppard, 136 Ga. App. 475, 221 S.E.2d 671, 1975 Ga. App. LEXIS 1391 (1975) (decided under former Code 1933, § 38-501); C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665, 1979 Ga. App. LEXIS 1645 (1979) (decided under former Code 1933, § 38-501).

Parol evidence inadmissible even to establish fraud. — Parol evidence was not admissible to vary the terms of a binding written agreement, even to establish fraud. Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332, 1981 Ga. App. LEXIS 2324 (1981) (decided under former Code 1933, § 38-501).

Oral representations made as inducements to the contract are inadmissible to add to, take from, or vary a written contract. Pepsico Truck Rental, Inc. v. Eastern Foods, Inc., 145 Ga. App. 410, 243 S.E.2d 662, 1978 Ga. App. LEXIS 2002 (1978) (decided under former Code 1933, § 38-501).

Different consideration. — As a general rule, the consideration of a contract is open to inquiry as between the original parties, but if the consideration be so stated in the contract as to make it one of the contract's terms or conditions, as when the consideration consists of mutual promises expressed in the contract, a different consideration, whether variant or additional, cannot be shown by parol. Lynchburg Shoe Co. v. Daniel, 23 Ga. App. 186, 98 S.E. 107, 1919 Ga. App. LEXIS 28 (1919) (decided under former Civil Code 1910, § 5788); Georgia Cas. Co. v. Dixie Trust & Sec. Co., 23 Ga. App. 447, 98 S.E. 414, 1919 Ga. App. LEXIS 154 (1919) (decided under former Civil Code 1910, § 5788); Ramsey-Fender Motor Co. v. Chapman, 46 Ga. App. 385, 168 S.E. 92, 1932 Ga. App. LEXIS 135 (1932) (decided under former Civil Code 1910, § 5788); Phillips v. Phillips, 46 Ga. App. 838, 169 S.E. 537, 1933 Ga. App. LEXIS 264 (1933)

In General (Cont'd)

(decided under former Civil Code 1910, § 5788).

Party cannot engraft new condition under guise of inquiring into consideration. — Although it was permissible to inquire into consideration when the principles of justice require it, one of the parties to a contract cannot, under the guise of inquiring into consideration, engraft upon the contract a new condition which imposed an additional affirmative obligation upon the other party. Hanover Ins. Co. v. Nelson Conveyor & Mach. Co., 159 Ga. App. 13, 282 S.E.2d 670, 1981 Ga. App. LEXIS 2460 (1981) (decided under former Code 1933, § 38-501).

Inquiry into consideration to vary terms of contract. — When in some instances parol evidence that the real consideration of a contract was different from the one actually recited in the instrument was admissible for the purpose of proving that the true consideration has failed, it was never allowable, under the guise of inquiring into the consideration, to vary or contradict by parol the substance and meaning of the written terms of the contract itself. Lynchburg Shoe Co. v. Daniel, 23 Ga. App. 186, 98 S.E. 107, 1919 Ga. App. LEXIS 28 (1919) (decided under former Civil Code 1910, § 5788); Middlebrooks v. Dunlap-Huckabee Auto Co., 44 Ga. App. 543, 162 S.E. 153, 1932 Ga. App. LEXIS 370 (1932) (decided under former Civil Code 1910, § 5788); Phillips v. Phillips, 46 Ga. App. 838, 169 S.E. 537, 1933 Ga. App. LEXIS 264 (1933) (decided under former Civil Code 1910, § 5788); Tyre v. Price, 52 Ga. App. 526, 183 S.E. 843, 1936 Ga. App. LEXIS 169 (1936) (decided under former Code 1933, § 38-501); Redfearn v. Citizens & S. Nat'l Bank, 122 Ga. App. 282, 176 S.E.2d 627, 1970 Ga. App. LEXIS 854 (1970) (decided under former Code 1933, § 38-501); Zorn v. Robertson, 237 Ga. 395, 228 S.E.2d 804, 1976 Ga. LEXIS 1244 (1976) (decided under former Code 1933, § 38-501).

Proof of different contract. — Entirely different contract from that evidenced by a writing cannot be pled or proved by parol as a substitute for that embodied in such writing. Branan v. Warfield & Lee, 3 Ga. App. 586, 60 S.E. 325, 1908 Ga. App. LEXIS 379 (1908) (decided under former Civil Code 1895, § 5201).

2. Notes

Admission to vary promissory note. — In absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict express terms of a promissory note. Tyson v. Henson, 159 Ga. App. 684, 285 S.E.2d 27, 1981 Ga. App. LEXIS 2769 (1981) (decided under former O.C.G.A. § 24-6-1).

With respect to an unambiguous promissory note, in the absence of fraud, accident, or mistake, parol evidence cannot be considered to alter or vary the terms of a promissory note. Citizens & S. Trust Co. v. Johnson, 201 Ga. App. 464, 411 S.E.2d 543, 1991 Ga. App. LEXIS 1438 (1991) (decided under former O.C.G.A. § 24-6-1).

Showing note to be conditional. — In an action upon an unconditional promissory note, evidence of a contemporaneous parol agreement that the note was not to be paid except upon the happening of a certain event was inadmissible in the absence of evidence tending to show that the agreement was omitted from the note by accident, fraud, or mistake. Probasco v. Shaw, 144 Ga. 416, 87 S.E. 466, 1915 Ga. LEXIS 224 (1915) (decided under former Civil Code 1910, § 5788); Cairo Banking Co. v. Hall, 42 Ga. App. 785, 157 S.E. 346, 1931 Ga. App. LEXIS 140 (1931) (decided under former Civil Code 1910, § 5788); Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-501); Mooney v. Boyd, 86 Ga. App. 369, 71 S.E.2d 685, 1952 Ga. App. LEXIS 958 (1952) (decided under former Code 1933, § 38-501); Knight v. William Summerlin Co., 119 Ga. App. 575, 168 S.E.2d 179, 1969 Ga. App. LEXIS 1175 (1969) (decided under former Code 1933, § 38-501); Smith v. Standard Oil Co., 227 Ga. 268, 180 S.E.2d 691, 1971 Ga. LEXIS 669 (1971) (decided under former Code 1933, § 38-501); First Nat'l Bank v. Harrison, 408 F. Supp. 137, 1975 U.S. Dist. LEXIS 16330 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976); Hyman v. Horwitz, 148 Ga. App. 647, 252 S.E.2d 74, 1979 Ga.

App. LEXIS 1589 (1979) (decided under former Code 1933, § 38-501).

Showing a want or failure of consideration. — When the consideration underlying a note was at issue, the maker of the note had the right to show by parol a want or failure of consideration. Beasley v. Paul, 223 Ga. App. 706, 478 S.E.2d 899 (decided under former O.C.G.A. § 24-6-1).

Variance in time of payment. — Parol evidence was inadmissible to vary the terms of payment or the date of the maturity of a promissory note, or to engraft upon the note a provision for an extension of time. Crooker v. Hamilton, 3 Ga. App. 190, 59 S.E. 722, 1907 Ga. App. LEXIS 590 (1907) (decided under former Civil Code 1895, § 5201); Wilder v. Federal Land Bank, 176 Ga. 813, 169 S.E. 13, 1933 Ga. LEXIS 295 (1933) (decided under former Civil Code 1910, § 5788).

Showing that note would not be enforced. — An unconditional promise to pay could not be defeated by proof of a contemporaneous oral agreement that it would never be enforced. Pulliam v. Merchants & Miners State Bank, 33 Ga. App. 68, 125 S.E. 509, 1924 Ga. App. LEXIS 730 (1924) (decided under former Civil Code 1910, § 5788); Cohan v. Flanders, 315 F. Supp. 1046, 1970 U.S. Dist. LEXIS 10616 (S.D. Ga. 1970). (decided under former Code 1933, § 38-501).

Note not to be paid in money. — Note in which it was stipulated that a certain sum would be paid meant that this sum will be paid in money, and the maker would not be heard to plead or prove that there was a parol agreement by which the note was to be satisfied with something else than money. Kerr v. Holder, 13 Ga. App. 9, 78 S.E. 682, 1913 Ga. App. LEXIS 3 (1913) (decided under former Civil Code 1910, § 5788); Cole v. Bank of Bowersville, 31 Ga. App. 435, 120 S.E. 790, 1923 Ga. App. LEXIS 975 (1923) (decided under former Civil Code 1910, § 5788).

Express warranty. — When a promissory note was given for purchase money, which was unambiguous and unconditional, and contained no warranty of soundness, no express warranty could be added to the note by parol. Fleming v. Satterfield, 4 Ga. App. 351, 61 S.E. 518, 1908 Ga. App. LEXIS 296 (1908) (decided under former Civil Code 1895, § 5201).

Additional warranty. — Purchaser of an article, who accepted a note for the price of the article, and therein gave a limited warranty, and stipulated not to exact anything beyond, would not be allowed to prove by parol another representation or warranty of the seller, unless upon the ground of fraud. Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566, 1938 Ga. App. LEXIS 459 (1938) (decided under former Code 1933, § 38-501).

Obligation conditioned on additional security. — "Parol contemporaneous evidence was inadmissible generally to contradict or vary the terms of a valid written instrument," thus, when an unconditional promissory note was signed by two persons, while it was permissible for one of them to show that one was a mere surety, it was not permissible to alter the unconditional character of the obligation by setting up a prior or contemporaneous parol agreement to the effect that the obligation was conditional upon the payees taking a mortgage upon personalty from the principal debtor as additional security. Bowen v. Mobley, 40 Ga. App. 833, 151 S.E. 667, 1930 Ga. App. LEXIS 722 (1930) (decided under former Civil Code 1910, § 5788).

Claim only in rem. — In a suit on a promissory note secured by a deed to land, it was not permissible for the maker to set up by way of plea and answer that by executing the two instruments together the payee agreed to look solely to the land for repayment of the debt due, and the maker of the note was not to be under any personal obligation, and no personal judgment could be procured against the maker, but only a judgment in rem against the property could be had for such an interpretation would be to vary by parol the plain terms of a written instrument by which the maker agreed to pay a stated sum on a certain day. Skeffington v. Rowland, 52 Ga. App. 619, 184 S.E. 330, 1936 Ga. App. LEXIS 200 (1936) (decided under former Code 1933, § 38-501).

Existence of prior cause of action. — In a suit by a payee against the maker of a promissory note reciting that the note was given "for value received," a contemporaneous parol agreement cannot be en-

Notes (Cont'd)

grafted thereon by the defendant by testimony to the effect that while the defendant, at the time of executing the note, actually received from the plaintiff the principal sum thereof, yet the defendant had a prior cause of action against the plaintiff and the note was to be set up against the demand of the defendant against the plaintiff in this case, and so understood at the time of the execution and delivery of the note. Dunson & Bros. Co. v. Smith Seed Co., 26 Ga. App. 585, 106 S.E. 914, 1921 Ga. App. LEXIS 536 (1921) (decided under former Civil Code 1910, § 5788).

Memorandum written at bottom of note. — Parol evidence was inadmissible to vary or contradict an unambiguous contract in writing so as to include a memorandum written upon the bottom of one note showing the note to be collateral, and this memorandum cannot by parol be included in (nor can this stipulation in itself include) another note of a prior date when in such prior note no such words appear. Buffington v. Bank of College Park, 157 Ga. 570, 122 S.E. 50, 1924 Ga. LEXIS 204 (1924) (decided under former Civil Code 1910, § 5788).

3. Real Estate Transactions

Additional conditions. — When expressed only by way of recital, parol evidence was admissible to show that the true consideration of the deed was in fact different from the one stated merely by way of recital. However, one of the parties to a deed cannot, under the guise of inquiring into the deed's consideration, engraft upon the instrument a new condition or covenant which imposed an additional affirmative obligation upon the other party. Awtrey v. Awtrey, 225 Ga. 666, 171 S.E.2d 126, 1969 Ga. LEXIS 605 (1969) (decided under former Code 1933, § 38-501).

Answer at variance with deed. — Allegations of the defendant's answer, setting up an understanding at variance with the terms of the deed executed by the plaintiff to the defendant, should have been stricken. Groover v. Simmons, 152 Ga. 423, 110 S.E. 179, 1921 Ga. LEXIS 113 (1921) (decided under former Civil Code 1910, § 5788).

House not included in deed. — When there was a conveyance of land by deed, containing no reservations as to the buildings, a parol understanding that the vendor retains the ownership of the houses, with the right to enter and remove the houses, was certainly inconsistent with the deed and ought to be excluded from evidence. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62, 1970 Ga. LEXIS 593 (1970) (decided under former Code 1933, § 38-501).

Obligation to sell adjoining tract. — When one of the parties to a contract involving a purchase and sale of land executed and delivered to the other a deed conveying a described tract of land for a named sum of money, a contemporaneous oral agreement obligating the grantee in the deed to purchase, at the option of the grantor and during the grantor's lifetime, an adjoining tract of land for an additional sum of money will not be enforced if it appears that the deed and the oral agreement constitute parts of the same contract, and the terms of the oral agreement add to and vary those of the written instrument. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13, 1936 Ga. LEXIS 145 (1936) (decided under former Code 1933, § 38-501).

Showing deed to be mortgage. — Father, by a deed absolute, conveyed land to his son, who mortgaged the land for a large sum. Thereafter, with the consent of his father, he sold and assigned in writing the equity of redemption. Under the law, the father could not show by parol a subsequent rescission of the transfer, and that the original deed from himself to his son was intended only as a mortgage, and thereby establish a right in himself to redeem the land. New England Mtg. Sec. Co. v. Tarver, 60 F. 660, 1894 U.S. App. LEXIS 2128 (5th Cir. 1894) (decided under former Code 1882, § 3800).

Failure to make improvements. — In a suit based on a written contract given for the purchase money of described cemetery lots, the court did not err in sustaining demurrer to defense asserting failure of plaintiff to make certain improvements in the cemetery which prior to or contem-

poraneously with the execution of the contract it had verbally agreed to make. Slaten v. College Park Cem. Co., 185 Ga. 27, 193 S.E. 872, 1937 Ga. LEXIS 659 (1937) (decided under former Code 1933, § 38-501).

Administrator denying sale at auction. — An administrator cannot dispute the truth of a solemn recital contained in a deed that the property was exposed for sale, that the highest bid was a stated sum, and that the administrator held the property therefor. The administrator may deny receipt of the proceeds, but the administrator cannot deny the sale at public auction for a stated sum. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126, 1923 Ga. App. LEXIS 53 (1923) (decided under former Civil Code 1910, § 5788).

Real estate bond. — Rule that negotiations in parol, occurring prior to or contemporaneously with the execution of a written contract, are considered as merged therein, and evidence as to parol terms which vary or contradict the terms of the written instrument should be excluded is ordinarily applied in a suit on the contract itself, but it also applies in suit against surety on real estate bond, as the alleged default under the bond sued on was in respect to the relation between the parties as fixed and governed by the real estate sales contract, especially in respect to the broker's right to commissions under the contract of sale. Pfeffer v. General Cas. Co. of Am., 87 Ga. App. 173, 73 S.E.2d 234, 1952 Ga. App. LEXIS 641 (1952) (decided under former Code 1933, § 38-501).

Real estate entire agreement clause. — Provision in parties' contracts that there would be no verbal agreements of any kind between the parties was absolute, and as such, the provision barred the enforcement of a prior verbal agreement that, in fulfillment of its written contractual obligation to convey "lakefront" lots to the plaintiffs, contractor would provide plaintiffs with a permanent easement ensuring their littoral rights. Great Am. Bldrs., Inc. v. Howard, 207 Ga. App. 236, 427 S.E.2d 588, 1993 Ga. App. LEXIS 142 (1993) (decided under former O.C.G.A. § 24-6-1).

Conveyance of right of way. — Written contract of conveyance of a right of way to a railroad company, duly executed and delivered by an owner of land, cannot be varied by oral testimony to the effect that the owner executed and delivered the contract upon agreement by the agent of the railroad company that the company would so construct the railroad as not to interfere with use of this land, on either side of the right of way, for pasturage purposes. Poole v. Elberton & E. Ry., 19 Ga. App. 631, 91 S.E. 1052, 1917 Ga. App. LEXIS 275 (1917) (decided under former Civil Code 1910, § 5788).

4. Other Agreements

Specific performance. — Parol evidence rule is applicable in a suit for specific performance to deny another parol proof of an antecedent, inconsistent parol agreement. Thompson v. Arrington, 209 Ga. 343, 72 S.E.2d 293, 1952 Ga. LEXIS 534 (1952) (decided under former Code 1933, § 38-501).

Exclusion of specific performance in land purchase contract. — When there is no language excluding specific performance as a remedy in a land purchase contract, the contract being unambiguous on this point, proffered evidence to the contrary, which purports to show that the parties intended liquidated damages to be the sole remedy, violates the parol evidence rule and is properly disregarded by the trial judge. Laseter v. Brown, 251 Ga. 179, 304 S.E.2d 72, 1983 Ga. LEXIS 758 (1983) (decided under former O.C.G.A. § 24-6-1).

Merger of prior negotiations. — Contract of sale merges prior negotiations and all oral understandings and the court cannot rewrite the agreement to suit one of the parties. Worthington Pump & Mach. Corp. v. Briarcliff, 67 Ga. App. 71, 19 S.E.2d 574, 1942 Ga. App. LEXIS 338 (1942) (decided under former Code 1933, § 38-501); R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051, 1975 U.S. Dist. LEXIS 16053 (S.D. Ga. 1975). (decided under former Code 1933, § 38-501).

Showing sale to be conditional. — When a special agent makes a contract of sale in writing, evidence of prior conversations is inadmissible for the purpose of showing that the sale, on the sale's face absolute was in fact conditional. Bass Dry

Other Agreements (Cont'd)

Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980, 1903 Ga. LEXIS 58 (1903) (decided under former Civil Code 1895, § 5201).

Oral understanding concerning contractual phrase. — When a timber release contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, any attempt to prove that at the time of the execution of the contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 1947 Ga. LEXIS 534 (1947) (decided under former Code 1933, § 38-501).

Material contractual term. — Statement in a complete conditional sales contract that one of the parties "has this day purchased" from the other party certain described personal property, for which one agrees to pay a stated amount of money, is a material contractual term and not a mere recital of the consideration of the contract, and may not be contradicted by parol evidence. Wade v. Ballard, 69 Ga. App. 669, 26 S.E.2d 542, 1943 Ga. App. LEXIS 166 (1943) (decided under former Code 1933, § 38-501).

Employment contract. — Parol "lifetime" employment contract between the parties upon which the plaintiff relied, even if certain and definite enough to be enforceable, is superseded by the inconsistent, valid, complete, unambiguous, written employment contracts covering the same subject matter and providing for termination of employment by written notice. Vulcan Materials Co. v. Douglas, 131 Ga. App. 21, 205 S.E.2d 84, 1974 Ga. App. LEXIS 1309 (1974) (decided under former Code 1933, § 38-501).

Sales contract. — Parol evidence was inadmissible to establish that a seller breached a written contract for the sale of certain carpet-making technology because such evidence would contradict the express disclaimers of the parties' written contract. Textile Rubber & Chem. Co. v. Thermo-Flex Techs., Inc., 301 Ga. App. 491, 687 S.E.2d 919, 2009 Ga. App. LEXIS 1407 (2009) (decided under former O.C.G.A. § 24-6-1).

Endorser. — When the contract was not one by which the plaintiff was merely secured against loss which might result from the plaintiff becoming an endorser for the defendant, any testimony which sought to show that such was the understanding of the parties at the time the contract was entered into was inadmissible since the testimony sought to vary the express terms of the written contract by proof of a contemporaneous parol agreement. Macon Baseball Ass'n v. Pennington, 45 Ga. App. 611, 166 S.E. 35, 1932 Ga. App. LEXIS 628 (1932) (decided under former Civil Code 1910, § 5788).

Guarantor. — After parties sign a bond as guarantors, the parties cannot set up, by way of defense to a suit thereon, that the instrument was executed by reason of a contemporaneous parol understanding with the principal debtor that they were not to be bound, and for a purpose wholly at variance with the instrument's plain tenor and import, as this would in effect be merely adding to and varying the terms of a written contract by parol evidence. Christopher v. Georgian Co., 22 Ga. App. 707, 97 S.E. 97, 1918 Ga. App. LEXIS 704 (1918) (decided under former Civil Code 1910, § 5788).

Replevy bond. — When a defendant, on whose property a distress warrant was levied, gave a replevy bond for condemnation money, the security could not defend on the ground that the defendant signed on condition that the bond was only a forthcoming bond. Daniels v. Smith, 144 Ga. 561, 87 S.E. 774, 1916 Ga. LEXIS 774 (1916) (decided under former Civil Code 1910, § 5788).

Partnership agreement to dissolve. — When one partner buys out another's interest, and assumes all the liabilities of the firm, and the terms of sale are in writing, parol evidence is not admissible to show that the purchaser agreed to pay an account of the vendor for board, though a memorandum of that account was on the partnership books and the board was due to a third member of the partnership. Delaney v. Anderson, 54 Ga. 586, 54 Ga. 587, 1875 Ga. LEXIS 271 (1875) (decided under former Code 1873, § 3800).

Prior indebtedness. — In the absence of fraud, accident, or mistake, a writing signed by the parties and treated by the parties as an account stated would be presumed to contain or represent the entire agreement between the parties with reference to the indebtedness then existing between the parties by reason of contract of employment in question, and it was error for the court to admit testimony tending to contradict or vary the terms of the account stated. Bullard v. Western Waterproofing Co., 63 Ga. App. 547, 11 S.E.2d 713, 1940 Ga. App. LEXIS 496 (1940) (decided under former Code 1933, § 38-501).

Present transfer or discharge. — Parol evidence rule forbids any attempt to prove that the promises stated in a writing do not accurately represent the agreement of the parties; and words, not merely reciting that a transfer or discharge had been made as consideration as an existing fact, but purporting to make a present transfer or present discharge, have also been held contractual in their nature and within the rule. Wade v. Ballard, 69 Ga. App. 669, 26 S.E.2d 542, 1943 Ga. App. LEXIS 166 (1943) (decided under former Code 1933, § 38-501).

Understandings between spouses not incorporated in divorce decree. — Negotiations and oral agreements between husband and wife, preceding divorce, as to alimony or child support, are, by presumption of law, merged in the final judgment in the divorce suit. Understandings between the husband and wife which are not incorporated into the divorce decree are not binding. Cabaniss v. Cabaniss, 251 Ga. 177, 304 S.E.2d 65, 1983 Ga. LEXIS 751 (1983) (decided under former O.C.G.A. § 24-6-1).

E-mail was inadmissible hearsay of disqualification in unemployment benefits. — Decision denying unemployment benefits to a discharged claimant under O.C.G.A. § 34-8-194 was reversed on appeal because the only evidence of the alleged violation of the employer's policy came by way of a patient's e-mail, which was inadmissible hearsay since the patient did not testify at the hearing. Robinson v. Butler, 319 Ga. App. 633, 737 S.E.2d 731, 2013 Ga. App. LEXIS 28 (2013) (decided under former O.C.G.A. § 24-6-1).

Evidence Admissible

1. In General

When writing incomplete. — Before parol evidence can be received to show a collateral agreement, it must appear, either from the contract itself or from the attendant circumstances, that the contract is incomplete, and that what is sought to be shown as a collateral agreement does not in any way conflict with or contradict what is contained in the writing. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S.E. 485, 1900 Ga. LEXIS 99 (1900) (decided under former Civil Code 1895, § 5201); McCommons v. Williams, 131 Ga. 313, 62 S.E. 230, 1908 Ga. LEXIS 74 (1908) (decided under former Civil Code 1895, § 5201); Napier v. Strong, 19 Ga. App. 401, 91 S.E. 579, 1917 Ga. App. LEXIS 130 (1917); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398, 1922 Ga. LEXIS 304 (1922) (decided under former Civil Code 1910, § 5788); Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625, 1936 Ga. App. LEXIS 251 (1936) (decided under former Code 1933, § 38-501); Shubert v. Speir, 201 Ga. 20, 38 S.E.2d 835, 1946 Ga. LEXIS 422 (1946) (decided under former Code 1933, § 38-501); Preferred Risk Mut. Ins. Co. v. Jones, 233 Ga. 423, 211 S.E.2d 720, 1975 Ga. LEXIS 1328 (1975) (decided under former Code 1933, § 38-501).

If the writing appears on the writing's face to be an incomplete contract and if the parol evidence offered is consistent with and not contradictory of the terms of the written instrument, then the parol evidence is admissible to complete the agreement between the parties. Thomas v. Clark, 178 Ga. App. 823, 344 S.E.2d 754, 1986 Ga. App. LEXIS 1755 (1986) (decided under former O.C.G.A. § 24-6-1).

Invoices as valid written instrument. — On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1); furthermore, former O.C.G.A. § 24-6-9 (see now O.C.G.A.

In General (Cont'd)

§ 24-3-9) specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253, 653 S.E.2d 835, 2007 Ga. App. LEXIS 1185 (2007) (decided under former O.C.G.A. § 24-6-1).

Construction of contract or explanation of ambiguities. — Parol evidence may be used to explain ambiguities, or aid on the construction of a contract, although it is clearly inadmissible to vary the terms of the written instrument. State Farm Fire & Cas. Co. v. Fordham, 148 Ga. App. 48, 250 S.E.2d 843, 1978 Ga. App. LEXIS 3013 (1978) (decided under former Code 1933, § 38-501); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138, 1980 Ga. LEXIS 1308, 1980 Ga. LEXIS 715 (1980) (decided under former Code 1933, § 38-501).

Conflicting documents should be read consistently if possible. — Courts may not use extrinsic evidence to vary the terms of or otherwise render ambiguous a written contract. However, when two releases both concern the allocation of liability between the parties and were executed on the same day, the court should read the releases together and consider the releases as a single contract in determining whether an ambiguity exists. But if one release violates public policy, the court may not consider extrinsic evidence altering or contradicting the unambiguous language of the valid release. Watson v. Union Camp Corp., 861 F. Supp. 1086, 1994 U.S. Dist. LEXIS 12282 (S.D. Ga. 1994) (decided under former O.C.G.A. § 24-6-1).

Existence of fraud. — Parol evidence is admissible to show that what appears to be a valid written contract is void because the complaining party was induced to execute the contract by the fraud of the other. Johnson v. Sherrer, 197 Ga. 392, 29 S.E.2d 581, 1944 Ga. LEXIS 278 (1944) (decided under former Code 1933, § 38-501); Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381, 1965 Ga. LEXIS 437 (1965) (decided under former Code 1933, § 38-501); Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787, 1977 Ga. LEXIS 1141 (1977) (decided under former Code 1933, § 38-501).

Contracts procured by fraud. — Rule that parol agreements shall not be received to change or add to terms of written contract does not apply when alleged contract was procured by fraud, and stipulation in contract that provisions thereof constitute sole and entire agreement between parties and that no modification thereof shall be binding on either party unless in writing and signed by seller can have no bearing in a case where fraud to induce the contract is at issue. Spires v. Relco, Inc., 165 Ga. App. 4, 299 S.E.2d 58, 1983 Ga. App. LEXIS 1741 (1983) (decided under former O.C.G.A. § 24-6-1).

In a dispute over installment contract to purchase land, evidence of alleged oral agreement between the parties, which the buyer partially performed and the seller accepted the benefits of, was not violative of the parol evidence rule and helped to prove the existence of the oral agreement as the buyer alleged. Hernandez v. Carnes, 290 Ga. App. 730, 659 S.E.2d 925, 2008 Ga. App. LEXIS 403 (2008) (decided under former O.C.G.A. § 24-6-1).

Rebuttal of fraud. — Parol evidence rule has no application when the defendant introduces testimony for the purpose of rebutting one of the elements of fraud, not for altering the instrument. Friendly Fin. Co. v. Stover, 109 Ga. App. 21, 134 S.E.2d 837, 1964 Ga. App. LEXIS 784 (1964) (decided under former Code 1933, § 38-501).

Lack of valid agreement. — Parol evidence may be used to show no valid agreement ever existed. Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289, 1978 Ga. App. LEXIS 2623 (1978) (decided under former Code 1933, § 38-501).

Lack of consideration. — While it is never allowable, under the guise of inquiring into the consideration of a valid written contract, to vary or contradict the terms or conditions of the instrument, it is permissible to show by parol evidence which does not vary or contradict the terms and conditions of the writing that it was never a contract for want of consider-

ation. Miller v. Whitesburg Banking Co., 58 Ga. App. 84, 197 S.E. 906, 1938 Ga. App. LEXIS 192 (1938) (decided under former Code 1933, § 38-501).

Oral contract as inducement for written contract. — Collateral oral agreement, not inconsistent with a written contract, is not necessarily merged into the written contract, and one contract may be the consideration for another contract and may induce the execution of the other contract; such independent oral contract may be proved and enforced. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-501).

Verbal agreement independent of written contract. — When a verbal agreement is an independent and complete contract within itself and forms no part of the written contract, it does not come within the operation of the parol evidence rule. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-501).

Subsequent agreement. — Rule is not violated by proof of a new and distinct subsequent agreement in the nature of a novation. Wimberly v. Tanner, 34 Ga. App. 313, 129 S.E. 306, 1925 Ga. App. LEXIS 245 (1925) (decided under former Civil Code 1910, § 5788); Mutual Furn. Co. v. Moore, 60 Ga. App. 655, 4 S.E.2d 711, 1939 Ga. App. LEXIS 131 (1939) (decided under former Code 1933, § 38-501); Long Tobacco Harvesting Co. v. Brannen, 98 Ga. App. 142, 105 S.E.2d 390, 1958 Ga. App. LEXIS 528 (1958).

Evidence of nondelivery. — It is no contradiction of a written agreement, which does not of itself purport to have been delivered, to assert its nondelivery, and therefore parol evidence is admissible to disprove the fact of delivery. Nalley Land & Inv. Co. v. Merchants' & Planters' Bank, 178 Ga. 818, 174 S.E. 618, 1934 Ga. LEXIS 194 (1934) (decided under former Code 1933, § 38-501).

Implication or rebuttal of trust. — Parol evidence rule does not prevent the introduction of evidence to show the nature of the transaction or the circumstances or conduct of the parties, either to imply or rebut a trust, although the effect is to alter or vary a written instrument. Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313, 1965 Ga. LEXIS 537 (1965) (decided under former Code 1933, § 38-501).

Identification of real party in interest. — Parol evidence is admissible when not a variance with a written contract to identify the real party in interest. Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473, 1975 Ga. App. LEXIS 1267 (1975) (decided under former Code 1933, § 38-501).

Proof of signature. — Although under O.C.G.A. § 13-2-2(1) and former O.C.G.A. § 24-6-1, parol evidence was inadmissible to add to, take from, or vary a written contract, it was properly admitted to show that a promisor who died signing a guaranty had actually signed the guaranty. A store employee testified that the employee witnessed the store owner sign the guaranty. John Deere Co. v. Haralson, 278 Ga. 192, 599 S.E.2d 164, 2004 Ga. LEXIS 552 (2004) (decided under former O.C.G.A. § 24-6-1).

Lack of malice. — When evidence is not offered for the purpose of altering the substantive rights of the parties under a written sales contract, but for the purpose of establishing that one party did not act maliciously and oppressively, and if the evidence is probative on that issue, the evidence should be admitted. Oden & Sims Used Cars, Inc. v. McMullen, 153 Ga. App. 127, 264 S.E.2d 580, 1980 Ga. App. LEXIS 1706 (1980) (decided under former Code 1933, § 38-501).

Division of consideration. — While proof of parol contemporaneous agreements is generally inadmissible to add to, take from, or vary a written contract, the allegations of the petition setting forth the division to be made of the consideration to be paid to the co-obligees under the contract do not come within the inhibition of the parol evidence rule since such alleged facts do not add to, take from, or vary the terms of the written instrument, but merely set forth the respective interests of the obligees. Bernstein v. Fagelson, 38 Ga. App. 294, 143 S.E. 237, 1928 Ga. App. LEXIS 200 (1928) (decided under former Civil Code 1910, § 5788).

Waiver of stipulation of contract. — While parol evidence is inadmissible to add to, take from, or vary a written con-

In General (Cont'd)

tract, the parol evidence rule has no application to a case if waiver of a stipulation of the contract is being asserted. Henry v. Hemingway, 159 Ga. App. 375, 283 S.E.2d 341, 1981 Ga. App. LEXIS 2613 (1981) (decided under former Code 1933, § 38-501).

2. Notes

Contract partly in parol. — Parol evidence is admissible not only when a promissory note is obtained by fraud, but when the note is not the entire contract between the parties, and when the contract is partly in parol and partly in writing. Crooker v. Hamilton, 3 Ga. App. 190, 59 S.E. 722, 1907 Ga. App. LEXIS 590 (1907) (decided under former Civil Code 1895, § 5201).

Inquiry into consideration. — When a promissory note recited no consideration except in the words "for value received," the real consideration of the note may be inquired into as far as may be necessary to the defense pleaded. Dunson & Bros. Co. v. Smith Seed Co., 26 Ga. App. 585, 106 S.E. 914, 1921 Ga. App. LEXIS 536 (1921) (decided under former Civil Code 1910, § 5788).

Failure of consideration. — In a suit on an unconditional promise to pay, although the consideration may not be expressed in the instrument, it is ordinarily permissible for the defendant to plead, and to prove by parol, that the consideration supporting the promise has failed either in whole or in part. Tyre v. Price, 52 Ga. App. 526, 183 S.E. 843, 1936 Ga. App. LEXIS 169 (1936) (decided under former Code 1933, § 38-501).

Note placed as collateral. — When there was evidence of a parol agreement on the part of the payee of the collateral note that a note should be held as collateral, which was itself a fact not affecting the contents of the writing, and which, if credible, tended to show that the note had been placed as collateral, the fact as to the pledge, being entirely independent from the contents of the note, could properly be shown by parol. Buffington v. Bank of College Park, 157 Ga. 570, 122 S.E. 50, 1924 Ga. LEXIS 204 (1924) (decided under former Civil Code 1910, § 5788).

When the alleged oral agreement was entered into subsequent to the execution of the promissory note, former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1) did not stand as a barrier to the agreement's enforcement. South Atl. Prod. Credit Ass'n v. Gibbs, 257 Ga. 521, 361 S.E.2d 167, 1987 Ga. LEXIS 951 (1987) (decided under former O.C.G.A. § 24-6-1).

3. Real Estate Transactions

Creation of trust. — Deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor if the maker remains in possession of the land. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829, 1945 Ga. LEXIS 233 (1945) (decided under former Code 1933, § 38-501).

Clerical error. — In view of the particular statement in a deed that the tract conveyed was bounded on the east and south by lands of named owners, parol evidence was admissible for the purpose of applying the description to the intended subject matter and to show that the statement as to the district number was a clerical error. Smith v. Federal Land Bank, 181 Ga. 1, 181 S.E. 149, 1935 Ga. LEXIS 4 (1935) (decided under former Code 1933, § 38-501).

4. Other Agreements

Receipt in full. — Receipt for money in full of all demands is always open to contradiction or explanation. Walters v. Odom, 53 Ga. 286, 1874 Ga. LEXIS 466 (1874) (decided under former Code 1873, § 3800).

Implied trust. — While an express trust must be created by writing and cannot be proved by parol, implied trusts may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument, and although the defendant sets up and insists upon the statute of frauds. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829, 1945 Ga. LEXIS 233 (1945) (decided under former Code 1933, § 38-501).

Implied warranty. — In an action to recover the purchase price of defective goods, testimony that the defendant told the plaintiff the goods would give satisfactory service and that the defendant would

give a one-year warranty with reference to the service was admissible to show the alleged breach of an implied contract and the trial court did not err in failing to charge the general rule concerning parol evidence. Cloud v. Stewart, 92 Ga. App. 247, 88 S.E.2d 323, 1955 Ga. App. LEXIS 565 (1955) (decided under former Code 1933, § 38-501).

Surety induced by false representation. — Plea to the effect that a surety was induced to sign by a false representation that a surety whose name appeared as such had already signed the contract of suretyship is not an effort to vary the terms of a written contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948) (decided under former Code 1933, § 38-501).

Assignment of salary as cover for usurious loan. — Parol evidence is admissible to show that a purported assignment of salary is but a cover for a usurious loan, notwithstanding its recitals to the contrary. Hinton v. Mack Purchasing Co., 41 Ga. App. 823, 155 S.E. 78, 1930 Ga. App. LEXIS 1108 (1930) (decided under former Civil Code 1910, § 5788).

Variance in deposit slip. — When husband had withdrawn money from the wife's account, in subsequent suit by the wife against the bank to recover money, evidence offered by the defendant bank, to the effect that while the deposit slip showed the money deposited to the separate account of the wife, such money was in fact placed to the credit of a joint business enterprise of the husband and wife, and thereafter drawn out on checks against this account by the plaintiff and her husband, was admissible in support of the defense urged by the defendant bank. Greeson v. Farmers' & Merchants' Bank, 50 Ga. App. 566, 179 S.E. 191, 1935 Ga. App. LEXIS 223 (1935) (decided under former Code 1933, § 38-501).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. Peterson v. Lexington Ins. Co., 753 F.2d 1016, 1985 U.S. App. LEXIS 28179 (11th Cir. 1985) (decided under former O.C.G.A. § 24-6-1).

Conversations supplementing recertification documents for lease. — When a public housing lease required information about family size and income annually, but the lease did not indicate that completion of the recertification documents was a condition precedent to renewal of the lease, the recertification document was not an agreement and was not merged with the lease so as to make admission of conversations supplementing the information contained in the recertification documents a violation of the parol evidence rule. Decatur Hous. Auth. v. Christian, 182 Ga. App. 270, 355 S.E.2d 764, 1987 Ga. App. LEXIS 1664 (1987) (decided under former O.C.G.A. § 24-6-1).

Collective bargaining agreement. — In action by retired employees to prevent the corporation from modifying their health insurance benefits, the fact that both parties offered reasonable interpretations of a collective bargaining agreement that gave full effect to one clause and qualified the other was sufficient to establish that the contract was ambiguous and that the trial court should have considered extrinsic evidence. Stewart v. KHD Deutz of Am., Corp., 980 F.2d 698, 1993 U.S. App. LEXIS 61 (11th Cir. 1993) (decided under former O.C.G.A. § 24-6-1).

Not admissible if contract unambiguous. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga.

Other Agreements (Cont'd)

App. 855, 622 S.E.2d 73, 2005 Ga. App. LEXIS 1124 (2005) (decided under former O.C.G.A. § 24-6-1).

Life insurance beneficiary designation form. — Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. Weatherly v. Weatherly, 292 Ga. App. 879, 665 S.E.2d 922, 2008 Ga. App. LEXIS 889 (2008) (decided under former O.C.G.A. § 24-6-1).

With regard to the defendant's murder conviction, the trial court properly denied the defendant's motion for a new trial because the victim's out-of-court statements to the victim's brother were admissible under the necessity exception set forth in former O.C.G.A. § 24-3-1(b); therefore, the defendant's counsel was not deficient because there is no deficient performance when an attorney fails to object to admissible evidence. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763, 2013 Ga. LEXIS 550 (2013).

Written consent required for timber cutting. — In an action for timber conversion, the trial court erred when the court denied the plaintiff's motion in limine to exclude parol evidence concerning the plaintiff's alleged consent to the timber company's cutting and other topics because O.C.G.A. § 51-12-51(a) clearly and unambiguously required written consent and any verbal consent to cut timber on the property was inadequate; parol evidence regarding an understanding to cut timber at or even after the closing was inadmissible as it could be taken to contradict the plain terms of the loan documents, which barred cutting without written consent; and the jury apparently considered the parol evidence in the course of reaching the jury's verdict for the timber company. AgSouth Farm Credit, ACA v. Gowen Timber Co., 336 Ga. App. 581, 784 S.E.2d 913, 2016 Ga. App. LEXIS 222 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1067, 1075.

C.J.S.

32A C.J.S., Evidence, §§ 1102 et seq., 1149 et seq., 1167 et seq., 1198, 1199.

ALR.

Parol evidence to prove title to real property when the title is only collaterally involved, 1 A.L.R. 1143.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 11 A.L.R. 637; 22 A.L.R. 527; 35 A.L.R. 1120; 54 A.L.R. 999; 92 A.L.R. 721.

Parol evidence rule as applied to lease, 25 A.L.R. 787; 88 A.L.R. 1380; 151 A.L.R. 279.

Parol evidence rule as applied to escrow agreement, 49 A.L.R. 1529.

Parol evidence in relation to assumption of mortgage debt by grantee of mortgaged property, 50 A.L.R. 1220; 143 A.L.R. 548.

Parol evidence rule as applicable to agreement for improvement or alterations by vendor of real property, 68 A.L.R. 245.

Parol evidence rule as applied to letters or other informal writings not purporting to be the agreement itself, 68 A.L.R. 1251.

Admissibility of parol evidence of contents of lost certificate of protest, 75 A.L.R. 134.

Parol evidence rule as affecting extrinsic evidence to show or to negative usury, 82 A.L.R. 1199; 104 A.L.R. 1261.

Admissibility of parol or extrinsic evidence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 A.L.R. 248.

Admissibility of parol or extrinsic evi-

dence to alter or supplement written records of local legislative bodies, 98 A.L.R. 1229.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 A.L.R. 625.

Exception to rule of admissibility of parol evidence to show that deed absolute on its face was intended as a mortgage, 111 A.L.R. 448.

Duty of federal courts to follow decisions of state courts as to the so-called "parol evidence rule"; and conflict of laws as to that rule, 141 A.L.R. 1043.

Application and effect of parol evidence rule as determinable upon the pleading, 10 A.L.R.2d 720.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 A.L.R.2d 1227.

Parol evidence to show duration of written contract for support or maintenance, 14 A.L.R.2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 A.L.R.2d 1330.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 A.L.R.2d 569.

Parol evidence rule as applied to written guaranty, 33 A.L.R.2d 960.

Applicability of parol evidence to written listing agreement of real estate broker, 38 A.L.R.2d 542.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificate of deposit, or similar instruments, 42 A.L.R.2d 600.

Admissibility of parol evidence of election officials to impeach election returns, 46 A.L.R.2d 1385.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 A.L.R.2d 1259.

Parol evidence to show that lease of personalty, absolute on its face, is conditional sale, 57 A.L.R.2d 1076.

Applicability of parol evidence rule to agreement between stockbroker and customer, 60 A.L.R.2d 1135.

Admissibility of parol evidence with respect to reservations or exceptions upon conveyance of real property, 61 A.L.R.2d 1390.

Admissibility of parol evidence as to limitation on cost structure in builder's action on written cost-plus-fee construction contract, 84 A.L.R.2d 1324.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 A.L.R.2d 570.

Applicability of parol evidence rule in favor of or against one not a party to contract of release, 13 A.L.R.3d 313.

Parol exception of fixtures from conveyance or lease, 29 A.L.R.3d 1441.

Application of parol evidence rule in action on contract for architect's services, 69 A.L.R.3d 1353.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 A.L.R.3d 249.

Admissibility of evidence to establish oral antenuptial agreement, 81 A.L.R.3d 453.

Liability in tort for interference with physician's contract or relationship with hospital, 7 A.L.R.4th 572.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Validity, construction, and enforcement of oral antenuptial agreements, 15 A.L.R.7th 2.

24-3-2. Proof of unwritten portions of contract admissible where not inconsistent.

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with the writing; collateral undertakings

between parties of the same part among themselves would not properly be looked for in the writing.

History.
Code 1981, § 24-3-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3726, former Code 1868, § 3750, former Code 1873, § 3803, former Code 1882, § 3803, former Civil Code 1895, § 5204, former Civil Code 1910, § 5791, former Code 1933, § 38-504, and former O.C.G.A. § 24-6-2 are included in the annotations for this Code section.

Requirements for application. — To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and, second, the parol evidence must be consistent with and not contradictory of the written instrument. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S.E. 485, 1900 Ga. LEXIS 99 (1900) (decided under former Civil Code 1895, § 5204); McCreary v. Acton, 29 Ga. App. 162, 114 S.E. 230, 1922 Ga. App. LEXIS 130 (1922) (decided under former Civil Code 1910, § 5791); See also Rauschenberg v. Peeples, 30 Ga. App. 384, 118 S.E. 409, 1923 Ga. App. LEXIS 486 (1923) (decided under former Civil Code 1910, § 5791); Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625, 1936 Ga. App. LEXIS 251 (1936) (decided under former Code 1933, § 38-504); Harden v. Orr, 219 Ga. 54, 131 S.E.2d 545, 1963 Ga. LEXIS 364 (1963) (decided under former Code 1933, § 38-504).

Writing must have essential elements of contract. — While it is true that parol evidence as to all attendant and surrounding facts and circumstances may be admitted to explain ambiguities in a written contract and that if it appears from the contract itself that it was not intended that the instrument should embrace the entire agreement, parol evidence is admissible to set up collateral agreements not inconsistent with the terms of the writing, in order for these principles of law to have application, the instrument relied on must embrace within itself the essential elements of a contract. Jones v. Knight Mercantile Co., 51 Ga. App. 57, 179 S.E. 569, 1935 Ga. App. LEXIS 554 (1935) (decided under former Code 1933, § 38-504).

Mere unsigned slip of paper, although in the handwriting of the president of the plaintiff corporation, containing only the words "Contract price, $2,950 — J.A. Glass, carpenter, San Verner, plumber and elect," wholly failed to disclose the subject matter of the alleged contract, did not purport to bind anyone with reference thereto, and cannot be construed as such an instrument as, when aided by parol, would constitute a binding agreement. Jones v. Knight Mercantile Co., 51 Ga. App. 57, 179 S.E. 569, 1935 Ga. App. LEXIS 554 (1935) (decided under former Code 1933, § 38-504).

Contracts within the statute of frauds. — Parol evidence rule does not apply to contracts covered by the statute of frauds. Douglass v. Bunn, 110 Ga. 159, 35 S.E. 339, 1900 Ga. LEXIS 340 (1900) (decided under former Civil Code 1895, § 5204); Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163, 1922 Ga. App. LEXIS 657 (1922) (decided under former Civil Code 1910, § 5791).

Provision of former O.C.G.A. § 24-6-2 that if a writing did not purport to be entire agreement between parties, parol evidence was admissible to prove other portions thereof not inconsistent with the writing, was inapplicable to a contract of guaranty because such contracts are required to be entirely in writing under O.C.G.A. § 13-5-30(2), statute of frauds. Builder's Supply Corp. v. Taylor, 164 Ga.

App. 127, 296 S.E.2d 417, 1982 Ga. App. LEXIS 2731 (1982) (decided under former O.C.G.A. § 24-6-2).

In action to recover on contract of guaranty, parol evidence was not admissible to prove identity of principal debtor, the identity not having been provided by the subject written agreement. Builder's Supply Corp. v. Taylor, 164 Ga. App. 127, 296 S.E.2d 417, 1982 Ga. App. LEXIS 2731 (1982) (decided under former O.C.G.A. § 24-6-2).

Contract, partly oral and partly written, for a period of one year is valid and enforceable. Empire Box, Inc. v. Moore, 87 Ga. App. 57, 73 S.E.2d 63, 1952 Ga. App. LEXIS 614 (1952) (decided under former Code 1933, § 38-504).

Collateral agreement which is inducement for written agreement. — Distinct, collateral oral agreement that is consistent with and usually forms part of the consideration or inducement for the second written agreement, may be established by parol evidence. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-504).

When the evidence showed the existence of a separate and independent collateral agreement, the renewal of which, for three consecutive years, induced appellee to renew a written agreement with appellant and that the appellant honored this agreement, the appellant could not now keep the agreement from evidence under the sanction of the parol evidence rule. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572, 1977 Ga. App. LEXIS 2585 (1977) (decided under former Code 1933, § 38-504).

Filling blanks. — Parol evidence is admissible to fill blanks in the writing not inconsistent with the writing itself. Westbrook v. Griffin, 24 Ga. App. 808, 102 S.E. 453, 1920 Ga. App. LEXIS 534 (1920) (decided under former Civil Code 1910, § 5791).

When, in a special contract in writing between a common carrier and a shipper of livestock, the amount of freight is left blank, the blank may be filled by parol evidence showing the actual amount contracted for and paid by the shipper. Georgia R.R. & Banking Co. v. Reid, 91 Ga. 377, 17 S.E. 934, 1893 Ga. LEXIS 332 (1893) (decided under former Code 1882, § 3803).

Subscription for stock. — Parol evidence rule applies to a written subscription for stock. Hendrix v. Academy of Music, 73 Ga. 437, 1884 Ga. LEXIS 144 (1884) (decided under former Code 1882, § 3803).

Receipt given by attorney. — Parol evidence rule applies to a receipt given by an attorney for a note placed in the attorney's hands for collection. Barclay v. Hopkins, 59 Ga. 562, 1877 Ga. LEXIS 335 (1877) (decided under former Code 1882, § 3803).

Contract excluding other representations. — If a written contract of sale stated that the writing was "made under inducements and representations herein expressed and no others," it could not be proved by parol that plaintiff's agent made any other representation or warranty. Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163, 1922 Ga. App. LEXIS 657 (1922) (decided under former Civil Code 1910, § 5791).

Unambiguous maturity date not waived. — Former O.C.G.A. § 24-6-2 permitted parol evidence of collateral undertakings between the parties only when the writing did not purport to contain all the stipulations of the contract and only when such evidence was not inconsistent with the writing. In this case, defendant's testimony that the maturity date was waived by parol agreement was directly inconsistent with the certain and unambiguous maturity date stipulated in the written note. Moreover, the general rule prohibiting parol evidence may not be avoided on the theory of a confidential or fiduciary relationship between the parties. Barton v. Marubeni Am. Corp., 204 Ga. App. 346, 419 S.E.2d 342, 1992 Ga. App. LEXIS 817 (1992) (decided under former O.C.G.A. § 24-6-2).

Letter reciting writer's understanding of oral contract. — Letter written by vice-president of corporation reciting the vice-president's understanding of the oral contract of employment between the president of corporation and the recipient of the letter, since it did not

purport to be the contract itself, did not prevent the use of parol evidence to show what the full contract was. Marston v. Downing Co., 73 F.2d 94, 1934 U.S. App. LEXIS 2606 (5th Cir. 1934) (decided under former Code 1933, § 38-504).

When written part may be varied. — When a contract is entire, part of which is in writing and part in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident, or mistake. Rauschenberg v. Peeples, 30 Ga. App. 384, 118 S.E. 409, 1923 Ga. App. LEXIS 486 (1923) (decided under former Civil Code 1910, § 5791).

Contract held complete on contract's face. — See McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839, 1945 Ga. LEXIS 344 (1945) (timber lease).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by the plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract rather than conflicting with any written provisions. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101, 1961 Ga. LEXIS 454 (1961) (decided under former Code 1933, § 38-504).

Admitting contract in answer. — When the defendants admitted in their answer that the written order and notes constituted the entire contract, the defendants were precluded from offering evidence of any other contract. Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163, 1922 Ga. App. LEXIS 657 (1922) (decided under former Civil Code 1910, § 5791).

Assignment of note to secure assignor's debts to bank. — For application of former O.C.G.A. § 24-6-2 to a situation where debts secured by an assignment of a note included only the assignor's debts on notes signed by the assignor as maker or also to notes on which the assignor might be liable as an endorser or accommodation party, see National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678, 1985 Ga. App. LEXIS 2965 (1985) (decided under former O.C.G.A. § 24-6-2).

Promissory note held complete. — If the promissory note constituted an unconditional promise to pay, defendants were prohibited from proving the lender's alleged oral promise which, if proven, would clearly have contradicted the terms of the note requiring payment. Devin Lamplighter, Ltd. v. American Gen. Fin., Inc., 206 Ga. App. 747, 426 S.E.2d 645, 1992 Ga. App. LEXIS 1789 (1992) (decided under former O.C.G.A. § 24-6-2).

Written part may not be varied. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73, 2005 Ga. App. LEXIS 1124 (2005) (decided under former O.C.G.A. § 24-6-2).

RESEARCH REFERENCES

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32A C.J.S., Evidence, §§ 1123, 1142, 1155, 1170 et seq., 1197.

ALR.

Competency of parol evidence to show a money consideration additional to that stipulated in a written contract, 12 A.L.R. 354.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 A.L.R. 655.

Parol evidence rule: tests for determining whether entire agreement is embodied in the writing (rule of integration), 70 A.L.R. 752.

Admissibility of parol or extrinsic evi-

dence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 A.L.R. 248.

Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, 98 A.L.R. 1229.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Parol evidence rule as applied to rights or liabilities of coparties to contract as between themselves or their privies, 129 A.L.R. 673.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 A.L.R. 316.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 A.L.R.2d 78.

Parol evidence to show duration of written contract for support or maintenance, 14 A.L.R.2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 A.L.R.2d 1330.

Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 A.L.R.2d 1269.

Admissibility of oral agreement respecting duration of employment or agency where written contract is silent, 85 A.L.R.2d 1331.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 A.L.R.3d 1394.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 A.L.R.3d 259.

24-3-3. Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent.

History.

Code 1981, § 24-3-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3724, former Code 1868, § 3748, former Code 1873, § 3801, former Code 1882, § 3801, former Civil Code 1895, § 5202, former Civil Code 1910, § 5789, former Code 1933, § 38-502, and former O.C.G.A. § 24-6-3 are included in the annotations for this Code section.

Parol evidence is admissible to explain an ambiguity in a writing. Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325, 1923 Ga. App. LEXIS 153 (1923) (decided under

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former Civil Code 1910, § 5789); Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566, 1938 Ga. App. LEXIS 459 (1938) (decided under former Code 1933, § 38-502); Hanson v. Stern, 102 Ga. App. 341, 116 S.E.2d 237, 1960 Ga. App. LEXIS 619 (1960) (decided under former Code 1933, § 38-502); R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051, 1975 U.S. Dist. LEXIS 16053 (S.D. Ga. 1975); (decided under former Code 1933, § 38-502); Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804, 278 S.E.2d 708, 1981 Ga. App. LEXIS 2016 (1981) (decided under former Code 1933, § 38-502).

Parol evidence is admissible to explain an ambiguity in a written contract, although such evidence is inadmissible to add to, take from, or vary the writing itself. Andrews v. Skinner, 158 Ga. App. 229, 279 S.E.2d 523, 1981 Ga. App. LEXIS 2139 (1981) (decided under former Code 1933, § 38-502).

If parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument. Andrews v. Skinner, 158 Ga. App. 229, 279 S.E.2d 523, 1981 Ga. App. LEXIS 2139 (1981) (decided under former Code 1933, § 38-502).

One writing purports to contain the entire understanding. — Contemporaneous writings should be considered even if one of the writings purports to contain the entire understanding of the parties in the transaction contemplated and even if the writings are not cross-referenced. Duke v. KHD Deutz of Am. Corp., 221 Ga. App. 452, 471 S.E.2d 537 (decided under former O.C.G.A. § 24-6-3).

Abbreviations. — When a writing is obscure or ambiguous, by reason of an unfamiliar abbreviation, what it means is for the jury and to arrive at the meaning, clear and intelligible expressions in the instrument may be compared with facts otherwise proved. Holland v. Long & Bro., 57 Ga. 36, 1876 Ga. LEXIS 14 (1876) (decided under former Code 1873, § 3801).

Letters "O.K." being ambiguous, their meaning may be explained by parol evidence. Penn Tobacco Co. v. Leman & Co., 109 Ga. 428, 34 S.E. 679, 1899 Ga. LEXIS 671 (1899) (decided under former Civil Code 1895, § 5202).

Capacity of signer. — When there is a written contract, not under seal and not containing a so-called integration or "entire agreement" clause, parol is admissible to show the capacity in which one signed such agreement. Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977) (decided under former Code 1933, § 38-502).

Jury question. — As a general rule, the construction of a contract is a question for the court; but if the terms of a written instrument are ambiguous, the contract's meaning should be left to the jury. Illges v. Dexter, 77 Ga. 36, 1886 Ga. LEXIS 275 (1886) (decided under former Code 1882, § 3801).

Contracts, even when ambiguous, are to be construed by the court and no jury question is presented unless after application of applicable rules of construction an ambiguity remains. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former O.C.G.A. § 24-6-3).

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Affidavits admissible. — Summary judgment was proper and parol evidence was admissible to show the meaning of a separation agreement when a former wife's affidavits established that four certificates of deposit were purchased with the proceeds from the sale of her premarital property and were her separate property and decedent husband's redemption of one of the CD's was in contravention of their separation agreement. Bradley v. Frank, 264 Ga. App. 772, 592 S.E.2d 138, 2003 Ga. App. LEXIS 1485 (2003), cert. denied, No. S04C0709, 2004 Ga. LEXIS 367 (Ga. Apr. 27, 2004) (decided under former O.C.G.A. § 24-6-3).

Contract is not necessarily contained in a single paper, and law pro-

vides that all contemporaneous writings shall be admissible to explain each other. Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97, 1941 Ga. App. LEXIS 531 (1941) (decided under former Code 1933, § 38-502).

Legal effect of two writings. — If it takes both writings to make the real contract of the parties, the legal effect is the same as if one paper held the contents of the note and the contemporaneous writing. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-502).

Terms of contract cannot be varied by parol. — When a written contract is expressly entered into on terms and conditions expressed and stated in two papers which constituted but one entire written contract, a party cannot change such terms and conditions in the written contract and set up terms and conditions by parol which are contrary to the written terms. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-502).

"Contemporaneous" means, literally, according to Webster, "living, existing, or occurring at the same time," but numerous authorities could be cited to the effect that the word does not connote perfect or absolute coincidence in point of time. One thing is contemporaneous with a given transaction when it is so related in point of time as reasonably to be said to be a part of such transaction. Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97, 1941 Ga. App. LEXIS 531 (1941) (decided under former Code 1933, § 38-502).

Letters to explain note. — When a promissory note did not express within itself the entire contract between the parties, but the remainder thereof was contained in letters written by the parties in connection with the making of the note, such letters were admissible in evidence in a suit between the maker and one who took the note after maturity. Marietta Sav. Bank v. Janes, 66 Ga. 286, 1881 Ga. LEXIS 6 (1881) (decided under former Code 1873, § 3801).

Documents properly construed together. — Trial court correctly evaluated an asset purchase agreement between a buyer and the owners of a dialysis center, including a doctor's spouse, a covenant not to compete, and a medical director agreement between a doctor and a buyer, all signed the same day, together under former O.C.G.A. § 24-6-3 as related to the sale of a business as the doctor was integral to the continued success of the center, and the doctor's execution of the medical director agreement was integral to the execution of the asset purchase agreement. Martinez v. DaVita, Inc., 266 Ga. App. 723, 598 S.E.2d 334, 2004 Ga. App. LEXIS 361 (2004) (decided under former O.C.G.A. § 24-6-3).

In a breach of contract action arising from a guaranty agreement between a guarantor and a retail space owner, the trial court properly granted summary judgment in the owner's favor as the court properly construed contemporaneous written agreements, which were executed on the same date, at the same time, and at the same location, despite a misnomer contained therein, as such did not render the agreement unenforceable. Thus, it was not erroneous for the court to correct an obvious error in the agreement, specifically, the failure to substitute one entity's name for another as the parties intended, and interpret the guaranty accordingly. C.L.D.F., Inc. v. Aramore, LLC, 290 Ga. App. 271, 659 S.E.2d 695, 2008 Ga. App. LEXIS 300 (2008), cert. denied, No. S08C1224, 2008 Ga. LEXIS 668 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-6-3).

As the evidence supported a finding that the defendant freely and voluntarily consented to a special condition in a bond, allowing a warrantless search of the defendant's residence, denial of suppression with respect to drugs and a handgun seized during the search was proper as was the finding that the defendant had waived rights under U.S. Const., amend. IV; the special condition form was considered along with the bond order as the documents had been executed contemporaneously pursuant to former O.C.G.A. § 24-6-3(a). Curry v. State, 309 Ga. App. 338, 711 S.E.2d 314, 2011 Ga. App. LEXIS 316 (2011) (decided under former O.C.G.A. § 24-6-3).

Trial court erred in granting a flea market operator and a property owner sum-

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mary judgment in their slander of title action against a real estate investment firm and the estate of the firm's sole member because there was a genuine issue of material fact as to whether the firm was a party to the sales contract entered into between the operator and the member since at the time the sales contract was executed contemporaneously with the promissory note and deed to secure debt, the member executed an affidavit of filing claiming specifically that the firm had a vested interest in the property pursuant to the sales contract; that affidavit was recorded along with the contract as an attachment, and the contemporaneous filings, considered together under former O.C.G.A. § 24-6-3, created an ambiguity as to whether the member signed the sales contract in a personal or corporate capacity. Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710, 2011 Ga. App. LEXIS 302 (2011) (decided under former O.C.G.A. § 24-6-3).

Statute of frauds did not bar a landlord's claim on a guaranty because the guaranty identified the debt, and the assignment contemplated in the guaranty was documented by a written agreement; the guaranty and the assignment, along with an amendment, could be read together to determine whether the guaranty complied with the statute of frauds, and when read together the documents identified the principal debt as required by the statute of frauds. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147, 2012 Ga. App. LEXIS 299 (2012) (decided under former O.C.G.A. § 24-6-3).

Contract for sale of coal. — When at the time of making a written contract for the sale of coal, the parties also executed a contemporaneous writing as to the kind of coal to be furnished, both writings should be considered together to determine the true intent of the parties. National Rosin Oil & Size Co. v. South Atl. Coal Co., 23 Ga. App. 87, 97 S.E. 559, 1918 Ga. App. LEXIS 53 (1918) (decided under former Civil Code 1910, § 5789).

Pleading contemporaneous writings. — It is not intimated in law that in order for contemporaneous writings to be admitted in evidence, even though the writings may govern and control the contract, the writings must be pled in the plaintiff's petition. International Harvester Co. of Am. v. Morgan, 19 Ga. App. 716, 92 S.E. 35, 1917 Ga. App. LEXIS 325 (1917) (decided under former Civil Code 1910, § 5789).

Contemporaneous writings need not be cross-referenced. — If all the necessary terms of an agreement are contained in signed contemporaneous writings, the statutory requirements and purpose of the statute of frauds have been met whether or not the writings are cross-referenced. Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874, 1984 Ga. LEXIS 735 (1984) (decided under former O.C.G.A. § 24-6-3); Harris v. Distinctive Builders, Inc., 249 Ga. App. 686, 549 S.E.2d 496, 2001 Ga. App. LEXIS 594 (2001), cert. dismissed, No. S01C1368, 2001 Ga. LEXIS 841 (Ga. Oct. 9, 2001) (decided under former O.C.G.A. § 24-6-3).

Language clear and unambiguous may not be contradicted by parol evidence of custom, surrounding circumstances, or intent. Daniel & Daniel, Inc. v. Cosmopolitan Co., 146 Ga. App. 200, 245 S.E.2d 885, 1978 Ga. App. LEXIS 2211 (1978) (decided under former Code 1933, § 38-502).

When the words and phrases are not technical nor in any sense ambiguous, a witness cannot, as an expert or otherwise, give the witness's opinion of the meaning of the instrument. Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325, 1923 Ga. App. LEXIS 153 (1923) (decided under former Civil Code 1910, § 5789).

Parol evidence inadmissible in unambiguous contract. — Rule that the construction put upon the contract by the parties before or after the contract's execution may be considered in arriving at the contract's true meaning does not apply to an unambiguous contract. Alexander Film Co. v. Brittain, 63 Ga. App. 384, 11 S.E.2d 66, 1940 Ga. App. LEXIS 105 (1940) (decided under former Code 1933, § 38-502).

If the provisions of a deed to land are plain and unambiguous, parol evidence is not admissible for the purpose of showing

an intent at variance with the plain terms of the deed. Rowland v. Sumner, 201 Ga. 317, 39 S.E.2d 655, 1946 Ga. LEXIS 458 (1946) (decided under former Code 1933, § 38-502).

In the absence of fraud, parol evidence is not admissible to overcome the express unambiguous language of a contract. Wilson v. Sheppard, 136 Ga. App. 475, 221 S.E.2d 671, 1975 Ga. App. LEXIS 1391 (1975) (decided under former Code 1933, § 38-502).

Parol evidence cannot be employed to add to, take from, or vary the terms of the written instrument. R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051, 1975 U.S. Dist. LEXIS 16053 (S.D. Ga. 1975) (decided under former Code 1933, § 38-502); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138, 1980 Ga. LEXIS 1308, 1980 Ga. LEXIS 715 (1980) (decided under former Code 1933, § 38-502).

When the contract is complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E.2d 1, 1982 Ga. LEXIS 1078 (1982) (decided under former O.C.G.A. § 24-6-3).

"Ambiguity" defined. — "Ambiguity" is defined as duplicity, indistinctness, or an uncertainty of meaning or expression. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S.E. 923, 1906 Ga. LEXIS 547 (1906) (decided under former Civil Code 1895, § 5202); Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688, 1945 Ga. LEXIS 337 (1945) (decided under former Code 1933, § 38-502).

"Ambiguity" also signifies doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful purport; open to various interpretations. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S.E. 923, 1906 Ga. LEXIS 547 (1906) (decided under former Civil Code 1895, § 5202).

Ambiguity refers to words or phrases of duplicitous, indistinct, or uncertain meanings which may fairly be understood in more ways than one. Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473, 1975 Ga. App. LEXIS 1267 (1975) (decided under former Code 1933, § 38-502).

Intent of parties. — If a written contract is ambiguous as to the intention of the parties, evidence, otherwise competent, of acts and transactions between the parties, tending to show the construction the parties themselves put upon the agreement when the agreement was executed, whether occurring prior to or subsequently to the execution of the contract, is admissible. Armistead v. McGuire, 46 Ga. 232, 1872 Ga. LEXIS 40 (1872) (decided under former Code 1868, § 3748); Georgia Iron & Coal Co. v. Ocean Accident & Guar. Corp., 133 Ga. 326, 65 S.E. 775, 1909 Ga. LEXIS 210 (1909) (decided under former Civil Code 1895, § 5202).

Even if the instrument is ambiguous, the testimony of one party as to that party's intent, undisclosed to the other, is not competent. National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408, 1934 Ga. App. LEXIS 116 (1934) (decided under former Code 1933, § 38-502).

If the language of the contract defining what interest the petitioners were buying is ambiguous, the court does not err in admitting testimony of the petitioners of what the petitioners thought the petitioners were buying. Manning v. Carroll, 204 Ga. 100, 48 S.E.2d 737, 1948 Ga. LEXIS 532 (1948) (decided under former Code 1933, § 38-502).

Through the proper admission of parol evidence, the intent of the parties can be determined and any ambiguity present can be resolved by the jury in the trial. Wright v. Piedmont Eng'r & Constr. Corp., 106 Ga. App. 401, 126 S.E.2d 865, 1962 Ga. App. LEXIS 717 (1962) (decided under former Code 1933, § 38-502).

If a release is ambiguous on the question of whether a plaintiff released a defendant from claims arising out of defendant's relationship with a corporation, parol evidence may be introduced on the issue of the parties' intent. Southern Stone Co. v. Singer, 665 F.2d 698, 1982 U.S. App. LEXIS 22700 (5th Cir. 1982) (decided under former O.C.G.A. § 24-6-3).

Trial court was authorized to construe the commercial lease and the shareholder buyout agreements between a lessor and a lessee together as multiple documents executed during the course of a single trans-

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action; in so doing, the court's finding that the agreement was linked to the lease's 10-year term upheld the contract as a whole, reflected the parties' intent as expressed in the testimony and documentary evidence offered at trial, and was supported by all the attendant and surrounding circumstances proved in this case. Allen v. Harkness Stone Co., 271 Ga. App. 397, 609 S.E.2d 647, 2004 Ga. App. LEXIS 1626 (2004), cert. denied, No. S05C0901, 2005 Ga. LEXIS 393 (Ga. May 23, 2005) (decided under former O.C.G.A. § 24-6-3).

Contract of goods over $50.00. — Law applies to a contract of goods over $50.00, even in view of the statute of frauds. Wilson v. Coleman & Ray, 81 Ga. 297, 6 S.E. 693, 1888 Ga. LEXIS 113 (1888) (decided under former Code 1882, § 3801).

Contract with contradictory terms. — When a contract embodied in two separate written instruments, simultaneously executed and delivered, contains contradictory and ambiguous terms, parol evidence is admissible to explain the contradiction and remove the ambiguity. Cable Co. v. McFeeley, 7 Ga. App. 435, 66 S.E. 1103, 1910 Ga. App. LEXIS 331 (1910) (decided under former Civil Code 1895, § 5202).

When the clause of sales contract referring to the amount of the purchase price is rendered ambiguous by contradictory statements as to the amount, the trial judge does not err in permitting defendant purchaser to testify, in explanation of the ambiguity, that at the time the defendant entered into the contract, the defendant had a conversation with the seller's agent and that it was distinctly understood that the items of insurance, carrying charges, and interest were included. Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688, 1945 Ga. LEXIS 337 (1945) (decided under former Code 1933, § 38-502).

If a written contract incorporates an ambiguous condition, parol evidence is admissible to aid in the construction of the condition. Columbia Nitrogen Corp. v. Dean's Power Oil Co., 136 Ga. App. 879, 222 S.E.2d 602, 1975 Ga. App. LEXIS 1521 (1975) (decided under former Code 1933, § 38-502).

Effect of "whole agreement" clause in contract. — If a contract is in fact ambiguous as to some matters, a stipulation in the contract to the effect that the contract expresses "the whole agreement" and that there is no agreement or modification of any kind in connection therewith that is not expressly set forth therein, will not prevent explanation in the usual manner. Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688, 1945 Ga. LEXIS 337 (1945) (decided under former Code 1933, § 38-502); Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874, 1984 Ga. LEXIS 735 (1984) (decided under former O.C.G.A. § 24-6-3).

Descriptions in instruments. — If, for want of fullness of statement, the writing be indefinite or uncertain, parol evidence is admissible, not to vary, add to, or take from the writing, but to explain and so illuminate the writing as to make the real intention of the parties apparent. So parol evidence is admissible to explain ambiguous descriptive terms in a written instrument and to apply the same to their subject matter. Georgia Iron & Coal Co. v. Ocean Accident & Guar. Corp., 133 Ga. 326, 65 S.E. 775, 1909 Ga. LEXIS 210 (1909) (decided under former Civil Code 1895, § 5202); see also Walnut Creek Milling Co. v. Smith Bros. Co., 178 Ga. 341, 173 S.E. 95, 1934 Ga. LEXIS 52 (1934).

Names. — When a grant was issued to a name and there was no such person, this made a case of latent ambiguity, and aliunde evidence was admissible to show who was the person meant. Bowen v. Slaughter, 24 Ga. 338, 1858 Ga. LEXIS 207 (1858) (decided under former law).

It is admissible to apply, by parol testimony, the description given in an instrument so as to ascertain the particular person or persons intended to be embraced in that description. Indeed, parol evidence is admissible to explain all such ambiguities. Houston v. Bryan, 78 Ga. 181, 1 S.E. 252, 1886 Ga. LEXIS 203 (1886) (decided under former Code 1882, § 3801).

Parol evidence admissible for goods. — Parol evidence was admissible to show that contract for sale of "Snoflour"

contemplated a grade of flour equal to another brand with which the vendee was familiar. Walnut Creek Milling Co. v. Smith Bros. Co., 178 Ga. 341, 173 S.E. 95, 1934 Ga. LEXIS 52 (1934) (decided under former Code 1933, § 38-502).

Receipts. — Parol evidence was admissible to show whether the parties intended the receipt given to the defendant by the assignee of the leased contract, to be a settlement of all future liability of the defendants for rent, or was only meant as a discharge of whatever the assignee could claim by the transfer to them, and was not to affect the rights of the lessor under a reassignment of the lease to the lessor. Bell v. Boyd & Brumby, 53 Ga. 643, 1875 Ga. LEXIS 40 (1875) (decided under former Code 1873, § 3801).

Whether a receipt of a promissory note amounts to the payment of a preexisting debt depends upon the intention of the parties. If such intention can be gathered with certainty from the papers themselves, resort need not be had to the attending circumstances. If the papers are ambiguous, parol evidence is admissible to establish intent. Hall's Self-Feeding Cotton Gin Co. v. Black, 71 Ga. 450, 1883 Ga. LEXIS 196 (1883) (decided under former Code 1882, § 3801).

Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation in view of the parol evidence rule. Watts v. Baker, 78 Ga. 622, 3 S.E. 773, 1887 Ga. LEXIS 41 (1887) (decided under former Code 1882, § 3801).

Release. — Parol evidence is admissible to explain ambiguous language in a release. In determining the existence of an ambiguity in a release, reference is permitted only to the face of the document. Southern Stone Co. v. Singer, 665 F.2d 698, 1982 U.S. App. LEXIS 22700 (5th Cir. 1982) (decided under former O.C.G.A. § 24-6-3).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. Peterson v. Lexington Ins. Co., 753 F.2d 1016, 1985 U.S. App. LEXIS 28179 (11th Cir. 1985) (decided under former O.C.G.A. § 24-6-3).

Construction of insurance policy is for the court, generally. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former Code 1933, § 38-502).

Auctioneer's memorandum of sale. — Rule as to the admissibility of parol evidence to explain a patent ambiguity in a deed to land applies with equal force to an auctioneer's memorandum of the sale of land. Mohr v. Dillon, 80 Ga. 572, 5 S.E. 770, 1888 Ga. LEXIS 190 (1888) (decided under former Code 1882, § 3801); Wilson v. Coleman & Ray, 81 Ga. 297, 6 S.E. 693, 1888 Ga. LEXIS 113 (1888) (decided under former Code 1882, § 3801).

Submission to award. — Ambiguities in a submission to award which describes the subject matter of controversy are explainable by parol evidence. Riley v. Hicks, 81 Ga. 265, 7 S.E. 173, 1888 Ga. LEXIS 104 (1888) (decided under former Code 1882, § 3801).

Whether lease included in contract. — Parol evidence was admissible to explain an ambiguity as to whether the lease of a building was also included in the terms of the contract sued on. Vaughn v. Castleberry, 24 Ga. App. 496, 101 S.E. 299, 1919 Ga. App. LEXIS 878 (1919) (decided under former Civil Code 1910, § 5789).

Lease ambiguous as to time may be explained by parol. Carmichael v. Brown, 97 Ga. 486, 25 S.E. 357, 1895 Ga. LEXIS 513 (1895) (decided under former Code 1882, § 3801).

If the date of an entry is uncertain because of illegibility of the handwriting, this would constitute an ambiguity, and make a jury question. Bolton v. Keys, 38 Ga. App. 570, 38 Ga. App. 573, 144 S.E. 406, 1928 Ga. App. LEXIS 341 (1928) (decided under former Civil Code 1910, § 5789).

Phrase "value received". — Expression, "value received," is a patent ambiguity, and the expression may be explained, and failure of consideration shown by parol. Pitts v. Allen, 72 Ga. 69, 1883 Ga.

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LEXIS 16 (1883) (decided under former Code 1882, § 3801); Waller v. Martin-Senour Co., 45 Ga. App. 808, 166 S.E. 53, 1932 Ga. App. LEXIS 713 (1932) (decided under former Civil Code 1910, § 5789); Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666, 1977 Ga. App. LEXIS 2081 (1977) (decided under former Code 1933, § 38-502).

Phrase "as hereafter agreed". — One clause in a written contract providing for the payment of a certain sum "as hereafter agreed," parol evidence was admissible to explain the ambiguity, and to show not only the date but the conditions, if any, on which such payment was to be made. Morrison v. Dickey, 119 Ga. 698, 46 S.E. 863, 1904 Ga. LEXIS 340 (1904) (decided under former Civil Code 1895, § 5202); see also Morrison v. Dickey, 122 Ga. 417, 50 S.E. 178, 1905 Ga. LEXIS 226 (1905).

Phrase "good cotton". — Term "good cotton" was subject to parol explanation to show the term's meaning as used in the contract. Ford & Co. v. Lawson, 133 Ga. 237, 65 S.E. 444, 1909 Ga. LEXIS 199 (1909) (decided under former Civil Code 1895, § 5202).

Determining meaning of ambiguous language. — If the language of an instrument in writing is ambiguous and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings, and decree according to the truth of the matter. Irwin v. Young, 212 Ga. 1, 90 S.E.2d 22, 1955 Ga. LEXIS 523 (1955) (decided under former Code 1933, § 38-502).

Unpriced, unexecuted damages provision. — In a claim for damages resulting from delays in the performance of a construction contract, parol evidence was relevant to construe the intent of the parties to incorporate and be bound by an unexecuted contract form containing an unpriced damages provision. Atlanta Economic Dev. Corp. v. Ruby-Collins, Inc., 206 Ga. App. 434, 425 S.E.2d 673, 1992 Ga. App. LEXIS 1664 (1992) (decided under former O.C.G.A. § 24-6-3).

Parol evidence inadmissible for guaranty. — Lessor was not entitled to recover on an equipment lease guaranty because the guaranty was unenforceable since the guaranty omitted essential elements and under former O.C.G.A. § 24-6-3(a) the lease could not supply the missing elements since this required consideration of parol evidence, which was inadmissible for a contract required by the statute of frauds to be in writing. Dabbs v. Key Equip. Fin., Inc., 303 Ga. App. 570, 694 S.E.2d 161, 2010 Ga. App. LEXIS 379 (2010) (decided under former O.C.G.A. § 24-6-3).

Consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555, 2011 Ga. App. LEXIS 176 (2011) (decided under former O.C.G.A. § 24-6-3).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract rather than conflicting with any written provisions. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101, 1961 Ga. LEXIS 454 (1961) (decided under former Code 1933, § 38-502).

Contract not ambiguous. — See McCann v. Glynn Lumber Co., 199 Ga. 669,

34 S.E.2d 839, 1945 Ga. LEXIS 344 (1945) (timber lease) (decided under former Code 1933, § 38-502).

Integration clause precluded consideration of parol evidence. — Court of appeals could not consider parol evidence to add to, take from, contradict, or vary an assignment contract containing the terms of an estoppel certificate because the contract's integration clause provided that the consent to assignment and all its exhibits, including the estoppel certificate, constituted the entire agreement of the parties and that all prior understandings and agreements among the parties concerning the matters were merged into the consent. Fundus Am. (Atlanta) L.P. v. RHOC Consolidation, LLC, 313 Ga. App. 118, 720 S.E.2d 176, 2011 Ga. App. LEXIS 930 (2011), cert. denied, No. S12C0629, 2012 Ga. LEXIS 401 (Ga. Apr. 24, 2012) (decided under former O.C.G.A. § 24-6-3).

Writings in Real Estate Transactions

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690, 2007 Ga. App. LEXIS 1276 (2007), cert. denied, No. S08C0618, 2008 Ga. LEXIS 286 (Ga. Mar. 10, 2008) (decided under former O.C.G.A. § 24-6-3).

Dates on multiple real estate documents. — Note, warranty deed, and agreement concerning a real estate transaction were all dated on the same day; therefore, the note and deed could be considered to establish the missing property description in the agreement. Owenby v. Holley, 256 Ga. App. 13, 567 S.E.2d 351, 2002 Ga. App. LEXIS 808 (2002) (decided under former O.C.G.A. § 24-6-3).

Deed construed with petition. — Deed by a wife to her husband was construed together with a petition that she be allowed to execute the deed. McCreary v. Gewinner, 103 Ga. 528, 29 S.E. 960, 1898 Ga. LEXIS 156 (1898) (decided under former Civil Code 1895, § 5202).

Use restriction in easement not applicable to deeds. — As there were no restrictions on use in warranty deeds that a property owner conveyed to a city, a restrictive use that was in a contemporaneously-executed easement could not be imposed on the deeds pursuant to former O.C.G.A. § 24-6-3(a). White House Inn & Suites, Inc. v. City of Warm Springs, 285 Ga. 322, 676 S.E.2d 178, 2009 Ga. LEXIS 165 (2009) (decided under former O.C.G.A. § 24-6-3).

Description in lease. — If a lease contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, parol evidence is admissible for the purpose of applying the description to the subject matter, but any attempt to prove that at the time of the execution of the contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 1947 Ga. LEXIS 534 (1947) (decided under former Code 1933, § 38-502).

Descriptions in real property transactions. — If there is a discrepancy as to a party's name in a plat and grant, this is a patent ambiguity and explainable by parol evidence. Ferrell v. Hurst, 68 Ga. 132, 1881 Ga. LEXIS 329 (1881) (decided under former Code 1873, § 3801).

If the description in a deed is ambiguous but sufficient to furnish a key to the boundary, extrinsic evidence may be used to correctly apply the description to the true boundary intended by the parties. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438, 1945 Ga. LEXIS 312 (1945) (decided under former Code 1933, § 38-502).

When the descriptive averments contained in a deed are sufficient to furnish a key whereby the land which the grantor intended to convey may be ascertained, parol evidence which does not add to, enlarge, or in any way change the description is admissible for the purpose of identifying the conveyed land. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d

Writings in Real Estate Transactions (Cont'd)

108, 1948 Ga. LEXIS 465 (1948) (decided under former Code 1933, § 38-502); see also Haygood v. Duncan, 204 Ga. 540, 50 S.E.2d 214, 1948 Ga. LEXIS 469 (1948).

If a property description in a written contract is ambiguous, in that it can be interpreted as referring to more than one piece of property, parol evidence is admissible to explain the ambiguity and the contract is not rendered unenforceable for vagueness. Tuggle v. Wilson, 248 Ga. 335, 282 S.E.2d 110, 1981 Ga. LEXIS 962 (1981) (decided under former Code 1933, § 38-502).

Claim of title in deed. — Any ambiguities in a deed may be explained by parol, if the evidence can be applied to elucidate the claim of title. Daniels v. Cagle, 180 Ga. 853, 181 S.E. 178, 1935 Ga. LEXIS 582 (1935) (decided under former Code 1933, § 38-502).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1075, 1101 et seq.

C.J.S.

32A C.J.S., Evidence, §§ 1149, 1156, 1173, 1193, 1194.

ALR.

Admissibility of parol evidence as to amount of commodity specified in written contract of sale, 8 A.L.R. 747.

Parol evidence as to whether one whose name appears on the face of a note signed as a witness or as maker, 15 A.L.R. 197.

Parol evidence rule as applied to lease, 25 A.L.R. 787; 88 A.L.R. 1380; 151 A.L.R. 279.

Admissibility of parol evidence to explain ambiguity in description of land in deed or mortgage, 68 A.L.R. 4.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 A.L.R. 625.

Rule that latent ambiguities may be explained by parol evidence but that patent ambiguities may not, 102 A.L.R. 287.

Admissibility of oral or extrinsic evidence on question of liability on bill of exchange, promissory note, or other contract where signature is followed by word or abbreviation which may be either descriptive or indicative of contracting character, 113 A.L.R. 1364.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 A.L.R. 316.

Extrinsic evidence regarding character and size of trees contemplated by written timber contract or lease, 173 A.L.R. 518.

Parol evidence to show duration of written contract for support or maintenance, 14 A.L.R.2d 897.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 A.L.R.2d 991.

Wills: admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given, 21 A.L.R.3d 778.

The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract, 40 A.L.R.3d 1384.

Admissibility of parol evidence to show whether guaranty of corporation's obligation was signed in officer's representative or individual capacity, 70 A.L.R.3d 1276.

24-3-4. Circumstances surrounding execution of contracts.

The surrounding circumstances shall always be proper subjects of proof to aid in the construction of contracts.

History.

Code 1981, § 24-3-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Supplementing Written Agreements: Restating the Parol Evi-

dence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3727, former Code 1868, § 3751, former Code 1873, § 3804, former Code 1882, § 3804, former Civil Code 1895, § 5205, former Civil Code 1910, § 5792, former Code 1933, § 38-505, and former O.C.G.A. § 24-6-4 are included in the annotations for this Code section.

When former statute applied. — Former statute applied only if a contract was of doubtful meaning; but a plain and unambiguous contract cannot be contradicted by parol. Ward v. Campbell, 73 Ga. 97, 1884 Ga. LEXIS 30 (1884) (decided under former Code 1882, § 3804); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138, 1980 Ga. LEXIS 1308, 1980 Ga. LEXIS 715 (1980) (decided under former Code 1933, § 38-505).

Ambiguities are explainable by the surrounding circumstances. Armistead v. McGuire, 46 Ga. 232, 1872 Ga. LEXIS 40 (1872) (decided under former Code 1868, § 3751); National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408, 1934 Ga. App. LEXIS 116 (1934) (decided under former Code 1933, § 38-505).

When the language of the written instrument may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings. National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408, 1934 Ga. App. LEXIS 116 (1934) (decided under former Code 1933, § 38-505); Irwin v. Young, 212 Ga. 1, 90 S.E.2d 22, 1955 Ga. LEXIS 523 (1955) (decided under former Code 1933, § 38-505).

Circumstances accompanying making of note. — Parol evidence was admissible to show the circumstances under which notes were made, and to explain the consideration and show the year in which the consideration appearing on the face of the notes was actually advanced. Anderson v. Brown, 72 Ga. 713, 1884 Ga. LEXIS 309 (1884) (decided under former Code 1882, § 3804); Camp v. Matthews, 143 Ga. 393, 85 S.E. 196, 1915 Ga. LEXIS 456 (1915) (decided under former Civil Code 1910, § 5792).

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690, 2007 Ga. App. LEXIS 1276 (2007), cert. denied, No. S08C0618, 2008 Ga. LEXIS 286 (Ga. Mar. 10, 2008) (decided under former O.C.G.A. § 24-6-4).

Improper admission. — If surrounding circumstances were improperly admitted, it was harmless error since substantially the same facts had already been established by the evidence of the plaintiff. Wells v. Gress, 118 Ga. 566, 45 S.E. 418, 1903 Ga. LEXIS 620 (1903) (decided under former Civil Code 1895, § 5205).

RESEARCH REFERENCES

Am. Jur. 2d.

17A Am. Jur. 2d, Contracts, § 323 et seq. 29A Am. Jur. 2d, Evidence, §§ 1083, 1117, 1118.

ALR.

Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 A.L.R. 13.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 A.L.R. 655.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 105 A.L.R. 1346.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 A.L.R.2d 945.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 A.L.R.2d 382.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 A.L.R.2d 991.

24-3-5. Known usage.

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents.

History.
Code 1981, § 24-3-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3728, former Code 1868, § 3752, former Code 1873, § 3805, former Code 1882, § 3805, former Civil Code 1895, § 5206, former Civil Code 1910, § 5793, former Code 1933, § 38-506, and former O.C.G.A. § 24-6-5 are included in the annotations for this Code section.

To make a proof of a custom as such proper testimony, it should appear by the proof itself that such custom is a general one, and that it is so well known and recognized within the sphere of the custom's operation, as to be usually considered a part of all contracts made in that particular locality in business transactions to which such custom relates. Hardeman v. English, 79 Ga. 387, 5 S.E. 70, 1887 Ga. LEXIS 234 (1887) (decided under former Code 1882, § 3805).

Custom can only be proved by word of mouth from the men engaged in the business. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691, 1955 Ga. App. LEXIS 824 (1955) (decided under former Code 1933, § 38-506).

Evidence thereof is necessarily in parol. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691, 1955 Ga. App. LEXIS 824 (1955) (decided under former Code 1933, § 38-506).

Testimony of custom as matter of fact. — If a witness is shown to have knowledge of a custom, the witness can state what it is, not as a matter of opinion or law, but as a fact. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804, 1916 Ga. LEXIS 53 (1916) (decided under former Civil Code 1910, § 5793).

Custom is inadmissible when agreement is unambiguous. — Custom or usage, while admissible to explain an ambiguous written agreement, is inadmissible if repugnant to or inconsistent with a clear, express agreement. Stamey v. Western Union Tel. Co., 92 Ga. 613, 18 S.E. 1008, 1893 Ga. LEXIS 214 (1893) (decided under former Code 1882, § 3805).

When the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Newark Fire Ins. Co. v. Smith, 176 Ga. 91, 167 S.E. 79, 1932 Ga. LEXIS 394 (1932) (decided under former Civil Code 1910, § 5793); TBS v. Europe Craft Imports, Inc., 186 Ga. App. 286, 367 S.E.2d 99, 1988 Ga. App. LEXIS 329 (1988) (decided under former O.C.G.A. § 24-6-5).

While proof of a custom is sometimes

admissible to aid in the construction of a contract, such proof is not admissible when the contract is clear and unambiguous. Atlantic Fertilizer Co. v. Southern States Phosphate & Fertilizer Co., 53 Ga. App. 798, 187 S.E. 237, 1936 Ga. App. LEXIS 401 (1936) (decided under former Code 1933, § 38-506).

Law cannot be changed. — Custom may sometimes be invoked as entering into a contract or supplying incidents, but not to change the law. Fidelity & Deposit Co. v. Butler, 130 Ga. 225, 60 S.E. 851, 1908 Ga. LEXIS 255 (1908) (decided under former Civil Code 1895, § 5206); Happ Bros. Co. v. Hunter Mfg. & Comm'n Co., 145 Ga. 836, 90 S.E. 61, 1916 Ga. LEXIS 507 (1916) (decided under former Civil Code 1910, § 5793).

Usage cannot make a contract when there is none nor prevent the effect of the settled rules of law. Newark Fire Ins. Co. v. Smith, 176 Ga. 91, 167 S.E. 79, 1932 Ga. LEXIS 394 (1932) (decided under former Civil Code 1910, § 5793).

In the absence of knowledge of the existence of the custom, it cannot be said that there was any meeting of the minds on this item. Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593, 1968 Ga. App. LEXIS 1505 (1968) (decided under former Code 1933, § 38-506).

If there was no evidence tending to show a contract by known and established usage, it was error to charge on known usage or custom. Craig v. Augusta Roofing & Metal Works, Inc., 78 Ga. App. 514, 51 S.E.2d 565, 1949 Ga. App. LEXIS 917 (1949) (decided under former Code 1933, § 38-506).

Signing other party's name to contract. — It was not admissible to show that it was the custom in a particular business for one party making sales, or its agent representing it in such a transaction, to sign the name of the other party to a contract therefor, so as to bind the latter. Happ Bros. Co. v. Hunter Mfg. & Comm'n Co., 145 Ga. 836, 90 S.E. 61, 1916 Ga. LEXIS 507 (1916) (decided under former Civil Code 1910, § 5793).

Time of performance of contract. — Usage in business as to time of performance of contract for services is admissible in suit for breach thereof. Beck v. Thompson & Taylor Spice Co., 108 Ga. 242, 33 S.E. 894, 1899 Ga. LEXIS 226 (1899) (decided under former Civil Code 1895, § 5206).

Customs of warehousemen. — On the trial of a suit against warehousemen to recover the value of certain cotton which had been burned, and which plaintiff alleged the warehousemen had agreed to keep insured for plaintiff's benefit, but had failed to do so, proof, in their behalf, that it was their custom to insure cotton only to the extent of the advances the warehousemen had made thereon and for the warehousemen's own benefit, unless instructed by the customer to insure for full value, was primarily inadmissible; but after testimony had been allowed, without objection, in favor of plaintiff, tending to show it was the warehousemen's custom to insure cotton on which the warehousemen had made advances to its full value, such proof was properly admitted. Hardeman v. English, 79 Ga. 387, 5 S.E. 70, 1887 Ga. LEXIS 234 (1887) (decided under former Code 1882, § 3805).

If a general custom existed on the part of the warehouses in a certain municipality to insure to its full value the cotton of patrons stored with them with the necessary characteristics, patrons who stored cotton with one of such warehousemen, knowing of the custom, and relying upon the custom, can assert a duty on the part of such warehouseman to so insure one's cotton. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804, 1916 Ga. LEXIS 53 (1916) (decided under former Civil Code 1910, § 5793).

It was not necessary that a witness should be a warehouseman in order to have sufficient knowledge to render the witness competent to testify as to the existence of such usage or custom among the warehouses of a particular town or city. If a person has been accustomed to deal with such warehouses, and to deposit cotton with those warehouses, so as to know those warehouses usage or custom on that subject, the witness was competent to testify as to that usage or custom. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804, 1916 Ga. LEXIS

53 (1916) (decided under former Civil Code 1910, § 5793).

Customs of insurance companies. — In this state, when life insurance companies deal with the assured for a time sufficient to make it their usage and custom to give notice to the assured of the date when the premiums fall due, and fail to give notice thereof, the policy will not be forfeited if, within a period so reasonably short as to show an intent to continue one's policy, the assured take steps to inquire and pay the premium. Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575, 1886 Ga. LEXIS 62 (1886) (decided under former Code 1882, § 3805).

It was well settled that insurers were bound to know the customs of a place where insurers transact business; and were assumed to have made contracts in reference to such customs. Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S.E. 94, 1907 Ga. App. LEXIS 524 (1907) (decided under former Civil Code 1895, § 5206).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1083, 1118, 1121.

C.J.S.

32A C.J.S., Evidence, § 1149.

ALR.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Validity and construction of "zoning with compensation" regulation, 41 A.L.R.3d 636.

24-3-6. Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance.

History.

Code 1981, § 24-3-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3729, former Code 1868, § 3753, former Code 1873, § 3806, former Code 1882, § 3806, former Civil Code 1895, § 5207, former Civil Code 1910, § 5794, former Code 1933, § 38-507, and former O.C.G.A. § 24-6-6 are included in the annotations for this Code section.

Plea of accord and satisfaction may be supported by parol evidence that the notes sued on were paid in full and satisfied by the surrender of the property described in the mortgage deed (given to secure the debt) in full and complete satisfaction of the debt; that the owner and holder of the note accepted the property in settlement of the notes sued on; and that the settlement was beneficial to the then owners and the holders of the notes, in that it enabled the owners to obtain property without the expense of foreclosure. Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774, 1936 Ga. App. LEXIS 265 (1936) (decided under former Code 1933, § 38-507).

Admissible testimony generally. — When there is strong presumptive evidence that, subsequently to the execution

of a written contract, the parties agreed orally upon a new contract, which was a modification of the former, testimony may be received of negotiations and conversations between these parties previous to the written contract for the purpose of throwing light upon, and showing more clearly, the nature and character of the subsequent agreement. Collins v. Lester, 16 Ga. 410, 1854 Ga. LEXIS 199 (1854) (decided under former Code 1933, § 38-507).

Agreement must be based on valuable consideration. — While parol evidence was admissible to prove a new and distinct agreement subsequent to the original written contract in reference to the same subject matter, such new agreement must be based upon a valuable consideration. Phelps v. Belle Isle, 29 Ga. App. 571, 116 S.E. 217, 1923 Ga. App. LEXIS 121 (1923) (decided under former Civil Code 1910, § 5794); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93, 1925 Ga. App. LEXIS 470 (1925) (decided under former Civil Code 1910, § 5794); Moon Motor Car Co. v. Savannah Motor Car Co., 41 Ga. App. 231, 152 S.E. 611, 1930 Ga. App. LEXIS 513 (1930) (decided under former Civil Code 1910, § 5794); Alexander Film Co. v. Brittain, 63 Ga. App. 384, 11 S.E.2d 66, 1940 Ga. App. LEXIS 105 (1940) (decided under former Code 1933, § 38-507); P & O Mach. Works, Inc. v. Pollard, 115 Ga. App. 96, 153 S.E.2d 631, 1967 Ga. App. LEXIS 1019 (1967) (decided under former Code 1933, § 38-507); American Century Mtg. Investors v. Bankamerica Realty Investors, 246 Ga. 39, 268 S.E.2d 609, 1980 Ga. LEXIS 1007 (1980) (decided under former Code 1933, § 38-507); Llop v. National Bank, 154 Ga. App. 504, 268 S.E.2d 777, 1980 Ga. App. LEXIS 2250 (1980) (decided under former Code 1933, § 38-507).

Agreement must embody essentials of new contract. Phelps v. Belle Isle, 29 Ga. App. 571, 116 S.E. 217, 1923 Ga. App. LEXIS 121 (1923) (decided under former Civil Code 1910, § 5794); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93, 1925 Ga. App. LEXIS 470 (1925) (decided under former Civil Code 1910, § 5794).

All previous verbal negotiations respecting a sale were merged in the subsequently written contract, and it was not permissible to prove a prior or contemporaneous parol agreement which had the effect of varying the terms of the written contract. Cottle v. Tomlinson, 192 Ga. 704, 16 S.E.2d 555, 1941 Ga. LEXIS 603 (1941) (decided under former Code 1933, § 38-507).

Agreement to give collateral security. — Parol agreement of parties subsequent to the execution of a contract of sale that the purchaser would turn over to the vendor a certain paper as collateral security was admissible. Loveless v. Bridges, 136 Ga. 338, 71 S.E. 166, 1911 Ga. LEXIS 530 (1911) (decided under former Civil Code 1910, § 5794).

Agreement as to time of delivery. — When a written contract for the purchase and sale of goods fixed no time for performance, it will be construed as implying that delivery will be made and accepted within a reasonable time, but parol evidence was admissible to prove a new and distinct subsequent agreement, mutually acted upon, that the deliveries would be made in installments at certain stated intervals. Breman v. Rodbell, 31 Ga. App. 358, 120 S.E. 697, 1923 Ga. App. LEXIS 946 (1923) (decided under former Civil Code 1910, § 5794).

Evidence of agreement to rescind contract held admissible. — See Manry v. Selph, 77 Ga. App. 808, 50 S.E.2d 27, 1948 Ga. App. LEXIS 649 (1948) (decided under former Code 1933, § 38-507); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794, 1951 Ga. App. LEXIS 814 (1951) (decided under former Code 1933, § 38-507).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1094.

C.J.S.

32A C.J.S., Evidence, § 1151 et seq.

ALR.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Provision in sale contract to effect that

only conditions incorporated therein shall be binding, 127 A.L.R. 132; 133 A.L.R. 1360.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 A.L.R.2d 78; 85 A.L.R.3d 259.

Application of parol evidence rule in action on contract for architect's services, 69 A.L.R.3d 1353.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 A.L.R.3d 259.

24-3-7. Proof of mistake in deed or written contract.

Parol evidence shall be admissible to prove a mistake in a deed or any other contract required by law to be in writing.

History.
Code 1981, § 24-3-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3063, former Code 1873, § 3118, former Code 1882, § 3118, former Civil Code 1895, § 3975, former Civil Code 1910, § 4572, former Code 1933, § 38-510, and former O.C.G.A. § 24-6-7 are included in the annotations for this Code section.

In general. — If the description in a deed is unambiguous, extrinsic evidence cannot be resorted to, except for the purpose of reforming the deed so as to make the deed express the real intention of the parties and correct a mutual mistake of fact. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438, 1945 Ga. LEXIS 312 (1945) (decided under former Code 1933, § 38-510).

Resort to parol evidence is necessary to reform an instrument. — Written instrument is evidence of what the parties intend to do; but when a party seeks information of an instrument, the instrument is not the best evidence in such controversy. The very purpose of resorting to parol evidence is to contradict the instrument. Nelson v. Spence, 129 Ga. 35, 58 S.E. 697, 1907 Ga. LEXIS 298 (1907) (decided under former Civil Code 1895, § 3975); Gaulding v. Baker, 9 Ga. App. 578, 71 S.E. 1018, 1911 Ga. App. LEXIS 240 (1911) (decided under former Civil Code 1910, § 4572); Green v. Johnson, 153 Ga. 738, 113 S.E. 402, 1922 Ga. LEXIS 163 (1922) (decided under former Civil Code 1910, § 4572); Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636, 1929 Ga. LEXIS 274 (1929) (decided under former Civil Code 1910, § 4572); Head v. Stephens, 215 Ga. 184, 109 S.E.2d 772, 1959 Ga. LEXIS 430 (1959) (decided under former Code 1933, § 38-510).

Because the decedent's offspring sought reformation of the option contract entered into with the decedent on the basis of mutual mistake of fact due to a scrivener's error mistakenly describing the property to be sold, parol evidence of the real terms of the agreement was admissible. Morris v. Morris, 282 Ga. App. 127, 637 S.E.2d 838, 2006 Ga. App. LEXIS 1334 (2006) (decided under former O.C.G.A. § 24-6-7).

Parol evidence admissible. — Grant of summary judgment to a corporation was vacated as reformation was a possible remedy against a corporation since an owner's warranty deed to a buyer contained a mistaken descriptor; the owner could seek reformation against the corporation as the corporation bought the property from the buyer under the same mistake and parol evidence was admissible in such a reformation action, even though the owner and the corporation were never parties to the same transaction. Amin v. Guruom, Inc., 280 Ga. 873, 635 S.E.2d 105, 2006 Ga. LEXIS 496 (2006) (decided under former O.C.G.A. § 24-6-7).

Trial court erred in granting a bank's motion for summary judgment in the bank's action for breach of a guaranty

because parol testimony was admissible and created a genuine issue of material fact over whether the guaranty was executed after the bank had already extended credit to the underlying debtor, and thus over whether the guaranty was void for lack of consideration; as in the context of a deed, a witness is entitled to offer parol testimony that the guaranty was executed on a date other than the date inserted on the guaranty. Helton v. Jasper Banking Co., 311 Ga. App. 363, 715 S.E.2d 765, 2011 Ga. App. LEXIS 726 (2011) (decided under former O.C.G.A. § 24-6-7).

Deed reformed. — See West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642, 1934 Ga. LEXIS 276 (1934) (stipulation as to assumption of liens) (decided under former Code 1933, § 38-510); Smith v. Smith, 223 Ga. 560, 156 S.E.2d 901, 1967 Ga. LEXIS 606 (1967) (date of execution of deed) (decided under former Code 1933, § 38-510).

Contract reformed. — See West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642, 1934 Ga. LEXIS 276 (1934) (stipulation as to assumption of liens) (decided under former Code 1933, § 38-510).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1092.

C.J.S.

32A C.J.S., Evidence, §§ 1149, 1166, 1181.

ALR.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Exception to rule of admissibility of parol evidence to show that deed absolute on its face was intended as a mortgage, 111 A.L.R. 448.

Parol evidence rule as applied to lease, 151 A.L.R. 279.

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 A.L.R.2d 1137.

Application of parol evidence rule in action on contract for architect's services, 69 A.L.R.3d 1353.

24-3-8. Original or subsequent voidness of writing.

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became void.

History.

Code 1981, § 24-3-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3725, former Code 1868, § 3749, former Code 1882, § 3802, former Civil Code 1895, § 5203, former Civil Code 1910, § 5790, former Code 1933, § 38-503, and former O.C.G.A. § 24-6-8 are included in the annotations for this Code section.

Failure of consideration. — It may be shown that a note sued on was in fact without legal consideration of any kind, and that the actual basis of the undertaking was wholly illegal and the resultant promise absolutely void. Simmons v. International Harvester Co. of Am., 22 Ga. App. 358, 96 S.E. 9, 1918 Ga. App. LEXIS 336 (1918) (decided under former Civil Code 1910, § 5790); see also Miller v. Whitesburg Banking Co., 58 Ga. App. 84, 197 S.E. 906, 1938 Ga. App. LEXIS 192 (1938); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777, 1964 Ga. LEXIS 323 (1964) (decided under former Code 1933, § 38-503).

Writing which undertakes to contract about a fictitious thing, even though it be denominated a consideration in the writ-

ing is in fact without consideration, is void, and the fact that it is void may be shown by parol under the rule of evidence. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-503).

When the promise as stated in the writing is admitted, the promisor can show that there was no consideration or that there was a consideration which has failed wholly or in part, and therefore the promise is no longer supported, and must fail either in whole or in part, according to the facts. First Nat'l Bank v. Harrison, 408 F. Supp. 137, 1975 U.S. Dist. LEXIS 16330 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976) (decided under former Code 1933, § 38-503).

Consideration of a contract may be always inquired into in order to show that the promise is no longer binding according to its tenor; but in inquiring into the consideration the promisor cannot deny that the promisor made the promise evidenced by the writing. First Nat'l Bank v. Harrison, 408 F. Supp. 137, 1975 U.S. Dist. LEXIS 16330 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976) (decided under former Code 1933, § 38-503).

Different consideration may be shown by parol evidence. Harris v. Tisereau, 52 Ga. 153, 1874 Ga. LEXIS 256 (1874) (decided under former Code 1863, § 3725).

Nonperformance of condition precedent. — Written document may by parol or other extrinsic evidence be shown not to be a contract at all because of the nonperformance of a condition precedent as to which the writing is silent. Rudder v. Belle Isle, 46 Ga. App. 336, 167 S.E. 753, 1933 Ga. App. LEXIS 54 (1933) (decided under former Civil Code 1910, § 5790).

Violation of public policy. — When a contract apparently valid on the contract's face was attacked on the ground that the contract was entered into in violation of public policy, a court, when called upon to approve such a contract, will closely examine the terms of the contract and the circumstances under which the contract was entered into, before permitting the agreement to be made the judgment of the court. Beverly v. Beverly, 209 Ga. 468, 74 S.E.2d 89, 1953 Ga. LEXIS 297 (1953) (decided under former Code 1933, § 38-503); Funderburk v. Funderburk, 229 Ga. 457, 192 S.E.2d 262, 1972 Ga. LEXIS 646 (1972) (decided under former Code 1933, § 38-503).

Fraud. — Parol evidence was admissible to show that a writing was void on account of fraud. Hinkle v. Hixon, 154 Ga. 193, 113 S.E. 805, 1922 Ga. LEXIS 328 (1922) (decided under former Civil Code 1910, § 5790); Johnson v. Sherrer, 197 Ga. 392, 29 S.E.2d 581, 1944 Ga. LEXIS 278 (1944) (decided under former Code 1933, § 38-503); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777, 1964 Ga. LEXIS 323 (1964) (decided under former Code 1933, § 38-503); Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381, 1965 Ga. LEXIS 437 (1965) (decided under former Code 1933, § 38-503); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938, 1975 U.S. Dist. LEXIS 13112 (N.D. Ga. 1975) (decided under former Code 1933, § 38-503); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765, 1976 Ga. App. LEXIS 2021 (1976) (decided under former Code 1933, § 38-503); Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183, 1977 Ga. App. LEXIS 2483 (1977) (decided under former Code 1933, § 38-503).

Fraud in beneficiary designation. Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. Weatherly v. Weatherly, 292 Ga. App. 879, 665 S.E.2d 922, 2008 Ga. App. LEXIS 889 (2008) (decided under former O.C.G.A. § 24-6-8).

Promise by bank not to enforce promissory note. — There is no confidential relationship between a bank and a customer borrowing funds and therefore an oral agreement not to enforce a promissory note, which is a contract in writing, is not a type of fraud constituting an

exception to the parol evidence rule. Boatman v. Citizens & S. Nat'l Bank, 155 Ga. App. 848, 273 S.E.2d 190, 1980 Ga. App. LEXIS 2813 (1980) (decided under former Code 1933, § 38-503).

Colorable scheme between husband and wife. — If a wife did not in fact purchase and was not to receive the machinery under the contract sued on, but the whole transaction was merely a colorable scheme or device by which the wife was induced by the plaintiff to assume the previous debt of the husband, without any consideration flowing to her, she would have the right to repudiate the entire illegal and void transaction, no matter by what device its true inwardness and purpose had been concealed. Simmons v. International Harvester Co. of Am., 22 Ga. App. 358, 96 S.E. 9, 1918 Ga. App. LEXIS 336 (1918) (decided under former Civil Code 1910, § 5790).

Evidence that party signed blank paper. — Evidence tending to prove that a party only signed a blank sheet of paper, instead of signing a written and printed contract, was admissible. Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 78 S.E. 244, 1913 Ga. LEXIS 620 (1913) (decided under former Civil Code 1910, § 5790).

Contract to evade usury, penalty, or forfeiture. — Parol evidence was admissible to show the circumstances attending the execution of papers and the sayings of the parties at the time for the purpose of ascertaining their intention as to a shipment of the cotton and enabling a jury to determine whether the contract of shipment was a device to evade the law relating to usury. Dwelle & Daniel v. Blackwood, 106 Ga. 486, 32 S.E. 593, 1899 Ga. LEXIS 710 (1899) (decided under former Civil Code 1895, § 5203).

While a valid written contract cannot be contradicted or varied by parol, it is competent by such evidence to show that the writing is but a cover for usury, penalty, or forfeiture. Lytle v. Scottish Am. Mtg. Co., 122 Ga. 458, 50 S.E. 402, 1905 Ga. LEXIS 239 (1905) (decided under former Civil Code 1895, § 5203).

What is called rent may be shown to have been really a part of the purchase money, or a device to obtain a penalty. Lytle v. Scottish Am. Mtg. Co., 122 Ga. 458, 50 S.E. 402, 1905 Ga. LEXIS 239 (1905) (decided under former Civil Code 1895, § 5203).

It was always permissible to show by parol evidence that a paper was but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than the law's evasion by giving innocent names to prohibited acts. Flood v. Empire Inv. Co., 35 Ga. App. 266, 133 S.E. 60, 1926 Ga. App. LEXIS 690 (1926) (decided under former Civil Code 1910, § 5790).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1090 et seq.

C.J.S.

32A C.J.S., Evidence, §§ 1149, 1156, 1159 et seq.

ALR.

Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 A.L.R. 13.

"Contractual" consideration as regards parol evidence rule, 100 A.L.R. 17.

Parol evidence rule as applied to lease, 151 A.L.R. 279.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 A.L.R. 316.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 A.L.R.2d 1330.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 A.L.R.2d 382.

24-3-9. Explanation or denial of receipts.

Receipts for money shall always be only prima-facie evidence of payment and may be denied or explained by parol.

History.
Code 1981, § 24-3-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3754, former Code 1873, § 3807, former Code 1882, § 3807, former Civil Code 1895, § 5208, former Civil Code 1910, § 5795, former Code 1933, § 38-508, and former O.C.G.A. § 24-6-9 are included in the annotations for this Code section.

Definition. — Receipt was a written admission or acknowledgment of payment or delivery. It was not required by law to be in a particular form. Crider v. City Supply Co., 16 Ga. App. 377, 85 S.E. 350, 1915 Ga. App. LEXIS 635 (1915) (decided under former Civil Code 1910, § 5795).

Receipt was not a contract, but merely an admission in writing of the fact of payment or other settlement between a debtor and a creditor. Hamlin v. Lupo, 24 Ga. App. 408, 101 S.E. 5, 1919 Ga. App. LEXIS 691 (1919) (decided under former Civil Code 1910, § 5795).

Exception to general rule. — Receipt for money mentioned in the former provisions was, as a general rule, an exception to the principle that parol evidence was inadmissible to explain or contradict a writing. Dunagan v. Dunagan, 38 Ga. 554, 1868 Ga. LEXIS 119 (1868) (decided under former Code 1868, § 3754); Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-508).

For admission rules when receipt was also contract, see Dunagan v. Dunagan, 38 Ga. 554, 1868 Ga. LEXIS 119 (1868) (decided under former Code 1868, § 3754).

If a receipt was a contract and not simply a receipt, there was no reason why the receipt should be susceptible of attack or explanation by parol more than any other contract. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797, 1941 Ga. App. LEXIS 94 (1941) (decided under former Code 1933, § 38-508).

No receipt was conclusive evidence, and evidence may be introduced to show the receipt did not correctly express the truth of the case. Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109, 1931 Ga. App. LEXIS 531 (1931) (decided under former Civil Code 1910, § 5795).

Receipt may be explained. — It was held not error to permit the maker of a receipt in evidence to explain the items in the receipt, or to cast upon the various amounts and testify to the sum total for which the receipt was given. Bigham v. Coleman, 71 Ga. 176, 1883 Ga. LEXIS 159 (1883) (decided under former Code 1882, § 3807).

Defendant may show that the defendant received less on certain promissory notes made by the defendant than the receipt shows. New England Mtg. Sec. Co. v. Gay, 33 F. 636, 1888 U.S. App. LEXIS 2031 (C.C.D. Ga. 1888), cert. dismissed, 145 U.S. 123, 12 S. Ct. 815, 36 L. Ed. 646, 1892 U.S. LEXIS 2125 (1892) (decided under former Code 1882, § 3807).

On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1); furthermore, former O.C.G.A. § 24-6-9 specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253,

653 S.E.2d 835, 2007 Ga. App. LEXIS 1185 (2007) (decided under former O.C.G.A. § 24-6-9).

Combination receipt and contract. — Written instrument may sometimes partake of the nature of both a receipt and a contract. Insofar as it was merely a receipt, the former statute was applicable; but insofar as it was a contract, it cannot be changed, modified, or have its terms enlarged by parol evidence. Southern Bell Tel. Tel. Co. v. Smith, 129 Ga. 558, 59 S.E. 215, 1907 Ga. LEXIS 509 (1907) (decided under former Civil Code 1895, § 5208); Graham v. Peacock, 131 Ga. 785, 63 S.E. 348, 1909 Ga. LEXIS 8 (1909) (decided under former Civil Code 1895, § 5208); see also Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578, 81 S.E. 892, 1913 Ga. LEXIS 279 (1913).

Acknowledgment in form of affidavit. — Fact that an acknowledgment of payment was in the form of an affidavit did not render the affidavit inadmissible when offered in evidence as a receipt. Crider v. City Supply Co., 16 Ga. App. 377, 85 S.E. 350, 1915 Ga. App. LEXIS 635 (1915) (decided under former Civil Code 1910, § 5795).

Letter and a reply amounting to nothing more than a receipt was explainable by parol evidence. Hall's Self-Feeding Cotton Gin Co. v. Black, 71 Ga. 450, 1883 Ga. LEXIS 196 (1883) (decided under former Code 1882, § 3807).

Ancient receipt. — When a receipt, as any other written instrument, was more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. Settle v. Alison, 8 Ga. 201, 1850 Ga. LEXIS 35 (1850) (decided under former law).

Administrator's receipt. — Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation. Watts v. Baker, 78 Ga. 622, 3 S.E. 773, 1887 Ga. LEXIS 41 (1887) (decided under former Code 1882, § 3807).

Receipts by wards to guardian. — Receipts in full by wards to their guardian which, in express terms, discharge the guardian from all liability, may be explained by parol evidence. Alexander v. Alexander, 46 Ga. 283, 1872 Ga. LEXIS 55 (1872) (decided under former Code 1868, § 3754).

Attorney's receipts. — When an attorney gave a receipt for a note to collect, in which the note is described, but omitting the fact that the note was endorsed in an action for damages, it was competent to prove by parol the fact of the indorsement. Cox v. Sullivan, 7 Ga. 144, 1849 Ga. LEXIS 112 (1849) (decided under former law); Barclay v. Hopkins, 59 Ga. 562, 1877 Ga. LEXIS 335 (1877) (decided under former Code 1873, § 3807).

Recital in lease that rent paid. — When a written lease states that the rent was a certain amount and contained a mere recital that it was paid, it was permissible to show by parol testimony that only a part of the rent was paid at the execution of the agreement and that the balance was still unpaid. Googe v. York, 38 Ga. App. 62, 142 S.E. 562, 1928 Ga. App. LEXIS 36 (1928) (decided under former Civil Code 1910, § 5795).

Words in a release placed upon a recorded security instrument importing payment of the secured indebtedness are not a contract but constitute a receipt, or evidence of payment of money, and can be contradicted by parol evidence. Security Fin. Corp. v. Blackwood, 111 Ga. App. 850, 143 S.E.2d 515, 1965 Ga. App. LEXIS 1114 (1965) (decided under former Code 1933, § 38-508).

Parol agreement at variance with contract as to time of payment. — When a contract calls for the payment of money at a certain time, evidence of a parol agreement at variance with the writing as to such matter was not admissible. Googe v. York, 38 Ga. App. 62, 142 S.E. 562, 1928 Ga. App. LEXIS 36 (1928) (decided under former Civil Code 1910, § 5795).

Effect of accepting incorrect receipt. — When a passenger accepts an incorrect receipt for fare paid, the passenger was not estopped from asserting that the passenger paid a different amount. Atlantic Coast Line R.R. v. Thomas, 14 Ga. App. 619, 82 S.E. 299, 1914 Ga. App. LEXIS 407 (1914) (decided under former Civil Code 1910, § 5795).

Province of jury to disregard receipt. — If an explanation given by au-

thority of the law was satisfactory, the receipt may be disregarded by the jury. Atlantic Coast Line R.R. v. Blalock, 8 Ga. App. 44, 68 S.E. 743, 1910 Ga. App. LEXIS 19 (1910) (decided under former Civil Code 1910, § 5795).

As receipts for money were only prima facie evidence of payment and may be denied or explained by parol, if an explanation was given, the existence of the receipt may be disregarded by the trier of fact. Meadows v. Phillips, 188 Ga. App. 377, 373 S.E.2d 27, 1988 Ga. App. LEXIS 1045 (1988) (decided under former O.C.G.A. § 24-6-9).

Instructions. — Court should instruct the jury, in addition to the statutory language, that it was a question for the jury to say whether or not the party's evidence sufficiently explained the receipts. McJenkin Ins. & Realty Co. v. Thompson, 79 Ga. App. 473, 54 S.E.2d 336, 1949 Ga. App. LEXIS 673 (1949) (decided under former Code 1933, § 38-508).

Application. — See Newsom v. Reynolds Chevrolet Co., 43 Ga. App. 376, 158 S.E. 763, 1931 Ga. App. LEXIS 373 (1931) (recital in written contract of sale of personalty concerning purchase-money) (decided under former Civil Code 1910, § 5795); Greeson v. Farmers' & Merchants' Bank, 50 Ga. App. 566, 179 S.E. 191, 1935 Ga. App. LEXIS 223 (1935) (deposit slip) (decided under former Code 1933, § 38-508).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1109.

C.J.S.

32A C.J.S., Evidence, § 1149.

ALR.

Admissibility of parol evidence to vary or explain contract implied from the regular endorsement of a bill or note, 92 A.L.R. 721.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 A.L.R.2d 569.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of deposit, or similar instruments, 42 A.L.R.2d 600.

24-3-10. Explanation of blank endorsements.

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements.

History.

Code 1981, § 24-3-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Effect of blank endorsement generally, § 11-3-204.

Provision that signature on negotiable instrument is an endorsement unless instrument clearly indicates that signature was made in some other capacity, § 11-3-402.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3808, former Code 1882, § 3808, former Civil Code 1895, § 5209, former Civil Code 1910, § 5796, former Code 1933, § 38-509, and former O.C.G.A. § 24-6-10 are included in the annotations for this Code section.

Only blank endorsements affected by statute. — Law of blank endorsements changes the rule that even a blank endorsement was not subject to be modified in the endorsement's legal effect by

parol evidence, but the law does not expose any other endorsements to like modification. Meador v. Dollar Sav. Bank, 56 Ga. 605, 1876 Ga. LEXIS 382 (1876) (decided under former Code 1873, § 3808); Jones v. Commercial Credit Co., 52 Ga. App. 796, 184 S.E. 652, 1936 Ga. App. LEXIS 252 (1936) (decided under former Code 1933, § 38-509).

Application to parties or those taking with notice. — As between the parties themselves, or those taking with notice of dishonor or of the actual facts of the endorsement, parol evidence was admissible to explain the endorsement. Pickett v. Bank of Ellijay, 182 Ga. 540, 186 S.E. 426, 1936 Ga. LEXIS 485 (1936); Hopkins Auto. Equip. Co. v. Lyon, 59 Ga. App. 468, 1 S.E.2d 460, 1939 Ga. App. LEXIS 327 (1939) (decided under former Code 1933, § 38-509); see also Massell v. Prudential Ins. Co. of Am., 57 Ga. App. 460, 196 S.E. 115, 1938 Ga. App. LEXIS 313 (1938).

But not to innocent third parties. — Law was plain and emphatic that a blank endorsement may be explained by parol, except as against subsequent holders for value, bona fide and without notice. McMillan v. Fourth Nat'l Bank, 17 Ga. App. 590, 87 S.E. 843, 1916 Ga. App. LEXIS 806 (1916) (decided under former Civil Code 1910, § 5796).

Law had application between the parties, or those taking with notice of dishonor, or of the actual facts of such endorsement, and had no application to the rights of third parties. Pickett v. Bank of Ellijay, 182 Ga. 540, 186 S.E. 426, 1936 Ga. LEXIS 485 (1936) (decided under former Code 1933, § 38-509).

As against a third party, the holder of the note before maturity, for value, and without notice of dishonor or of the actual facts of the endorsement, parol evidence was not admissible to contradict or explain the capacity in which such written endorsement was signed, but the construction thereof was for the court. Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937); see also Hopkins Auto. Equip. Co. v. Lyon, 59 Ga. App. 468, 1 S.E.2d 460, 1939 Ga. App. LEXIS 327 (1939).

Endorsements. — Former statute was not confined to technical endorsements, i.e., endorsements essential to transfer of title, but extended to endorsements in the broader sense which were irregular and unnecessary to pass title. Atkinson v. Bennett, 103 Ga. 508, 30 S.E. 599, 1898 Ga. LEXIS 153 (1898) (decided under former Civil Code 1895, § 5209).

Former statute was not confined merely to blank endorsements in the strict sense as when the endorser wrote only the endorser's name upon the negotiable instrument; the former statute related to all endorsements which were not full or complete. McMillan v. Fourth Nat'l Bank, 17 Ga. App. 590, 87 S.E. 843, 1916 Ga. App. LEXIS 806 (1916) (decided under former Civil Code 1910, § 5796); Proctor v. Royster Guano Co., 21 Ga. App. 617, 94 S.E. 821, 1918 Ga. App. LEXIS 432 (1918) (decided under former Civil Code 1910, § 5796); Bowden v. Owens, 33 Ga. App. 700, 127 S.E. 664, 1925 Ga. App. LEXIS 695 (1925) (decided under former Civil Code 1910, § 5796).

Agreement to endorse may be construed as a contract of guarantee. Georgia Cas. Co. v. Dixie Trust & Sec. Co., 23 Ga. App. 447, 98 S.E. 414, 1919 Ga. App. LEXIS 154 (1919) (decided under former Civil Code 1910, § 5796).

Endorsement in full. — If an endorsement in blank had been partially completed by a subsequent endorser writing the words, "without recourse," and signing the endorser's name, it was not an endorsement in full, and parol evidence was admissible. West Yellow Pine Co. v. Kendrick, 9 Ga. App. 350, 71 S.E. 504, 1911 Ga. App. LEXIS 548 (1911) (decided under former Civil Code 1910, § 5796).

When the endorsement was one "in full," though followed by the words "without recourse," parol evidence was not admissible to explain any unambiguous terms. Odom Realty Co. v. Central Trust Co., 22 Ga. App. 711, 97 S.E. 116, 1918 Ga. App. LEXIS 708 (1918) (decided under former Civil Code 1910, § 5796).

Endorsement for special purpose. — It may be shown by parol evidence that the endorsement of a note was made for a special purpose. Carhart Bros. & Co. v. Wynn, 22 Ga. 24, 1857 Ga. LEXIS 102 (1857) (decided under former law).

Transfer for collection. — When the payee of a note, payable to the payee or order, transfers the note in writing to a third person, without recourse, and signs the transfer, parol evidence was admissible, at the instance of the payee or the payee's executors to show that such transfer was made for collection. This was the rule at common law; and the former statute was not intended to abrogate this principle of the common law, the purpose of the former statute being, not to narrow the admission of parol evidence when it was permissible by common law, but to extend the admission of such evidence to the explanation of endorsements in blank, which was not permissible by that law. Sanders v. Ayers, 155 Ga. 630, 117 S.E. 651, 1923 Ga. LEXIS 137 (1923) (decided under former Civil Code 1910, § 5796).

Accommodation endorsements. — Former law applied to accommodation endorsements. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923) (decided under former Civil Code 1910, § 5796).

Accommodation endorser had the right to stipulate the character of the liability which the endorser assumed in signing a particular paper. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923) (decided under former Civil Code 1910, § 5796).

Endorsements to pass title merely. — Parol evidence was, in any given instance, admissible to show that such an endorsement upon a promissory note was made simply to pass title and not to create liability in the endorser. Bryan v. Windsor, 99 Ga. 176, 25 S.E. 268, 1896 Ga. LEXIS 276 (1896) (decided under former Civil Code 1895, § 5209); Cowart Co. v. Sheffield, 18 Ga. App. 512, 89 S.E. 1101, 1916 Ga. App. LEXIS 1075 (1916) (decided under former Civil Code 1910, § 5796); see also Stapler v. Burns, 43 Ga. 382, 1871 Ga. LEXIS 255 (1871); Galceran v. Noble, 66 Ga. 367, 1881 Ga. LEXIS 25 (1881) (suit by plaintiff who took note after dishonor) (decided under former Code 1873, § 3808).

In a suit by the payee of a promissory note signed in the name of a corporation as maker, a plea by certain individuals who had signed their names in blank upon the back of the note, to the effect that their names were so placed upon the instrument "only for the purpose of perfecting title and passing title, and upon the distinct understanding that they were not to be held liable thereon in any way," did not set up a good defense. Proctor v. Royster Guano Co., 21 Ga. App. 617, 94 S.E. 821, 1918 Ga. App. LEXIS 432 (1918) (decided under former Civil Code 1910, § 5796).

Assuming that the contract of suretyship or accommodation endorsement sued on should be taken as having been signed in blank, a plea merely denying all liability thereunder, without showing any bona fide reason why the endorsement was entered for a purpose other than that of incurring liability, cannot be taken as an effort to explain the true nature and intent of the contract, as was permitted by the former statute, and did not set up a good defense. Pearce v. Swift & Co. Fertilizer Works, 21 Ga. App. 622, 94 S.E. 915, 1918 Ga. App. LEXIS 438 (1918) (see former Civil Code 1910, § 5796).

Capacity of signers. — When a promissory note was upon the note's face payable to the order of the payee at a chartered bank, though reading "we promise to pay," etc., and signed by one person only, the prima facie import of an endorsement thereon in blank by a third person was that such endorser undertook to be liable as a second endorser, and not as a joint maker. The true intent of the parties, however, in an action by the payee upon the instrument, was open to explanation by parol evidence. Neal & Co. v. Wilson, 79 Ga. 736, 5 S.E. 54, 1887 Ga. LEXIS 293 (1887) (decided under former Code 1882, § 3808).

Party signing negotiable paper in blank may show by parol that the party was a surety only. Sibley v. American Exch. Nat'l Bank, 97 Ga. 126, 25 S.E. 470, 1895 Ga. LEXIS 303 (1895) (decided under former Code 1882, § 3808).

When several parties are sued on a check, one as maker and the others as endorsers, the payee could show by parol that those signing apparently as endorsers were in fact sureties or joint makers. James v. Calder, 7 Ga. App. 707, 67 S.E. 1125, 1910 Ga. App. LEXIS 480 (1910) (decided under former Civil Code 1910, § 5796).

Evidence could not be introduced, as against third persons, to show a different capacity, but could be introduced to show as between the immediate parties, an agreement that the person signing should be bound in a capacity different from that shown by the instrument. Massell v. Prudential Ins. Co. of Am., 57 Ga. App. 460, 196 S.E. 115, 1938 Ga. App. LEXIS 313 (1938) (decided under former Code 1933, § 38-509).

Showing agency of drawer. — Agency of the drawer and knowledge by the payee and endorsee cannot be shown by parol in defense to a suit on a draft. Bedell v. Scarlett, 75 Ga. 56, 1885 Ga. LEXIS 69 (1885) (decided under former Code 1882, § 3808).

Endorsement of mortgage note. — Blank endorsement of a mortgage note may be explained by parol to show an agreement that an indebtedness of the mortgagee was to be first satisfied out of the mortgaged property. Willingham & Cone v. Huguenin, 129 Ga. 835, 60 S.E. 186, 1908 Ga. LEXIS 205 (1908) (decided under former Civil Code 1895, § 5209).

RESEARCH REFERENCES

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Endorsement, "to the order of any bank or banker," as a restrictive endorsement, 10 A.L.R. 709.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 35 A.L.R. 1120; 54 A.L.R. 999; 92 A.L.R. 721.

Parol evidence as to liability of irregular endorser to payee, 37 A.L.R. 1222.

CHAPTER 4

RELEVANT EVIDENCE AND ITS LIMITS

Sec.	
24-4-401.	"Relevant evidence" defined.
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24-4-411.	Liability insurance.
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24-4-415.	Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.
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24-4-418.	Admissibility of criminal gang activity; disclosure.
24-4-419.	Admissibility of criminal history record information.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

For comment, "Lyrics for Lockups: Using Rap Lyrics to Prosecute in America," see 69 Mercer L. Rev. 917 (2018).

For comment, "Cameras Down, Hands Up: How the Supreme Court Chilled the Development of the First Amendment Right to Record the Police," see 71 Mercer L. Rev. 1125 (2020).

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ALR.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 4 A.L.R.2d 761.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death, 81 A.L.R.2d 733.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 A.L.R.2d 110.

Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 A.L.R.2d 1044.

Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in vicinity, 45 A.L.R.2d 1121.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or

good faith on issue whether conveyance was in fraud of transferor's creditors, 52 A.L.R.2d 418.

Admissibility and conclusiveness, as against insured, of statements in proof of loss, 58 A.L.R.2d 429.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 A.L.R.2d 556.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 A.L.R.2d 819.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 A.L.R.3d 9.

Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 A.L.R.3d 996.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R.3d 148.

Admissibility on defendant's behalf, as matter in mitigation of punitive damages, of evidence as to his lack of financial resources, 79 A.L.R.3d 1138.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 A.L.R.4th 1072.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 A.L.R.4th 472.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 A.L.R.4th 934.

Proof of mailing by evidence of business or office custom, 45 A.L.R.4th 476.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Thermographic tests: admissibility of test results in personal injury suits, 56 A.L.R.4th 1105.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 A.L.R.4th 576.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 A.L.R. Fed. 541.

Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 A.L.R. Fed. 658.

24-4-401. "Relevant evidence" defined.

As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

History.

Code 1981, § 24-4-401, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Test for relevant evidence, Fed. R. Evid. 401.

Law reviews.

For comment discussing the admissibility of ex parte affidavit in nonjury situations, in light of Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125 (1957), see 20 Ga. B.J. 392 (1958).

For comment discussing admissibility of relevant motion picture films, in light of Long v. General Elec. Co., 213 Ga. 809, 102 S.E.2d 9 (1958), see 22 Ga. B.J. 92 (1959).

For note discussing the possible uses of video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For article, "The Myth of Conditional Relevancy," see 14 Ga. L. Rev. 435 (1980).

For article, "'They Say He's Gay': The Admissibility of Evidence of Sexual Orientation," see 37 Ga. L. Rev. 793 (2003).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5158, former Civil Code 1910, § 5744, former Code 1933, § 38-201, and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

It is error to admit irrelevant evidence. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475, 1983 Ga. App. LEXIS 2078 (1983) (decided under former O.C.G.A. § 24-2-1).

Admission of irrelevant evidence is not a ground for reversal unless it can be shown the evidence was prejudicial. Hill v. State, 177 Ga. App. 850, 341 S.E.2d 322, 1986 Ga. App. LEXIS 1556 (1986) (decided under former O.C.G.A. § 24-2-1).

Objecting party failed to carry burden of proving that admission of evidence unduly prejudicial to that party's rights. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816, 1983 Ga. App. LEXIS 2826 (1983) (decided under former O.C.G.A. § 24-2-1).

When testimony is part material and in part irrelevant, a general objection to the whole is not well taken; if however, the objecting party points out the irrelevant portion of the testimony offered, it is not error for the court to reject the evidence in toto, when the party offering the evidence fails to segregate the relevant portions from those which are irrelevant; and when it is shown that designated portions of the evidence are irrelevant, but the court over such objection admits the testimony as a whole, a new trial will be granted provided such irrelevant testimony could have been harmful to the complaining party. Taintor v. Rogers, 197 Ga. 872, 30 S.E.2d 892, 1944 Ga. LEXIS 349 (1944); Serdula v. State, 356 Ga. App. 94, 845 S.E.2d 362, 2020 Ga. App. LEXIS 359 (2020), cert. denied, No. S20C1508, 2021 Ga. LEXIS 241 (Ga. Apr. 5, 2021) (decided under former Code 1933, § 38-201).

Relevancy Defined

Any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Sample v. Lipscomb, 18 Ga. 554, 1855 Ga. LEXIS 241 (1855) (decided under former law); Walker v. Roberts, 20 Ga. 15, 1856 Ga. LEXIS 4 (1856) (decided under former law); Alexander v. State, 7 Ga. App. 88, 66 S.E. 274, 1909 Ga. App. LEXIS 547 (1909) (decided under former Civil Code 1895, § 5158); Carter v. Marble Prods., Inc., 179 Ga. 122, 175 S.E. 480, 1934 Ga. LEXIS 232 (1934) (decided under former Code 1933, § 38-201); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633, 1949 Ga. App. LEXIS 884 (1949) (decided under former Code 1933, § 38-201); MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431, 1976 Ga. App. LEXIS 2522 (1976) (decided under former Code 1933, § 38-201); Citizens & S. Nat'l Bank v. Hodnett, 139 Ga. App. 839, 229 S.E.2d 792, 1976

Ga. App. LEXIS 2016 (1976) (decided under former Code 1933, § 38-201); Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205, 1979 Ga. App. LEXIS 1619 (1979) (decided under former Code 1933, § 38-201); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23, 1979 Ga. App. LEXIS 1999 (1979) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 1979 Ga. LEXIS 1338 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2937, 64 L. Ed. 2d 821 (1980) (decided under former Code 1933, § 38-201); Kelly v. Floor Bazaar, Inc., 153 Ga. App. 163, 264 S.E.2d 697, 1980 Ga. App. LEXIS 1724 (1980) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305, 1980 Ga. App. LEXIS 2023 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-201); Guest v. State, 155 Ga. App. 374, 270 S.E.2d 904, 1980 Ga. App. LEXIS 2585 (1980) (decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73, 1981 Ga. App. LEXIS 1854 (1981) (decided under former Code 1933, § 38-201).

Every fact or circumstance serving to elucidate or throw light upon the issue being tried constitutes proper evidence in the case. A.A.A. Highway Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462, 1945 Ga. App. LEXIS 627 (1945) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466, 1947 Ga. App. LEXIS 394 (1947); Hodnett v. Hodnett, 99 Ga. App. 285, 109 S.E.2d 285 (1959) (decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73, 1981 Ga. App. LEXIS 1854 (1981) (decided under former Code 1933, § 38-201).

Evidence is relevant if the evidence renders the desired inference more probable than it would be without the evidence. Baker v. State, 246 Ga. 317, 271 S.E.2d 360, 1980 Ga. LEXIS 1102 (1980) (decided under former Code 1933, § 38-201).

Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Owens v. State, 248 Ga. 629, 284 S.E.2d 408, 1981 Ga. LEXIS 1081 (1981) (decided under former Code 1933, § 38-201).

Any fact is relevant which, when taken alone or in connection with another or others, would warrant the drawing by the jury of a logical inference with reference to the issue on trial. Pope v. Triangle Chem. Co., 157 Ga. App. 386, 277 S.E.2d 758, 1981 Ga. App. LEXIS 1829 (1981) (decided under former Code 1933, § 38-201).

Evidence of victim's gang membership irrelevant. — Trial court did not commit plain error by excluding evidence that the first victim was a member of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134, 2018 Ga. LEXIS 71 (2018).

Evidence of witness's feelings towards parties. — Former O.C.G.A. §§ 24-2-1 and 24-9-68 (see now O.C.G.A. §§ 24-4-401 through 24-4-403 and 24-9-622) should be considered in pari materia; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. Lockett v. State, 217 Ga. App. 328, 457 S.E.2d 579, 1995 Ga. App. LEXIS 445 (1995) (decided under former O.C.G.A. § 24-2-1).

Crime participant's testimony relevant. — During the appellant's trial for felony murder, aggravated assault, and possession of a firearm during the commission of a felony, it was not error to admit the testimony of a witness related to their personal observations as a participant and witness to the crimes as the testimony clearly was damaging to the appellant's defense, it was relevant to establish the appellant's guilt and the circumstances surrounding the charged

Relevancy Defined (Cont'd)

crimes, and did not improperly place the appellant's character in issue. Williams v. State, 298 Ga. 538, 783 S.E.2d 594, 2016 Ga. LEXIS 134 (2016).

Testimony on use of Facebook. — Trial court did not err by excluding as irrelevant the testimony of a witness the defendant sought to have testify regarding the witness's general experience using Facebook because the testimony was not relevant to a replaced juror's personal style. Smith v. State, 335 Ga. App. 497, 782 S.E.2d 305, 2016 Ga. App. LEXIS 13 (2016).

Consideration of relevancy in motion to strike. — Georgia Supreme Court held that courts should not ordinarily decide to strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of pleading alone; relevance, which is a broad concept even in the trial context, O.C.G.A. § 24-4-401, is viewed even more liberally in the context of O.C.G.A. § 9-11-12(f) motions. Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, 305 Ga. 401, 825 S.E.2d 206, 2019 Ga. LEXIS 143 (2019).

Criteria of Admissibility

Questions as to the relevancy and admissibility of the testimony are properly for the court, and the question must be determined in each case according to the facts of that particular case and in accordance with the teachings of reason and judicial experience. Dumas v. State, 131 Ga. App. 79, 205 S.E.2d 119, 1974 Ga. App. LEXIS 1336 (1974) (decided under former Code 1933, § 38-201); MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431, 1976 Ga. App. LEXIS 2522 (1976) (decided under former Code 1933, § 38-201); Downs v. State, 145 Ga. App. 588, 244 S.E.2d 113, 1978 Ga. App. LEXIS 2050 (1978) (decided under former Code 1933, § 38-201); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916, 1979 Ga. App. LEXIS 2166 (1979) (decided under former Code 1933, § 38-201); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522, 1980 Ga. App. LEXIS 1987 (1980) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305, 1980 Ga. App. LEXIS 2023 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-201); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206, 1980 Ga. App. LEXIS 2386 (1980) (decided under former Code 1933, § 38-201); Guest v. State, 155 Ga. App. 374, 270 S.E.2d 904, 1980 Ga. App. LEXIS 2585 (1980) (decided under former Code 1933, § 38-201); Baker v. State, 246 Ga. 317, 271 S.E.2d 360, 1980 Ga. LEXIS 1102 (1980) (decided under former Code 1933, § 38-201).

Admissibility of evidence is a matter which rests largely within the sound discretion of the trial court, and if an item of evidence has a tendency to help establish a fact in issue, that is sufficient to make the evidence relevant and admissible. Lewis v. State, 158 Ga. App. 586, 281 S.E.2d 331, 1981 Ga. App. LEXIS 2323 (1981) (decided under former Code 1933, § 38-201).

Insufficient funds evidence relevant and admissible. — Trial court did not err when the court allowed the state to introduce evidence that, on the date of the death of the defendant's wife, the defendant received an email notifying the defendant that the defendant had insufficient funds in the defendant's bank account because it was within the discretion of the trial court to conclude that the evidence was relevant to show that the defendant was under some degree of financial stress and had some reason to be upset on the day of the killing; and the prejudicial effect of the evidence, if any, was minimal and not unfair. McClain v. State, 303 Ga. 6, 810 S.E.2d 77, 2018 Ga. LEXIS 68 (2018).

Evidence of defendants' financial worth. — In a premises liability suit, the trial court erred by excluding evidence of the defendants' security expenditures by failing to determine whether the financial worth of the defendants was relevant to the issue since the plaintiffs contended that such evidence would show that the defendants' increased security expenditures constituted only a small percentage

of the defendants' security budget. Cham v. ECI Mgmt. Corp., 353 Ga. App. 162, 836 S.E.2d 555, 2019 Ga. App. LEXIS 611 (2019), cert. denied, No. S20C0600, 2020 Ga. LEXIS 562 (Ga. July 15, 2020), aff'd, 311 Ga. 170, 856 S.E.2d 267, 2021 Ga. LEXIS 85 (2021).

Delay in outcry based on social standards. — Supreme Court of Georgia did not see how a jury reasonably could infer from the school counselor's testimony that the victim's decision about the timing of the outcry, including suffering nearly three years of abuse before revealing it, was affected (let alone motivated) by the cultural attitudes the school counselor testified to having observed and studied. Martinez-Arias v. State, 313 Ga. 276, 869 S.E.2d 501, 2022 Ga. LEXIS 26 (2022).

Question for the jury. — When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to hear the facts. Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305, 1980 Ga. App. LEXIS 2023 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-201); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206, 1980 Ga. App. LEXIS 2386 (1980) (decided under former Code 1933, § 38-201); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741, 1981 Ga. App. LEXIS 2858 (1981) (decided under former Code 1933, § 38-201).

Relevant evidence cannot be kept from the jury by admission of the fact or waiver of the requirement of proof. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, 1980 Ga. LEXIS 721, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124, 1980 U.S. LEXIS 2103 (1980); Dick v. State, 246 Ga. 697, 273 S.E.2d 124, 1980 Ga. LEXIS 1243 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357, 1981 U.S. LEXIS 2009 (1981).

If the evidence offered by a party is of doubtful relevancy, the evidence should nevertheless be admitted and the weight of the evidence left to the jury. Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319, 1926 Ga. App. LEXIS 833 (1926) (decided under former Civil Code 1910, § 5744); Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937) (decided under former Code 1933, § 38-201); A.A.A. Highway Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462, 1945 Ga. App. LEXIS 627 (1945) (decided under former Code 1933, § 38-201); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466, 1947 Ga. App. LEXIS 394 (1947). Manners v. State, 77 Ga. App. 843, 50 S.E.2d 158, 1948 Ga. App. LEXIS 658 (1948) (decided under former Code 1933, § 38-201); Burton v. Campbell Coal Co., 95 Ga. App. 338, 97 S.E.2d 924, 1957 Ga. App. LEXIS 798 (1957) (decided under former Code 1933, § 38-201); Carroll v. Hayes, 98 Ga. App. 450, 105 S.E.2d 755, 1958 Ga. App. LEXIS 607 (1958) (decided under former Code 1933, § 38-201); Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (decided under former Code 1933, § 38-201); Citizens & S. Nat'l Bank v. Hodnett, 139 Ga. App. 839, 229 S.E.2d 792, 1976 Ga. App. LEXIS 2016 (1976) (decided under former Code 1933, § 38-201); Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205, 1979 Ga. App. LEXIS 1619 (1979) (decided under former Code 1933, § 38-201); Calhoun v. Branan, 149 Ga. App. 160, 253 S.E.2d 838, 1979 Ga. App. LEXIS 1766 (1979) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305, 1980 Ga. App. LEXIS 2023 (1980) (decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73, 1981 Ga. App. LEXIS 1854 (1981) (decided under former Code 1933, § 38-201); Lewis v. State, 158 Ga. App. 586, 281 S.E.2d 331, 1981 Ga. App. LEXIS 2323 (1981) (decided under former Code 1933, § 38-201); Owens v. State, 248 Ga. 629, 284 S.E.2d 408, 1981 Ga. LEXIS 1081 (1981) (decided under former Code 1933, § 38-201).

Question as to admissibility of evidence is not to be determined by the

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evidence's weight; if the evidence has any probative value, however small, and is otherwise competent, the evidence should be admitted. Fuller v. State, 196 Ga. 237, 26 S.E.2d 281, 1943 Ga. LEXIS 319 (1943) (decided under former Code 1933, § 38-201).

Res gestae. — In a murder trial, the trial court did not err in admitting the defendant's own evidence that the defendant had been free-basing cocaine the night before the killing and again on the day of the killing; this evidence, as part and parcel of the crime and as res gestae, was admissible even though the killing did not appear to have directly involved drug usage and even though the evidence incidentally put the defendant's character in issue. Latham v. State, 195 Ga. App. 355, 393 S.E.2d 498, 1990 Ga. App. LEXIS 477 (1990) (decided under former O.C.G.A. § 24-2-1).

Mere circumstance that certain evidence may fall short of proving a fact is not a sufficient reason for excluding that evidence; unless otherwise objectionable, the evidence should be admitted, even though the evidence may only tend to prove the matter in issue. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385, 1942 Ga. LEXIS 445 (1942) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466, 1947 Ga. App. LEXIS 394 (1947); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633, 1949 Ga. App. LEXIS 884 (1949) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-201).

When the admissibility of evidence is doubtful, the burden is on the objecting party to show wherein it is inadmissible. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (decided under former Code 1933, § 38-201).

When evidence is admitted for one purpose, it is not error for the court to fail to instruct the jury to limit the jury's consideration to the one purpose for which the evidence is admissible, in the absence of a request to so instruct the jury. Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862, 1980 Ga. App. LEXIS 2836 (1980) (decided under former Code 1933, § 38-201).

Relevant evidence is not subject to an objection that the evidence might inflame the minds of the jury or prejudice the jury and this is true even when the offered evidence is only cumulative; this rule favors the admission of any relevant evidence, no matter how slight the probative value. Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173, 1979 Ga. LEXIS 761 (1979) (decided under former Code 1933, § 38-201).

Evidence indirectly relevant. — Evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate the issue, and to aid the jury in arriving at the truth of the matter, should be admitted. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937) (decided under former Code 1933, § 38-201); A.A.A. Highway Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462, 1945 Ga. App. LEXIS 627 (1945) (decided under former Code 1933, § 38-201); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-201); Kalish v. King Cabinet Co., 140 Ga. App. 345, 232 S.E.2d 86, 1976 Ga. App. LEXIS 1465 (1976) (decided under former Code 1933, § 38-201); Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573, 1978 Ga. App. LEXIS 1859 (1978) (decided under former Code 1933, § 38-201).

Evidence of similar occurrences is admitted when it appears that all the essential physical conditions on two occasions are identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to matters which cannot reasonably be expected to have affected the result. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540, 1933 Ga. App. LEXIS 27 (1933) (decided under former Code 1933, § 38-201).

Evidence excludable. — It is not error to refuse to receive evidence not perti-

nent to the proceeding. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627, 1937 Ga. App. LEXIS 207 (1937) (decided under former Code 1933, § 38-201); Gaskill v. Brown, 103 Ga. App. 33, 118 S.E.2d 113, 1961 Ga. App. LEXIS 847 (1961) (decided under former Code 1933, § 38-201); Roberts v. Farmer, 127 Ga. App. 237, 193 S.E.2d 216, 1972 Ga. App. LEXIS 844 (1972) (decided under former Code 1933, § 38-201).

County was properly precluded from introducing evidence of a school district's condemnation of a landowner's property to indirectly show that the value of the property the county was condemning was less than that proposed by the landowner's expert. The admission of such evidence would have been improper because: (1) the landowner's compulsory sale of the property to the school district a year after the county initiated the county's condemnation action would not have affected the value of the land at the time of the county's taking a year earlier; and (2) the school district's inability to use the property as rezoned did not change the fact that the property was already in the process of being rezoned in a manner that affected the property's value for purposes of just and adequate compensation to the landowner at the time of the county's taking. Gwinnett County v. Howington, 280 Ga. App. 347, 634 S.E.2d 157, 2006 Ga. App. LEXIS 852 (2006) (decided under former O.C.G.A. § 24-2-1).

In a medical malpractice action, even if evidence of the doctor's professional liability policy, which a decedent's executrix sought as impeachment evidence, consisted of a prior inconsistent statement by the doctor, the trial court properly excluded evidence of the policy, as well as its inclusion in the court's instruction to the jury, as it involved a collateral matter and was more prejudicial than probative. King v. Zakaria, 280 Ga. App. 570, 634 S.E.2d 444, 2006 Ga. App. LEXIS 822 (2006), cert. denied, No. S06C2086, 2006 Ga. LEXIS 953 (Ga. Nov. 6, 2006) (decided under former O.C.G.A. § 24-2-1).

Grounds for new trial. — While generally the admission of irrelevant testimony or illegal evidence, which is wholly immaterial, will not be cause for the grant of a new trial, it will be such ground if it appears of sufficient consequence to injuriously affect the complaining party. Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678, 1904 Ga. LEXIS 232 (1904) (decided under former Civil Code 1895, § 5158); McGriff v. McGriff, 154 Ga. 560, 115 S.E. 21, 1922 Ga. LEXIS 419 (1922) (decided under former Civil Code 1910, § 5744); McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612, 1944 Ga. LEXIS 333 (1944) (decided under former Code 1933, § 38-201); Dismuke v. State, 142 Ga. App. 381, 236 S.E.2d 12, 1977 Ga. App. LEXIS 1624 (1977) (decided under former Code 1933, § 38-201); Drew v. Collins, 153 Ga. App. 794, 266 S.E.2d 570, 1980 Ga. App. LEXIS 1985 (1980) (decided under former Code 1933, § 38-201); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905, 1980 Ga. App. LEXIS 2405 (1980) (decided under former Code 1933, § 38-201).

In a negligent misrepresentation action filed by a business against the business's accountants, the business was entitled to a new trial as the trial court twice erred by admitting irrelevant and prejudicial evidence that: (1) the business was sold for $65.5 million in 2005, in order to establish the business's 1993 value, as the sale was too remote, the business had undergone physical changes since the sale, and the market conditions had also changed; and (2) the loans from a shareholder to purchase and operate the business were later reclassified as a shareholder investment of capital, and that the debt owed to the shareholder was forgiven in exchange for the issuance of additional stock in the business as such was irrelevant to the determination of whether the business was entitled to direct damages. Atlando Holdings, LLC v. BDO Seidman, LLP, 290 Ga. App. 665, 660 S.E.2d 463, 2008 Ga. App. LEXIS 388 (2008), cert. denied, No. S08C1319, 2008 Ga. LEXIS 583 (Ga. June 16, 2008) (decided under former O.C.G.A. § 24-2-1).

Conjectural testimony not competent evidence. — Testimony as to what one thinks would have been the result of an occurrence had the occurrence happened in a particular way is not competent evidence, being merely conjectural and without probative value. Queen v.

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Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933) (decided under former Code 1933, § 38-201).

Foundation for introduction of evidence must be laid. — There is no legal ground to complain of the failure to admit certain evidence or testimony when it is not shown what the evidence or testimony would have been. Lakeview Estates Homeowners Corp. v. Hilltop Enters. of Ga., Inc., 153 Ga. App. 323, 265 S.E.2d 120, 1980 Ga. App. LEXIS 1791 (1980) (decided under former Code 1933, § 38-201).

Relevant Evidence in Civil Cases

Evidence relevant. — See Benton v. Roberts, 41 Ga. App. 189, 152 S.E. 141, 1930 Ga. App. LEXIS 488 (1930) (issue not raised in pleadings) (decided under former Civil Code 1910, § 5744); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933); Miller v. Clermont Banking Co., 180 Ga. 556, 179 S.E. 718, 1935 Ga. LEXIS 476 (1935) (decided under former Code 1933, § 38-201); A.A.A. Highway Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462, 1945 Ga. App. LEXIS 627 (1945) (custom, practice, and habit) (decided under former Code 1933, § 38-201); Wade v. Drinkard, 76 Ga. App. 159, 45 S.E.2d 231, 1947 Ga. App. LEXIS 397 (1947) (automobile accident) (decided under former Code 1933, § 38-201); Norton v. Norton, 213 Ga. 384, 99 S.E.2d 139, 1957 Ga. LEXIS 391 (1957) (treatment of one spouse by another in divorce proceedings) (decided under former Code 1933, § 38-201); Gallant v. Gallant, 223 Ga. 397, 156 S.E.2d 61, 1967 Ga. LEXIS 541 (1967) (financial status of spouse in divorce proceedings) (decided under former Code 1933, § 38-201); Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573, 1978 Ga. App. LEXIS 1859 (1978) (medical treatment for accidental injury) (decided under former Code 1933, § 38-201); Harley-Davidson Motor Co. v. Daniel, 244 Ga. 284, 260 S.E.2d 20, 1979 Ga. LEXIS 1211 (1979) (manufacturer's recall letter) (decided under former Code 1933, § 38-201); Gwinnett Com. Bank v. Flake, 151 Ga. App. 578, 260 S.E.2d 523, 1979 Ga. App. LEXIS 2650 (1979) (documentary evidence) (decided under former Code 1933, § 38-201); Sasser v. Lester, 153 Ga. App. 220, 264 S.E.2d 728, 1980 Ga. App. LEXIS 1757 (1980) (insurance) (decided under former Code 1933, § 38-201); Ponder v. Ponder, 251 Ga. 323, 304 S.E.2d 61, 1983 Ga. LEXIS 748 (1983) (income tax returns) (decided under former Code 1933, § 38-201); Spencer v. Kyle Realty Co., 225 Ga. App. 203, 483 S.E.2d 639 (employment issues).

Evidence of the abusive and violent relationship between a murder victim and a defendant was relevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403) to show defendant's motive, intent, and bent of mind, and the remoteness of events relating to such relationship affected the weight of the evidence but not the admissibility of the evidence. Mote v. State, 277 Ga. 429, 588 S.E.2d 748, 2003 Ga. LEXIS 998 (2003), cert. denied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968, 2004 U.S. LEXIS 3743 (2004) (decided under former O.C.G.A. § 24-2-1).

Evidence that a college had removed credit hours from a student's transcript was relevant to the student's claim for breach of contract damages as the student could recover the cost of tuition for classes the student was forced to repeat due to the college's actions. Morehouse College, Inc. v. McGaha, 277 Ga. App. 529, 627 S.E.2d 39, 2005 Ga. App. LEXIS 1356 (2005), cert. denied, No. S06C1060, 2006 Ga. LEXIS 434 (Ga. June 12, 2006) (decided under former O.C.G.A. § 24-2-1).

In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to evidence showing a legal property owner's record title. The evidence was not hearsay, as alleged by a claimant who sought title to that property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28, 2007 Ga. LEXIS 132 (2007) (decided under former O.C.G.A. § 24-2-1).

In a divorce case after the wife was awarded child support, the trial court did

not abuse the court's discretion in overruling the husband's objection to the wife's questions regarding checks that had been paid to him but that he had not deposited into his bank account. The wife was entitled to inquire whether the deposited and undeposited checks matched the amount of income reported by the husband. Leggette v. Leggette, 284 Ga. 432, 668 S.E.2d 251, 2008 Ga. LEXIS 810 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of diminished value after unauthorized cutting of timber. — Holder of a security deed on property from which timber was cut without authorization was not entitled to damages for the diminished value of the property, but only for the value of the trees; however, evidence of diminished value was relevant for purposes of attorney's fees and punitive damages. Redcedar, LLC v. CML-GA Social Circle, LLC, 341 Ga. App. 110, 798 S.E.2d 334, 2017 Ga. App. LEXIS 136 (2017).

Homeowner countersued a contractor for fraud. — Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405, 2008 Ga. App. LEXIS 1338 (2008), cert. denied, No. S09C0643, 2009 Ga. LEXIS 115 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-2-1).

Evidence of poor nursing home conditions. A trial court did not err in admitting evidence that a nursing home was short staffed, lacked various supplies, that residents, including the deceased patient, were observed soiled with urine and waste, and that residents, including the patient, were not turned as often as required, as relevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). The witnesses were certified nursing assistants who were directly involved in patient care while the patient was a resident, and the evidence showed both negligence and that the nursing home was aware of these conditions and did nothing to correct them. Tucker Nursing Ctr., Inc. v. Mosby, 303 Ga. App. 80, 692 S.E.2d 727, 2010 Ga. App. LEXIS 277 (2010) (decided under former O.C.G.A. § 24-2-1).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (decided under former O.C.G.A. § 24-2-1).

In a legal malpractice action arising from attorney's alleged filing of a voluntary dismissal based upon the erroneous and negligent assumption that the underlying medical malpractice case could be re-filed, the trial court abused its discretion in granting defendant attorneys' motion in limine effectively prohibiting plaintiffs from introducing expert testimony related to the issue of whether, but for the attorneys' negligence, the plaintiffs would have prevailed in the underlying action. It was an abuse of discretion to conlude that plaintiffs were categorically restricted to the evidence already in the record at the time the attorneys represented them. Blackwell v. Potts, 266 Ga. App. 702, 598 S.E.2d 1, 2004 Ga. App. LEXIS 642 (2004), cert. denied, No. S04C1391, 2004 Ga. LEXIS 734 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-2-1).

Evidence in condemnation case. — Trial court erred in denying a housing authority's motion in limine in a condemnation case seeking to exclude evidence of the commercial value of the land at issue; since the property was restricted by a federal court order for use as a public playground, there was no basis for the admission of evidence regarding any potential commercial value that the property could have had under other, nonexistent circumstances. Housing Auth. of Macon v. Younis, 279 Ga. App. 599, 631 S.E.2d 802, 2006 Ga. App. LEXIS 651 (2006) (decided under former O.C.G.A. § 24-2-1).

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Trial court properly granted the Georgia Department of Transportation's (DOT) motion in limine to preclude a property owner from questioning an expert witness about the fact that the expert had been originally hired by the DOT in the DOT's condemnation proceeding as that information was not relevant to the just and adequate compensation determination. H.D. McCondichie Props. v. Ga. DOT, 280 Ga. App. 197, 633 S.E.2d 558, 2006 Ga. App. LEXIS 684 (2006), cert. denied, No. S06C1959, 2006 Ga. LEXIS 673 (Ga. Sept. 18, 2006) (decided under former O.C.G.A. § 24-2-1).

In a condemnation action, the trial court erred in denying a lessor's motion in limine to exclude evidence of the lessor's entitlement to statutory pre-judgment interest under O.C.G.A. § 32-3-19 because the fact that the trial court could later instruct the jury to disregard irrelevant evidence was not a reason to allow the jury to hear the irrelevant evidence; under the statutory framework of § 32-3-19, the amount of pre-judgment interest due a condemnee is determined after the jury enters a verdict. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862, 2010 Ga. App. LEXIS 1152 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court did not abuse the court's discretion in denying the lessees' motion in limine to exclude evidence that the lessees and the lessor knew of the possible condemnation when the lessees sold the property to the lessor because the Georgia Department of Transportation (DOT) sought to use the evidence to discredit the estimate the lessees and lessor made of the property's market value at the time of the taking by challenging the use of the sale as a factor in reaching that estimate used in that way, the evidence of the knowledge of a possible condemnation would bear, at least indirectly, on the question of the just and adequate compensation due the condemnees. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862, 2010 Ga. App. LEXIS 1152 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court did not err in denying a motion in limine to exclude evidence of the rent a lessee charged a sublessee for use of the property before the lessee sold the property to a lessor because the evidence bore upon the property's market value. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862, 2010 Ga. App. LEXIS 1152 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court erred in denying the lessees' motion in limine to exclude evidence of the cause of the fire that damaged the restaurant that was on the real property at issue because evidence concerning the reasons giving rise to the uncertainty in insurance coverage (i.e., the cause of the fire), as opposed to the fact of uncertainty, was not relevant to the issue of just and adequate compensation. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862, 2010 Ga. App. LEXIS 1152 (2010) (decided under former O.C.G.A. § 24-2-1).

Evidence in negligent construction cases. — Builder sued homeowners to recover for services rendered in constructing a house under a theory of quantum meruit; the homeowners alleged negligent construction. The trial court properly admitted evidence of the homeowners' listing price for the home as the court instructed the jury that this evidence could be considered only to show the homeowners' opinion of the home's value, in regard to the quantum meruit and negligent construction claims, not to show the home's fair market value. Biederbeck v. Marbut, 294 Ga. App. 799, 670 S.E.2d 483, 2008 Ga. App. LEXIS 1316 (2008) (decided under former O.C.G.A. § 24-2-1).

Similar transaction evidence on failure to pay. — In an action alleging an automobile company's negligent design and placement of the fuel system in a car model, evidence relating to crash tests on vehicles from which the car model involved in the automobile collision evolved, a composite video tape of crash tests and related exhibits and internal documents were relevant to the issue of the automobile manufacturer's continuing negligence in regard to its knowledge of the safety hazard, its failure to warn the public of

the danger and its continued marketing of the dangerous product, as well as to the issue of callous disregard upon which basis punitive damages were sought. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470, 1984 Ga. App. LEXIS 2164 (1984) (decided under former O.C.G.A. § 24-2-1).

In an action to recover expert fees, admitting evidence of defendant's failure to pay another expert was not error because of the similarity of the transactions involved and the issues of bad faith and fraud. Kent v. White, 238 Ga. App. 792, 520 S.E.2d 481 (decided under former O.C.G.A. § 24-2-1).

Evidence of witness's compensation relevant. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Contract damages. — In an action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement, evidence of actual commissions earned in the representative's territory was relevant to prove the representative's claim for damages. Douglas & Lomason Co. v. Hall, 212 Ga. App. 475, 441 S.E.2d 870, 1994 Ga. App. LEXIS 304 (1994), cert. denied, No. S94C1045, 1994 Ga. LEXIS 700 (Ga. May 5, 1994) (decided under former O.C.G.A. § 24-2-1).

Summary judgment affidavit was not relevant to material issue. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortuous interference with the company's contractual relations, based on an allegedly illegal lien filed by the supplier against a property, when no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403), as it related to the supplier's failure to sign a lien waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418, 2003 Ga. App. LEXIS 1002 (2003) (decided under former O.C.G.A. § 24-2-1).

Prior lease violations. — Trial court did not abuse the court's discretion by admitting evidence of previous lease violations in eviction proceedings instituted primarily for a tenant's child's criminal activity, but secondarily based on serious and repeated violations of the material terms of the tenant's lease with a public housing authority; the prior violations were relevant to the secondary reason for terminating the tenant's lease. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245, 2003 Ga. App. LEXIS 1465 (2003) (decided under former O.C.G.A. § 24-2-1).

Autopsy photographs. — In a wrongful death action, it was not error for the trial court to refuse to allow publication to the jury of autopsy pictures of the decedent's bowel. Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420, 2000 Ga. App. LEXIS 460 (2000), cert. denied, No. S00C1375, 2000 Ga. LEXIS 911 (Ga. Nov. 30, 2000) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in allowing certain autopsy photographs of the victim to be admitted because the challenged photographs did not depict the victim's autopsy incisions, and the photographs were not especially gory or gruesome in the context of autopsy photographs in a murder case; the photographs were relevant to show the nature and location of the victim's injuries, which corroborated the state's evidence of the circumstances of the killing; contrary to the defendant's assertion, the victim did not die solely

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from manual strangulation, but also from blunt force head trauma, and the photographs illustrated the nature and extent of the physical beating and resulting trauma sustained by the victim; and exclusion based on unfair prejudice was not warranted. Pike v. State, 302 Ga. 795, 809 S.E.2d 756, 2018 Ga. LEXIS 56 (2018).

Trial court did not abuse the court's discretion by admitting into evidence an autopsy photograph as relevant evidence because, even though the trial court concluded that the photograph was unpleasant to look at, the court also concluded that the medical examiner stated that the examiner's explanation of the trajectory and direction of the gunshot could be better explained by the examiner through the use of the photograph. Mitchell v. State, 307 Ga. 855, 838 S.E.2d 847, 2020 Ga. LEXIS 84 (2020).

Testimony by officer regarding merger. — Testimony by an officer and agent of the successor legal entity regarding the merger was relevant and material to explain the course of conduct and corporate intent of the successor corporation after the merger and how the official came to have custody of the records. NationsBank v. Tucker, 231 Ga. App. 622, 500 S.E.2d 378 (decided under former O.C.G.A. § 24-2-1).

Photos in condemnation cases. — Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to low income housing because the utility: (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. Ga. Power Co. v. Jones, 277 Ga. App. 332, 626 S.E.2d 554, 2006 Ga. App. LEXIS 93 (2006), cert. denied, No. S06C0985, 2006 Ga. LEXIS 359 (Ga. May 18, 2006) (decided under former O.C.G.A. § 24-2-1).

Background and testimony about impact. — Trial court did not err in preventing an invitee from providing the jury with background information regarding the effects of the injuries on the parties as: (1) the invitee cited no authorities to support this proposition; (2) lost wages were not an element of damages in a loss of consortium claim; (3) witness after witness testified about the effects of the invitee's injury on the invitee and the family; and (4) the issue was moot because a loss of consortium claim was derivative of the invitee's claim, and the jury declined to award the invitee any damages. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207, 2006 Ga. App. LEXIS 168 (2006) (decided under former O.C.G.A. § 24-2-1).

Breach of contract. — In a breach of contract suit brought by a contractor who was engaged to advertise a computer program, the trial court properly excluded as irrelevant evidence regarding the purported illegality of the sale of the program as the reason why the defendants stopped selling the program was irrelevant to the issue of whether the contractor was owed commissions from past sales; even if it was relevant, the trial court was authorized to conclude that the substantially prejudicial impact of the evidence far outweighed any probative value. Smith v. Saulsbury, 286 Ga. App. 322, 649 S.E.2d 344, 2007 Ga. App. LEXIS 759 (2007) (decided under former O.C.G.A. § 24-2-1).

With regard to debtor's claim against creditor for intentional infliction of emotional distress, trial court properly excluded as irrelevant the testimony of debtor's coworker that creditor had been calling coworker at work because it mistook coworker for debtor; this conduct did not affect debtor, who was not aware of it until after debtor had a confrontation with creditor and its employees, and thus the conduct was irrelevant to issue of whether creditor's and employees' conduct was extreme or outrageous. Cook v. Covington Credit of Ga., Inc., 290 Ga. App. 825, 660

S.E.2d 855, 2008 Ga. App. LEXIS 421 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of bad faith excluded. — Trial court properly granted an insurer's motion in limine to exclude all evidence of bad faith and claims handling from the coverage trial because the trial court reasonably concluded that information involving bad faith and whether the insurer acted appropriately with respect to claims administration exceeded the scope of the coverage issues; the trial court found that issues regarding the insurer's handling of the claim and whether the insurer abided by the insurer's claims manual related to bad faith, not coverage, and thus could not be addressed by either party during the coverage phase. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614, 2011 Ga. App. LEXIS 553 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in refusing to permit record title holder's descendants to show that a developer agreed to pay a property owner for an easement on the property because the trial court correctly limited the evidence to the issue of adverse possession; the developer's offer to pay the owner was irrelevant to the issues decided by the jury. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697, 2012 Ga. LEXIS 88 (2012) (decided under former O.C.G.A. § 24-2-1).

Witness failure to appear for lack of timely subpoena service. — In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under former O.C.G.A. § 24-10-25(a) (see now O.C.G.A. § 24-13-26); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). Buster v. Poole, 279 Ga. App. 828, 632 S.E.2d 680, 2006 Ga. App. LEXIS 638 (2006), cert. dismissed, No. S06C1865, 2006 Ga. LEXIS 876 (Ga. Oct. 16, 2006) (decided under former O.C.G.A. § 24-2-1).

Document which is not relevant to any issue in a civil action is properly excluded. Farris v. Pazol, 166 Ga. App. 760, 305 S.E.2d 472, 1983 Ga. App. LEXIS 2319 (1983) (decided under former O.C.G.A. § 24-2-1); City of Dalton v. Smith, 210 Ga. App. 858, 437 S.E.2d 827, 1993 Ga. App. LEXIS 1367 (1993), cert. denied, No. S94C0327, 1994 Ga. LEXIS 230 (Ga. Jan. 27, 1994) (decided under former O.C.G.A. § 24-2-1).

Evidence of settlements with other tortfeasors. — In an action against a vascular surgeon for medical negligence in ordering an arteriogram to be performed on a patient and in not being available to direct complications resulting therefrom, it was error to admit evidence of plaintiff's settlements with other alleged tortfeasors since the relevant issues were whether the defendant doctor was negligent and, if so, the damages for which the plaintiff should be compensated. Allison v. Patel, 211 Ga. App. 376, 438 S.E.2d 920, 1993 Ga. App. LEXIS 1521 (1993), cert. denied, No. S94C0501, 1994 Ga. LEXIS 559 (Ga. Mar. 10, 1994) (decided under former O.C.G.A. § 24-2-1).

Fact and amount of a settlement with other parties is not relevant to the amount of damages to be awarded and were properly excluded from the jury's consideration. Bryant v. Haynie, 216 Ga. App. 430, 454 S.E.2d 533, 1995 Ga. App. LEXIS 165 (1995) (decided under former O.C.G.A. § 24-2-1).

Limine ruling not violated. — Trial court did not abuse the court's discretion in concluding that an insurer did not violate the court's limine ruling excluding all evidence of bad faith and claims handling by submitting evidence that an insured did not claim that a disability arose from injury until after the insured's benefits were terminated under the sickness clause of the insurance policy because evidence relating to how the insurer characterized the condition was relevant to whether the condition arose from an injury or a sickness; although the insurer's assertion that the insured received pay-

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ment under the policy potentially touched on claims handling, it also gave the jury context for how the disability claim and the litigation arose. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614, 2011 Ga. App. LEXIS 553 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-2-1).

Testimony on date rape drug admitted. — Trial court did not abuse the court's discretion in denying an auto driver's motion in limine and in permitting a man, with whom the driver had been prior to an auto accident, to testify that the driver of the car, who collided the driver's car with another vehicle, had been at the man's residence to provide sex for money as the evidence was relevant to the driver's defense that the man had secretly slipped the driver a date rape drug, causing the driver to flee from the man. Further, the trial court did not abuse the court's discretion in granting the motion to the extent that the man could only testify as to the woman being a prostitute as impeachment evidence. Jackson v. Heard, 264 Ga. App. 620, 591 S.E.2d 487, 2003 Ga. App. LEXIS 1540 (2003) (decided under former O.C.G.A. § 24-2-1).

Observations of teacher's conduct in student's class were relevant and material to the issue of the teacher's alleged mistreatment of the student. Houston v. Kinder-Care Learning Ctrs., Inc., 208 Ga. App. 235, 430 S.E.2d 24, 1993 Ga. App. LEXIS 462 (1993), cert. denied, No. S93C1098, 1993 Ga. LEXIS 766 (Ga. July 1, 1993) (decided under former O.C.G.A. § 24-2-1).

Lottery ticket investigator's statement was relevant. — In a dispute over a $1 million lottery ticket, an investigator's testimony regarding the investigator's conversations with one claimant, including that the claimant did not remember what gas station the claimant purchased the ticket from and that the claimant claimed to always play the numbers on the ticket, which was a quick pick ticket, was highly relevant to the main issue in the case and was properly allowed. Heard v. Payne, 350 Ga. App. 283, 828 S.E.2d 657, 2019 Ga. App. LEXIS 287 (2019), cert. denied, No. S19C1350, 2020 Ga. LEXIS 19 (Ga. Jan. 13, 2020).

Evidence in malicious prosecution case. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that the plaintiff's past criminal history was relevant, should have thereafter considered whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because those arrests potentially would confuse or mislead the jury. Rivers v. K-Mart Corp., 321 Ga. App. 788, 743 S.E.2d 464, 2013 Ga. App. LEXIS 409 (2013).

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Character. — General character of the defendant and the defendant's conduct in other transactions is irrelevant unless the defendant chooses to put the defendant's character in issue. Bacon v. State, 209 Ga. 261, 71 S.E.2d 615, 1952 Ga. LEXIS 465 (1952), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, § 38-201); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185, 1968 Ga. App. LEXIS 1479 (1968) (decided under former Code 1933, § 38-201); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45, 1969 Ga. App. LEXIS 725 (1969) (decided under former Code 1933, § 38-201); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409, 1972 Ga. App. LEXIS 1430 (1972) (decided under former Code 1933, § 38-201); Nooner v. State, 131 Ga. App. 563, 206 S.E.2d 660, 1974 Ga. App. LEXIS 1471 (1974) (decided under former Code 1933, § 38-201); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275, 1976 Ga. LEXIS 1014 (1976) (decided under former Code 1933, § 38-201); Brown v. State, 237 Ga. 467, 228 S.E.2d 853, 1976 Ga. LEXIS 1268 (1976) (decided under former Code 1933, § 38-201).

For cases concerning evidence of state of mind, plan, intent, or motive. — See Thomas v. State, 244 Ga. 608, 261 S.E.2d 389, 1979 Ga. LEXIS 1345 (1979) (decided under former Code 1933, § 38-201); Smith v. State, 151 Ga. App. 697, 261

S.E.2d 439, 1979 Ga. App. LEXIS 2754 (1979) (decided under former Code 1933, § 38-201); Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755, 1980 Ga. App. LEXIS 3219 (1980) (decided under former Code 1933, § 38-201).

As defendant, a sheriff, was not empowered to use the sheriff's department as defendant's personal domain, evidence of corruption in the sheriff's office was relevant and admissible, and the prosecution was well within bounds when the prosecution theorized that defendant killed the victim, a political opponent, to prevent the victim from uncovering evidence of defendant's corruption. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512, 2005 Ga. LEXIS 449 (2005) (decided under former O.C.G.A. § 24-2-1).

By placing intent at issue by claiming at trial that the defendant's delusions completely negated criminal intent, the state needed evidence that the defendant acted with intent to commit the crimes of murder and possession of a firearm; thus, the trial court did not abuse the court's discretion in admitting evidence of a prior New York crime since as to both crimes, the defendant used a handgun to assault people that the defendant perceived had committed an offense against the defendant. Castillo-Velasquez v. State, 305 Ga. 644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

Evidence of the counterfeit bills that were released from the appellant's vehicle were relevant to explain why the appellant fled from law enforcement and engaged in dangerous behavior leading up to the fatal crash because, though motive was not an essential element of any offense, evidence of motive was generally relevant in murder prosecutions, and trial counsel did not perform deficiently in failing to object. Calhoun v. State, 308 Ga. 146, 839 S.E.2d 612, 2020 Ga. LEXIS 138 (2020).

Trial court did not abuse the court's discretion by admitting testimony that prior to the murder defendant owned dirt bikes, the victim had expressed an interest in purchasing one, and one was stolen during a test drive because defendant's motive for shooting the victim was relevant and probative given that only weeks had passed between the bike being stolen and the victim's murder, and defendant admitted shooting someone he believed had stolen one of his bikes. Jordan v. State, 313 Ga. 841, 874 S.E.2d 67, 2022 Ga. LEXIS 161 (2022).

Defendant's demeanor at the time of arrest. — Trial court did not abuse the court's discretion by allowing a detective who arrested defendant after defendant took a woman's purse to testify that, when defendant was arrested, defendant was uncooperative, verbally combative, and smelled of alcohol. Moore v. State, 265 Ga. App. 511, 594 S.E.2d 734, 2004 Ga. App. LEXIS 166 (2004) (decided under former O.C.G.A. § 24-2-1).

Circumstances of defendant's arrest. — Gun was properly admitted into evidence at a trial on sex offenses because the gun was relevant to the issue of a witness's alleged bias and was also admissible as evidence of the circumstances of the defendant's arrest; on the night of the defendant's arrest, the witness told the police that the defendant had just raped the witness's niece and was carrying a 9mm gun. Ward v. State, 274 Ga. App. 511, 618 S.E.2d 154, 2005 Ga. App. LEXIS 791 (2005), cert. denied, No. S05C1975, 2005 Ga. LEXIS 880 (Ga. Nov. 18, 2005) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that they were not to consider the warrant for any purpose other than to explain the officers' presence at the defendant's home. Thrasher v. State, 289 Ga. App. 399, 657 S.E.2d 316, 2008 Ga. App. LEXIS 97 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence discovered in search of co-indictee's home. — Evidence recovered by law enforcement during a search of the co-indictee's home, including marijuana, baggies and a digital scale, was clearly relevant and admissible as the

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defendant and the co-indictee were jointly charged with conspiracy to distribute marijuana based upon their attempt to sell marijuana to the victim prior to the victim's death; furthermore, for the same reasons, the defendant failed to show that the admission of that evidence was more prejudicial than probative. Thorpe v. State, 304 Ga. 266, 818 S.E.2d 547, 2018 Ga. LEXIS 545 (2018).

Commission of independent offenses. — Evidence which in any manner shows or tends to show that the accused has committed another crime separate and distinct from that for which the accused is on trial is generally irrelevant and inadmissible, unless there be shown some logical connection between the two from which it can be said that proof of the one tends to establish the other. Patterson v. State, 121 Ga. App. 159, 172 S.E.2d 873, 1970 Ga. App. LEXIS 1152 (1970); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409, 1972 Ga. App. LEXIS 1430 (1972) (decided under former Code 1933, § 38-201); Banks v. State, 169 Ga. App. 645, 314 S.E.2d 480, 1984 Ga. App. LEXIS 2794 (1984) (decided under former O.C.G.A. § 24-2-1).

Evidence which shows or tends to show that the defendant has committed another crime independent of the offenses for which defendant is on trial is irrelevant and inadmissible. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114, 1981 Ga. App. LEXIS 2722 (1981) (decided under former O.C.G.A. § 24-2-1).

Intrinsic evidence. — Trial court did not abuse the court's discretion by admitting evidence related to the shootings at another location as intrinsic evidence because the evidence was relevant as ballistics evidence linked the gambling house and restaurant shootings to the other location and the shooting at the other location occurred a few hours before one gambling house shooting and a week before the restaurant shooting. Johnson v. State, 312 Ga. 481, 863 S.E.2d 137, 2021 Ga. LEXIS 625 (2021).

Evidence not relevant to intent. — Trial court erred in excluding proffered evidence regarding how the detention center handled the defendant and the other detainee after the fight, because the proffered evidence dealt with administrative actions or decisions that occurred after the defendant struck the officer and those actions or decisions were not part of the circumstances connected with the act for which the defendant was accused and, thus, was not relevant under former O.C.G.A. § 24-2-1 to the issue of intent. Hickey v. State, 325 Ga. App. 496, 753 S.E.2d 143, 2013 Ga. App. LEXIS 1007 (2013) (decided under former O.C.G.A. § 24-2-4).

Evidence showing res gestae. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the res gestae of the child molestation crime. Prather v. State, 279 Ga. App. 552, 631 S.E.2d 758, 2006 Ga. App. LEXIS 632 (2006) (decided under former O.C.G.A. § 24-2-1).

Because the evidence presented against both the defendants showed numerous connections between the crimes such that proof of the former tended to prove the latter, and a vehicle theft committed by both the defendants earlier in the day could be considered a continuation of a crime spree and therefore admissible as part of the res gestae, the trial court did not err in admitting the evidence as similar crimes evidence. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514, 2007 Ga. App. LEXIS 983 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the res gestae as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689, 2007

Ga. LEXIS 716 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence that the defendant hid under a bed when police came to execute an arrest warrant was properly admitted as the evidence was part of the res gestae of the arrest. Gilford v. State, 295 Ga. App. 651, 673 S.E.2d 40, 2009 Ga. App. LEXIS 56 (2009), cert. denied, No. S09C0827, 2009 Ga. LEXIS 258 (Ga. Apr. 28, 2009), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-1).

Admission of other acts evidence in murder trial constituted harmless error. — Trial court abused the court's discretion admitting 2005 shooting evidence of the appellant's firing a handgun, but that error was harmless in light of the array of other strong evidence demonstrating the appellant's guilt and considering it was an evidentiary error and not of constitutional dimensions; given the overall strength of the other evidence of the appellant's guilt, the Georgia Supreme Court held that it was highly probable that erroneously admitted evidence of the 2005 shooting did not contribute to the jury's verdict. Jackson v. State, 306 Ga. 69, 829 S.E.2d 142, 2019 Ga. LEXIS 392 (2019).

When evidence of other crime admissible. — When evidence is relevant for purpose of showing circumstances of arrest, it will not be excluded because the evidence incidentally shows commission of another crime. Ray v. State, 157 Ga. App. 519, 277 S.E.2d 804, 1981 Ga. App. LEXIS 1887 (1981) (decided under former O.C.G.A. § 24-2-1).

Two competing principles must be considered in deciding whether to admit testimony relating to an offense other than the one charged: on the one hand, there is the rule that evidence of the commission of a crime other than the one charged is generally not admissible; on the other hand, there is the rule that testimony as to the circumstances connected with the arrest is admissible. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177, 1981 Ga. App. LEXIS 1946 (1981) (decided under former O.C.G.A. § 24-2-1).

Evidence of other crimes may be admitted if there is sufficient similarity or connection between the other crimes and the crime charged that proof of the former tends to prove the latter. Ballweg v. State, 158 Ga. App. 576, 281 S.E.2d 319, 1981 Ga. App. LEXIS 2316 (1981) (decided under former O.C.G.A. § 24-2-1).

While no gun was used in committing the crimes for which the defendant was being tried, evidence of the gun used in a prior aggravated assault and armed robbery of a separate victim was relevant to the charges being tried because the evidence connected the defendant to the identification documents presented to police in close proximity to the instant victim's body by the person who had custody of the victim's car on the day the victim was killed. Brooks v. State, 281 Ga. 514, 640 S.E.2d 280, 2007 Ga. LEXIS 49 (2007) (decided under former O.C.G.A. § 24-2-1).

Because evidence of the defendant's prior drug use, and history of crimes committed against family members fueled by that drug use, were properly admitted as relevant to the crime's charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. Jones v. State, 283 Ga. App. 812, 642 S.E.2d 887, 2007 Ga. App. LEXIS 208 (2007) (decided under former O.C.G.A. § 24-2-1).

Trial court's ruling that the other-acts evidence would not be admitted was vacated because the appellate court could not discern whether the trial court considered whether the defendants had taken affirmative steps to withdraw intent as an element to be proved by the state or whether it compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27, 2015 Ga. App. LEXIS 498 (2015).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because the evidence was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not

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drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414, 2016 Ga. App. LEXIS 547 (2016).

Other acts evidence regarding two earlier instances of obstructing a law enforcement officer was relevant and admissible because, by expressly challenging whether the officer was lawfully discharging the officer's official duties, the defendant implicitly challenged the defendant's own knowledge that the officer's commands to the defendant were lawful; and it established that, on past occasions, the defendant had encountered officers under similar circumstances and been apprehended or accused of obstructing the officers when the defendant fled, such that the defendant knew that the officer's command that the defendant talk with the officer was made in the lawful discharge of the officer's official duties and that the defendant was not free to flee. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156, 2016 Ga. App. LEXIS 608 (2016).

Testimony regarding similar transactions that occurred years earlier was properly admitted as it was relevant to show the defendant's lustful disposition with respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498, 2017 Ga. App. LEXIS 150 (2017).

O.C.G.A. § 24-4-404(b) only relates to "other" crimes, wrongs, or acts that are independent of or extrinsic to the charged offense. If the other crime, wrong, or act is intrinsic to the charged offense or inextricably intertwined with it, it is admissible under O.C.G.A. § 24-4-401. Such evidence was called part of the res gestae of the offense under the rules in effect prior to the new Evidence Code, adopted in 2013. State v. Battle, 344 Ga. App. 565, 812 S.E.2d 1, 2018 Ga. App. LEXIS 68 (2018).

Trial court did not plainly err in admitting the defendant's Mississippi driving record which related to a prior DUI conviction because the defendant failed to identify any specific evidence that could have been presented to prove the defendant had notice that the defendant was driving on a suspended license and, as the defendant admitted, the redacted driving record was clearly relevant. Hines v. State, 350 Ga. App. 752, 830 S.E.2d 380, 2019 Ga. App. LEXIS 375 (2019).

Trial court did not abuse the court's discretion by allowing the admission of evidence regarding the defendant's prior drug possession arrest because the evidence of prior drug activity was highly probative of intent to sell a controlled substance for which the defendant was on trial and the prior act of drug possession happended while the defendant was driving a car in the same area where the sale of the methamphetamine during the first buy occurred. Moton v. State, 351 Ga. App. 789, 833 S.E.2d 171, 2019 Ga. App. LEXIS 488 (2019).

Although a prior victim's testimony was remote in time, the trial court did not abuse the court's discretion in allowing the prior instance of child molestation to be admitted because it was relevant to show the defendant's lustful disposition with respect to younger females. Wilson v. State, 354 Ga. App. 64, 840 S.E.2d 601, 2020 Ga. App. LEXIS 120 (2020), aff'd, 312 Ga. 174, 860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Trial court did not abuse the court's discretion when the court concluded that the evidence of two prior acts was relevant because the 2002 attack showed that the defendant, when affronted by a romantic partner, would call on male friends to help subdue the partner, as well as the 2003 vase-throwing incident with the defendant biting the victim, were both strikingly similar to the assault upon the defendant's boyfriend, which resulted in the boyfriend's death. Morgan v. State, 354 Ga. App. 754, 841 S.E.2d 430, 2020 Ga. App. LEXIS 216 (2020).

Defendant's prior offenses of child molestation were relevant because the prior offenses showed that the defendant had the propensity, as well as the motive and intent, to engage in offenses of child molestation. Wilson v. State, 312 Ga. 174,

860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Trial court did not err by allowing the state to introduce extrinsic evidence of the defendant's two prior traffic violations and two videos the defendant posted on the defendant's social media account because the evidence was relevant to show the defendant's intent to engage in a chase and to show the defendant's knowledge of traffic regulations. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Trial court did not abuse the court's discretion by admitting evidence that a rifle and shell casings were stolen from a police officer's apartment, which the state alleged were used in the victim's murder, because the admission of the physical evidence was not hearsay and because the evidence was relevant and probative, as the weapon and ammunition were stolen four months before the murder, they were the same caliber used in the murder, the exact number of branded cartridges stolen were found at the murder scene, and defendant's known associate lived next door to where the burglary occurred. Jordan v. State, 313 Ga. 841, 874 S.E.2d 67, 2022 Ga. LEXIS 161 (2022).

Evidence of defendant's gang affiliation and claimed prior murders relevant after defendant opened door. — In the defendant's murder trial, defense counsel opened the door to evidence from two witnesses about the defendant's gang activities and prior murders by suggesting that the witnesses had named the defendant as the shooter because the witnesses were afraid of the actual shooter; this evidence was relevant under O.C.G.A. § 24-4-401 and not unduly prejudicial under O.C.G.A. § 24-4-403. Strother v. State, 305 Ga. 838, 828 S.E.2d 327, 2019 Ga. LEXIS 341 (2019).

Prior convictions inadmissible. — In a malice murder and aggravated assault case, because the defendant never claimed, nor was there any evidence to suggest, that the shooting was the result of an accident or mistake, whether the defendant's actions were the result of an accident or mistake was irrelevant, and it was error for the trial court to admit the 2006 guilty pleas to aggravated assault. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

Prior conviction of person not testifying inadmissible. — Defendant's attempt to introduce a prior conviction of a person who did not testify or appear at the trial was correctly rejected by the trial court as irrelevant to the issues on trial. Holder v. State, 194 Ga. App. 790, 391 S.E.2d 808, 1990 Ga. App. LEXIS 309 (1990) (decided under former O.C.G.A. § 24-2-1).

Criminal convictions of a person not called as a witness were not admissible for purposes of impeachment, and since the person's criminal history was not otherwise relevant, its exclusion under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403) was proper. Gadson v. State, 252 Ga. App. 347, 556 S.E.2d 449, 2001 Ga. App. LEXIS 1279 (2001) (decided under former O.C.G.A. § 24-2-1).

Testimony that defendant was suspected of the theft of a gun used in committing offenses was probative of whether defendant was in possession of a particular gun, the purpose for which the testimony was offered. Baker v. State, 225 Ga. App. 848, 485 S.E.2d 548 (decided under former O.C.G.A. § 24-2-1).

Prior difficulties evidence. — When the defendant was charged with aggravated assault, evidence of a previous incident when the defendant had punched the victim in the face while the victim was sleeping was admissible as prior difficulties evidence because the evidence was relevant to show the defendant's motive, intent, and bent of mind. McCullors v. State, 291 Ga. App. 393, 662 S.E.2d 197, 2008 Ga. App. LEXIS 507 (2008) (decided under former O.C.G.A. § 24-2-1).

Testimony by the victims' mother regarding the defendant's prior history of violence toward the children or in the children's presence was relevant as probative of the defendant's ability to execute the threats to which the victims had testified. Allen v. State, 345 Ga. App. 599, 814 S.E.2d 740, 2018 Ga. App. LEXIS 245 (2018).

Prior conduct by victim. — In a murder prosecution in which the defendant admitted that the defendant killed

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the victim, but claimed that the defendant was justified in doing so because of his daughter's molestation by the victim, evidence of the alleged molestation was not relevant since the law will not justify a killing for deliberate revenge no matter how grievous the past wrong may have been. Brown v. State, 270 Ga. 601, 512 S.E.2d 260 (decided under former O.C.G.A. § 24-2-1).

Testimony that defendant was suspected of the theft of a gun used in committing offenses was probative of whether defendant was in possession of a particular gun, the purpose for which the testimony was offered. Baker v. State, 225 Ga. App. 848, 485 S.E.2d 548 (decided under former O.C.G.A. § 24-2-1).

In a prosecution for rape, the trial court properly barred defendant's crossexamination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. Lee v. State, 241 Ga. App. 182, 525 S.E.2d 426 (decided under former O.C.G.A. § 24-2-1).

Trial court's error in not permitting the defendant to show that the wife's minor daughter, whom the defendant was charged with molesting, made an allegation of molestation with respect to another individual that the daughter later denied, was harmless given the overwhelming evidence against defendant, including the facts that there was photographic evidence that the daughter was molested in the defendant's bedroom, that the wife and the daughter's uncle both identified the daughter in the photographs, that a Polaroid camera like that used to take the photographs was found in defendant's home, that the wife had testified that she had not left the daughter alone in the house with any man other than defendant, and that the photographs were found in a house owned by defendant in a file containing personal items. Holloway v. State, 278 Ga. App. 709, 629 S.E.2d 447, 2006 Ga. App. LEXIS 298 (2006) (decided under former O.C.G.A. § 24-2-1).

In a prosecution for child molestation, aggravated child molestation, and statutory rape allegedly committed by the defendant against three of the defendant's children, testimony from one of the defendant's other sons concerning similar transactions committed against him was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children. McCoy v. State, 278 Ga. App. 492, 629 S.E.2d 493, 2006 Ga. App. LEXIS 351 (2006) (decided under former O.C.G.A. § 24-2-1).

In a felony murder and aggravated assault prosecution, the trial court did not err in excluding evidence of the victim's prior violent acts, given that at the time of the confrontation with the defendant, the victim was no longer the aggressor, any prior confrontation between the two had already ended, and when the defendant confronted the victim with a loaded gun, the defendant became the aggressor, precipitating the deadly confrontation that ensued; hence, the defendant failed to make a prima facie showing of justification. Milner v. State, 281 Ga. 612, 641 S.E.2d 517, 2007 Ga. LEXIS 46 (2007) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err by refusing to allow the defendant to introduce evidence that in 2013 the other driver had attempted to abduct a teenage girl from a bus and then attempted to flee because that evidence was not relevant, as whether the driver attempted to overcharge the defendant was of no consequence to the determination of the issues in the case and the issue for determination was not whether the driver left the scene of the accident but rather whether the defendant caused the accident by brake checking the driver and causing the driver to lose control. The probative value of the evidence was substantially outweighed by the risk of prejudice. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Evidence of victim's violent acts. — Trial court did not abuse the court's discretion in excluding evidence that the victim pulled a gun on a third person at a dice game the week prior to the murder because the defendant failed to show how that evidence met basic admissibility requirements as to relevancy and offered

nothing more than speculation and conjecture that the third person could have been involved in the victim's murder, regardless of the applicability of O.C.G.A. § 24-4-404(b). Roberts v. State, 305 Ga. 257, 824 S.E.2d 326, 2019 Ga. LEXIS 107 (2019).

Evidence of victim's relationship. — In a murder prosecution in which the victim's body was never found, evidence of the victim's relationships at the time of the victim's disappearance was relevant because it rendered the inference that the victim did not run away but was killed more probable than it would be without the evidence. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365, 2006 Ga. LEXIS 390 (2006) (decided under former O.C.G.A. § 24-2-1).

In a murder trial, testimony from the victim's girlfriend regarding their relationship was not irrelevant; the girlfriend called police to report that the victim was missing, and she explained that she did so because of their relationship. Simmons v. State, 282 Ga. 183, 646 S.E.2d 55, 2007 Ga. LEXIS 403 (2007) (decided under former O.C.G.A. § 24-2-1).

Because the victim's understanding of what the state had to prove to obtain a conviction was irrelevant, the defendant was properly curtailed from questioning the victim on this matter. Mayhew v. State, 299 Ga. App. 313, 682 S.E.2d 594, 2009 Ga. App. LEXIS 762 (2009), cert. denied, No. S09C2059, 2009 Ga. LEXIS 786 (Ga. Sept. 28, 2009) (decided under former O.C.G.A. § 24-2-1).

Evidence rehabilitating victim's credibility not relevant or admissible. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because the state did not contend that cross-examination of the victim included any manner of impeachment that would permit introduction of the complained-of evidence as being generally relevant; and there was no rule that generally opened the door to otherwise inadmissible evidence. Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018).

Prior allegations of child molestation by another irrelevant. — Evidence that the victim made an allegation of child molestation against the victim's father at the age of six did not tend to show how the victim, at the age of 16, would have the knowledge necessary to come up with a plan to falsely accuse the defendant of molesting her; or to otherwise call into question the victim's credibility in that regard. Indeed, evidence that the victim had prior experience with the process of making an allegation of child molestation was wholly irrelevant to the issue of whether the defendant committed the acts alleged by the victim and was thus properly excluded by the trial court. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

Victim's testimony on extremely attenuated issue not admissible. — After the defendant was convicted of incest, rape, aggravated child molestation, child molestation, and reckless conduct, as the connection between the victim's sexual assault allegations and the victim's testimony regarding the victim's purported video sharing channel was extremely attenuated, the trial court did not abuse the court's discretion in excluding the defendant's extrinsic evidence on that issue as irrelevant and on a matter collateral to the issues at trial. Campbell v. State, 362 Ga. App. 337, 868 S.E.2d 471, 2022 Ga. App. LEXIS 34 (2022).

Evidence regarding victim's use of seatbelt. — Trial court properly excluded evidence of seatbelt-use because evidence of the victim's failure to wear a seatbelt was irrelevant to causation and inadmissible in a criminal case as it did not tend to make it either more or less probable that an accident caused by the defendant proximately caused the victim's death, in violation of the statutes for homicide by vehicle in the first degree predicated on a hit-and-run offense and for hit and run. State v. Mondor, 306 Ga. 338, 830 S.E.2d 206, 2019 Ga. LEXIS 449 (2019).

Weapons and ammunition. — Trial court did not err by admitting evidence of the weapons and ammunition officers

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found when the defendant was arrested because the evidence was relevant as consciousness of guilt and the evidence was not unduly prejudicial as the state had a great need for the evidence given that it was a circumstantial case and the state did not argue that the gun and ammunition were used in the drive-by shootings. Harris v. State, 313 Ga. 225, 869 S.E.2d 461, 2022 Ga. LEXIS 37 (2022).

Items found at the scene of the defendant's arrest are relevant and are admissible at trial. Thompson v. State, 168 Ga. App. 734, 310 S.E.2d 725, 1983 Ga. App. LEXIS 3436 (1983) (decided under former O.C.G.A. § 24-2-1).

Evidence of defendant's 28 years of physical and psychological abuse by defendant's two former spouses was properly excluded at defendant's trial for murder since the defendant was permitted to adequately testify as to the facts in the defendant's relationship with the victim which allegedly caused the defendant's fear of the victim. Clenney v. State, 256 Ga. 116, 344 S.E.2d 216 (1986) (decided under former O.C.G.A. § 24-2-1).

Evidence victim's father was sexual abuse victim irrelevant. — Since there was no logical link between the fact that the victim had a father who also claimed to be a victim of sexual abuse and a conclusion that the victim might therefore be an unreliable witness whose testimony regarding the defendant's actions was not worthy of belief, the trial court did not abuse the court's discretion in finding that any evidence that the victim's father suffered sexual abuse was irrelevant. Morris v. State, 341 Ga. App. 568, 802 S.E.2d 13, 2017 Ga. App. LEXIS 246 (2017).

Victim's condition relevant in cruelty to children case. — Trial court did not commit reversible error when the court permitted the state to bring the first victim into the courtroom because evidence of the first victim's condition was clearly relevant to the state's cruelty to children in the first and second charges, including that the defendant caused the first victim bodily harm by rendering the first victim's brain, a member of the first victim's body, useless by violently shaking the victim, causing permanent brain damage; the probative value of viewing the victim was not substantially outweighed by the danger of unfair prejudice; and under the Crime Victims' Bill of Rights statute, O.C.G.A. § 17-7-1 et seq., the first victim had the right to be present at the trial. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258, 2015 Ga. App. LEXIS 427, overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS 793 (2015).

Flight, even an escape from jail after the offense, is a circumstance which may be weighed by the jury in connection with other circumstances to determine the guilt of the accused. The fact that an escape from the courthouse during trial was involved does not remove such conduct from former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). Smith v. State, 184 Ga. App. 739, 362 S.E.2d 384, 1987 Ga. App. LEXIS 2826 (1987) (decided under former O.C.G.A. § 24-2-1).

Chain of custody and tampering. — In proving chain of custody, the state is not required to show that a substance is guarded each minute the substance is in one's custody, and in the absence of a showing to the contrary, the chain is not thereby broken. Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341, 1980 Ga. App. LEXIS 1832 (1980) (decided under former Code 1933, § 38-201).

When there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight of the evidence. Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341, 1980 Ga. App. LEXIS 1832 (1980) (decided under former Code 1933, § 38-201); Mayfield v. State, 153 Ga. App. 459, 265 S.E.2d 366, 1980 Ga. App. LEXIS 1850 (1980) (decided under former Code 1933, § 38-201); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474, 1980 Ga. App. LEXIS 2349 (1980) (decided under former Code 1933, § 38-201).

Because defendant produced no affirmative evidence of tampering, substitution, or mishandling of the methamphetamine at the crime lab, there was no error in treating the crime lab as a single link in

the chain of custody for admissibility purposes. Eaton v. State, 294 Ga. App. 124, 668 S.E.2d 770, 2008 Ga. App. LEXIS 1118 (2008) (decided under former O.C.G.A. § 24-2-1).

Exclusion of battered person's syndrome evidence. — If the defendant suffered from a psychological condition that caused the defendant to believe the defendant had to hurt the defendant's child to help the child, the only way the jury could know about such a condition was through expert testimony, and thus, it was error to exclude the defendant's proffered expert testimony of battered person syndrome; however, such error was harmless given the overwhelming weight of evidence which established that the defendant's conduct was knowing, if not intentional. Pickle v. State, 280 Ga. App. 821, 635 S.E.2d 197, 2006 Ga. App. LEXIS 894 (2006), cert. denied, No. S06C2150, 2007 Ga. LEXIS 110 (Ga. Jan. 8, 2007), cert. denied, No. S06C2143, 2007 Ga. LEXIS 111 (Ga. Jan. 8, 2007), overruled in part, Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019) (decided under former O.C.G.A. § 24-2-1).

Refusal to allow defendant to stipulate to intercourse in rape trial. — Trial court did not abuse the court's discretion when the court refused to allow a defendant to stipulate to having sex with a rape victim in an effort to keep evidence of the victim's rape related pregnancy, her subsequent abortion, and DNA evidence that showed that there was a 99.9969% probability that the defendant had fathered the aborted fetus from being presented to the jury; the evidence was relevant to the state's case against the defendant, particularly because the defendant had denied any sexual contact with the victim, and the defendant could not selectively choose which incriminating evidence the defendant would admit to. Mims v. State, 291 Ga. App. 777, 662 S.E.2d 867, 2008 Ga. App. LEXIS 642 (2008), cert. denied, No. S08C1691, 2008 Ga. LEXIS 768 (Ga. Sept. 22, 2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of license suspension agreement relevant in DUI case. — In a DUI case under O.C.G.A. § 40-6-391(a)(1), evidence of an agreement the defendant entered in an administrative license suspension (ALS) proceeding, in which the defendant agreed to plead guilty to DUI in exchange for the return of the defendant's license, was relevant and admissible in the defendant's DUI case although the defendant later decided not to plead guilty and go to trial, and although the agreement did not recite that it could be used against the defendant at trial. Smith v. State, 345 Ga. App. 43, 812 S.E.2d 117, 2018 Ga. App. LEXIS 163 (2018).

Admission of horizontal gaze nystagmus test. — In the defendant's DUI trial, O.C.G.A. § 40-6-391(a)(1), horizontal gaze nystagmus (HGN) test was properly admitted, although the defendant stated the defendant had taken Prozac, which would influence the results, because the evidence was relevant as to whether the defendant showed signs of impairment, O.C.G.A. § 24-4-401, and the defendant remained free to attempt to persuade the factfinder that the testimony be afforded little weight under the circumstances. Cherry v. State, 345 Ga. App. 409, 813 S.E.2d 408, 2018 Ga. App. LEXIS 116 (2018), cert. denied, No. S18C1104, 2018 Ga. LEXIS 720 (Ga. Oct. 22, 2018).

Video admissible in DUI case. — Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245, 2017 Ga. App. LEXIS 68 (2017), cert. denied, No. S17C1278, 2017 Ga. LEXIS 678 (Ga. Aug. 14, 2017).

For cases concerning photographic and diagrammatic evidence. — See Smith v. State, 202 Ga. 851, 45 S.E.2d 267, 1947 Ga. LEXIS 557 (1947) (general admissibility) (decided under former Code 1933, § 38-201); Crittenden v. State, 98 Ga. App. 329, 105 S.E.2d 778, 1958 Ga. App. LEXIS 577 (1958) (skid marks) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d

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379, 1979 Ga. LEXIS 1338 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2937, 64 L. Ed. 2d 821 (1980) (photograph of rape victim's injuries) (decided under former Code 1933, § 38-201); Gates v. State, 244 Ga. 587, 261 S.E.2d 349, 1979 Ga. LEXIS 1340 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980) (videotape recording) (decided under former Code 1933, § 38-201); Williams v. State, 151 Ga. App. 683, 261 S.E.2d 430, 1979 Ga. App. LEXIS 2747 (1979) (shoes and footprints) (decided under former Code 1933, § 38-201); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707, 1979 Ga. App. LEXIS 3025 (1979) (diagrams of scene of crime) (decided under former Code 1933, § 38-201); Miller v. State, 94 Ga. App. 259, 94 S.E.2d 120, 1956 Ga. App. LEXIS 520 (1956) (photographs of liquor) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 1979 Ga. LEXIS 1338 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2937, 64 L. Ed. 2d 821 (1980) (photograph of teeth marks on victim's breast) (decided under former Code 1933, § 38-201); City Council v. Lee, 153 Ga. App. 94, 264 S.E.2d 683, 1980 Ga. App. LEXIS 1692 (1980) (movie film) (decided under former Code 1933, § 38-201); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490, 1980 Ga. App. LEXIS 2340 (1980) (authentication) (decided under former Code 1933, § 38-201); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490, 1980 Ga. App. LEXIS 2340 (1980) (change in scene photographed) (decided under former Code 1933, § 38-201); Tatum v. State, 206 Ga. 171, 56 S.E.2d 518, 1949 Ga. LEXIS 453 (1949) (photographs of deceased after death) (decided under former Code 1933, § 38-201); Blount v. State, 214 Ga. 433, 105 S.E.2d 304, 1958 Ga. LEXIS 451 (1958) (photographs of deceased, an ax, and wooden bar) (decided under former Code 1933, § 38-201); Williams v. State, 151 Ga. App. 765, 261 S.E.2d 487, 1979 Ga. App. LEXIS 2789 (1979) ("gruesome" photographs of deceased victim) (decided under former Code 1933, § 38-201); Moses v. State, 245 Ga. 180, 263 S.E.2d 916, 1980 Ga. LEXIS 732 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60, 1980 U.S. LEXIS 2962 (1980), overruled, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490, 1993 Ga. LEXIS 326 (1993) (photograph of deceased) (decided under former Code 1933, § 38-201); Gaylor v. State, 247 Ga. 759, 279 S.E.2d 207, 1981 Ga. LEXIS 861 (1981) (photograph of deceased) (decided under former Code 1933, § 38-201); Williams v. State, 255 Ga. 97, 335 S.E.2d 553, 1985 Ga. LEXIS 946 (1985) (photograph of child in hospital bed surrounded by medical equipment) (decided under former O.C.G.A. § 24-2-1); Gosdin v. State, 176 Ga. App. 381, 336 S.E.2d 261, 1985 Ga. App. LEXIS 2881 (1985) (photograph of defendant printed from negative taken from camera allegedly stolen by defendant) (decided under former O.C.G.A. § 24-2-1); Pittman v. State, 178 Ga. App. 693, 344 S.E.2d 511, 1986 Ga. App. LEXIS 1712 (1986) (anatomically correct diagram of child molestation victim's body) (decided under former O.C.G.A. § 24-2-1).

Defendant's conviction for aggravated child molestation under O.C.G.A. § 16-6-4 was affirmed because the trial court did not commit plain error by admitting photographs of the victim's injuries as the photographs were material and relevant to issues raised at trial, and the photographs were admissible even if the photographs, to some extent, duplicated other photographs. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103, 2017 Ga. App. LEXIS 390 (2017).

Photographic evidence of gun. — Trial court did not err in partially denying the state's Motion to Include Relevant and Probative Evidence, which sought a pretrial ruling on the admissibility of two photographs for use at a second murder trial because to find the photograph relevant to show the defendant had access to the murder weapon, the jury would need to make not just one inference, but a series of inferences including that the gun in the photograph was the murder weapon because the defendant's girlfriend held the gun in the photograph, the girlfriend had continued access to the gun, the defendant had access to the gun, and the defendant had access to the gun at the

time of the murder. State v. Stephens, 310 Ga. 57, 849 S.E.2d 459, 2020 Ga. LEXIS 739 (2020).

Homemade rap video admissible. — Homemade rap video was properly admitted into evidence because the video was relevant as the video connected the defendant and the codefendants to the murder weapon, and the video implicated one of the codefendants in a robbery, very close in time to the crimes in this case, making it more likely that it was the defendant and the codefendants who possessed the murder weapon and used the weapon to kill the victim; the video provided further evidence of a conspiracy by showing the defendant and the codefendants together in the days after the shooting, brandishing a gun of the same model as the murder weapon, and boasting of having committed a robbery; and, although the video might have cast the defendant in an unflattering light, it did not do so unfairly. Wilson v. State, 315 Ga. 728, 883 S.E.2d 802, 2023 Ga. LEXIS 29 (2023).

Social media messages admissible. — Trial court did not abuse the court's discretion in admitting social media messages from the defendant to one of the codefendants because the messages were relevant as the messages showed that the defendant and that codefendant were still on good terms while they were both being prosecuted for the murder, which tended to make it less likely that the defendant was an unwitting bystander to a murder carried out solely by the two codefendants; and there was no danger of unfair prejudice from the messages. Wilson v. State, 315 Ga. 728, 883 S.E.2d 802, 2023 Ga. LEXIS 29 (2023).

Exhibits properly admitted. — There was no prejudice to the defendant in the admission of exhibits which merely showed the lead fragments, displayed against a neutral background, that were removed from the victim's head; admission of evidence of "prior difficulties" between the two groups was proper to explain how two people became the innocent victims of the two groups' hostilities. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, 2003 Ga. LEXIS 489, rev'd, 276 Ga. 839, 584 S.E.2d 253, 2003 Ga. LEXIS 625 (2003) (decided under former O.C.G.A. § 24-2-1).

Photos were arguably objectionable. — Three photos from the hospital series that did not depict the victim at all were arguably objectionable by counsel and an objection may have been sustained under O.C.G.A. § 24-4-403 as to relevancy but no ineffective assistance of counsel was shown based on the other evidence against the appellant being strong and the appellant failing to show a reasonable probability that the result of the trial would have been different. Davis v. State, 299 Ga. 180, 787 S.E.2d 221, 2016 Ga. LEXIS 407 (2016).

Photographs of the victim of a crime are admissible when the photographs are relevant on the issues in the case, although the photographs may be inflammatory and prejudicial to the accused. Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436, 1980 Ga. LEXIS 1030 (1980) (decided under former Code 1933, § 38-201).

When defendants contended defendants were not responsible for the injuries and poor physical condition of deceased child, 12 photos of the body and one of clothing were relevant to the issues in the case to show the unlikelihood that these injuries would have been self-inflicted or accidental, as were autopsy photographs of a fractured rib. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478, 1980 Ga. LEXIS 1130 (1980) (decided under former Code 1933, § 38-201).

Photographs of body of victim showing the body's location when found and various aspects of the wounds causing death were relevant and material to show that the victim was bludgeoned and shot twice in the head. Knowles v. State, 246 Ga. 378, 271 S.E.2d 615, 1980 Ga. LEXIS 1116 (1980) (decided under former Code 1933, § 38-201); Dick v. State, 246 Ga. 697, 273 S.E.2d 124, 1980 Ga. LEXIS 1243 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357, 1981 U.S. LEXIS 2009 (1981) (decided under former Code 1933, § 38-201); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, 1981 Ga. LEXIS 629, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981).

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In a prosecution for a violation of O.C.G.A. § 16-5-21(a)(2), as the indictment alleged that the aggravated assault was committed with objects likely to cause serious bodily injury (a broom handle and the defendant's feet and hands), photos depicting the condition of the victim, one of which depicted the defendant's foot print on the victim's face, were relevant to establish the nature and extent of the injury. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706, 2006 Ga. App. LEXIS 313 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err by admitting three photographs of a victim's bullet wound to the head and two photographs of defendant's handgun as the photographs were not repetitive or cumulative, and the photographs presented the evidence from different distances and vantage points in order to accurately depict the nature and location of the victim's wound and the location of the weapon when the weapon was found; moreover, the victim's injuries and the weapon used to inflict those injuries were obviously relevant to the charges against defendant. Smith v. State, 279 Ga. App. 211, 630 S.E.2d 833, 2006 Ga. App. LEXIS 502 (2006) (decided under former O.C.G.A. § 24-2-1).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, those photographs were admissible even if those photographs were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head. Bradley v. State, 281 Ga. 173, 637 S.E.2d 19, 2006 Ga. LEXIS 886 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court properly admitted one of three photographs of the victim's body which showed an exterior mark of strangulation as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim's wounds were admissible as both relevant and material. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127, 2006 Ga. LEXIS 463 (2006) (decided under former O.C.G.A. § 24-2-1).

Photographs of a victim's body, after the body had been taken to the crime lab, were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639, 2006 Ga. LEXIS 927 (2006) (decided under former O.C.G.A. § 24-2-1).

Photograph showing the victim's vagina and bloody underwear was relevant to show that the victim had been raped and to refute the defendant's assertion that her injuries resulted from a kick to the groin. Smith v. State, 291 Ga. App. 545, 662 S.E.2d 323, 2008 Ga. App. LEXIS 567 (2008) (decided under former O.C.G.A. § 24-2-1).

Trial court did not abuse the court's discretion in admitting the autopsy photographs of the victim because the photographs were relevant as the medical examiner testified that the photographs showed the internal injuries that caused the victim's death that were not evident from the pre-incision photographs; the fact that the defendant might not have disputed the cause of death did not diminish the relevance of the photographs; and the trial court considered whether the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672, 2015 Ga. LEXIS 498 (2015).

Trial court did not abuse the court's discretion by admitting into evidence an autopsy photograph showing the victim's exposed brain because the photograph was relevant as evidence of the severity of the victim's injury, the single photograph was not particularly gory or gruesome, and the court concluded that the trial

court did not abuse the court's discretion in deciding that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice. Flowers v. State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Autopsy photo admissible. — Trial court did not abuse the court's discretion in admitting an autopsy photo after the medical examiner explained that the only way the examiner could get the trajectory probes through the victim's body was in the manner depicted in the photo. Venturino v. State, 306 Ga. 391, 830 S.E.2d 110, 2019 Ga. LEXIS 435 (2019).

Photographs posted on social media. — Trial court did not abuse the court's discretion when the court found that a photograph that a friend took of the three defendants during the trial and posted on social media was relevant to show that the three defendants were members of a gang as the state also introduced other photographs of the three defendants that the same friend posted on social media and that depicted the defendants allegedly throwing gang signs. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399, 2018 Ga. LEXIS 184 (2018).

Photographs posted on social media.— Trial court did not err by admitting evidence of the defendant's social media posts because the fact that the defendant claimed to possess a gun that could have been used in the drive-by shootings had a tendency to make it more probable that one of the weapons used in the shootings belonged to defendant. Defendant failed to show that the evidence was unfairly prejudicial because the evidence was used to show, in a circumstantial case in which no murder weapon was found, that the defendant had in the defendant's possession a week before the shootings a type of gun that could have been used in those shootings. Harris v. State, 313 Ga. 225, 869 S.E.2d 461, 2022 Ga. LEXIS 37 (2022).

Video recordings from officers' body cameras relevant. — After the defendant murdered the defendant's two infant daughters by drowning the children, the video-recordings of the crime scene taken from the body cameras of two police officers who responded to the defendant's 911 call were relevant and admissible, with the exception of the last four minutes of the second recording, because those portions as a whole were relevant to show the children's manner of death; the video-recordings were not needlessly cumulative of the manner of death as the state was not required to stipulate to the cause of death and the circumstances surrounding the murders; and the video-recordings were probative of matters other than the manner of death, including rebutting the defendant's insanity defense. Morgan v. State, 307 Ga. 889, 838 S.E.2d 878, 2020 Ga. LEXIS 102 (2020).

Photograph of coconspirator with another person irrelevant. — Trial court did not err in excluding a photograph of one of the state's witnesses on the beach with a person defendant claimed committed the murders as irrelevant, O.C.G.A. § 24-4-401, because the photograph established at most that the two were acquainted, which was not in dispute. Jones v. State, 305 Ga. 750, 827 S.E.2d 879, 2019 Ga. LEXIS 316 (2019).

Skeletal remains. — Trial court did not err in admitting the victim's skeletal remains in a murder trial since the remains were used to illustrate portions of the testimony of an expert forensic anthropologist. Quedens v. State, 280 Ga. 355, 629 S.E.2d 197, 2006 Ga. LEXIS 200 (2006) (decided under former O.C.G.A. § 24-2-1).

Tape of prior telephone conversation with witness admissible for impeachment. — In a trial for theft by deception, the trial court erred in ruling inadmissible the tape recording of a telephone conversation between a witness and defendant's father after a determination was made, through questions posed to the witness and defendant's father, that it was authentic, accurate and complete and since it was offered for impeachment by showing discrepancies between the witness's representations about certain facts made during the telephone conversation and the witness's trial testimony regarding those same facts pertaining to the issues of whether defendant intended to deceive clients. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595, 1983 Ga. App. LEXIS 3280 (1983) (decided under former O.C.G.A. § 24-2-1).

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Trial court properly disallowed forensic pathologist (as defense witness) to testify: (1) why neurologists and neurosurgeons consulted with the pathologist; and (2) that many cases of suspected child abuse in which the pathologist had been consulted had been determined to be accidental; as neither response would have tended to show the guilt or innocence of the defendant of the offense of aggravated battery for which defendant was being tried. Cohn v. State, 186 Ga. App. 816, 368 S.E.2d 572, 1988 Ga. App. LEXIS 523 (1988) (decided under former O.C.G.A. § 24-2-1).

Recorded telephone conversations made from jail. — Defendant's recorded telephone conversations made from jail were relevant and admissible: (1) to show the defendant's consciousness of guilt for the armed robbery as the defendant admonished a witness for divulging the defendant's name to the police; the defendant asked the witness if the witness told the police that the defendant had a gun; and the defendant told the witness that the police pressure should not get to the witness as the witness had not done anything; and (2) to corroborate the witness's testimony that the defendant had told the witness not to give the defendant's name to the police; further, the probative value of the recorded telephone calls was not substantially outweighed by the danger of unfair prejudice. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831, 2016 Ga. App. LEXIS 401 (2016).

Admission of defendant's tattoo irrelevant, but harmless. — Trial court abused the court's discretion in overruling the defendant's relevancy objection to questions about the defendant's tattoos, but the error was harmless as the properly admitted evidence proving the defendant's guilt was overwhelming given that several witnesses and the defendant testified the defendant was alone with the victim when the symptoms started, the defendant admitted to squeezing the baby, and expert testimony established that the symptoms would have been immediately apparent. Smith v. State, 299 Ga. 424, 788 S.E.2d 433, 2016 Ga. LEXIS 453 (2016).

Admission of medical records on mental health. — Trial counsel was not ineffective for failing to present available evidence corroborating the defendant's testimony about the defendant's mental health because trial counsel correctly recognized that under the rule of completeness, the state could have sought to admit portions of the medical records from prison, as well as medical records from other facilities, that were unfavorable to the defendant. Castillo-Velasquez v. State, 305 Ga. 644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

Exclusion of evidence regarding lack of history of mental illness. — Evidence regarding the defendant's lack of history of mental illness was properly excluded because the defendant did not raise any type of mental-health related defense for which evidence of psychological evaluations might have been relevant; the defendant pointed to no legal authority for the proposition that a defendant should be permitted to introduce expert testimony that the defendant had no history of mental illness in order to show that the defendant did not intend to commit a crime; and there was no authority suggesting that evidence of the defendant's lack of mental illness had any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable. Sullivan v. State, 308 Ga. 772, 843 S.E.2d 411, 2020 Ga. LEXIS 347 (2020).

Police dogs. — Even when it is shown that a dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. O'Quinn v. State, 153 Ga. App. 467, 265 S.E.2d 824, 1980 Ga. App. LEXIS 1854 (1980) (decided under former Code 1933, § 38-201).

Trial court improperly granted the state's motion to quash the defendant's

subpoena for all records and documents pertaining to the drug detection dog and the dog's handler involved in the detection of drugs in the defendant's luggage because the appellate court could not determine from the existing record whether the training materials were relevant to the issue of reliability of the drug dog as certification of the drug dog on the day of the alert did not preclude a challenge to its reliability; other than the blanket assertion that training materials were irrelevant to show reliability, the state offered no other basis for the state's objection to the subpoena; and the trial court had the discretion to modify the subpoena if the subpoena was overly broad. Harris v. State, 341 Ga. App. 831, 802 S.E.2d 708, 2017 Ga. App. LEXIS 288 (2017).

Prior verdict of not guilty by reason of insanity irrelevant in subsequent prosecution. — Defendant's mental state at defendant's previous trial for burglary and assault to commit rape at which defendant was found not guilty by reason of insanity was irrelevant to any issue in defendant's subsequent trial for another rape and thus was properly excluded. Crapse v. State, 180 Ga. App. 321, 349 S.E.2d 190, 1986 Ga. App. LEXIS 2728 (1986) (decided under former O.C.G.A. § 24-2-1).

Prior acquittals irrelevant in perjury trial. — Prior acquittals in two trials for child molestation had no probative value in a trial for perjury committed at those trials because evidence of the acquittals was neither relevant nor material to any issue in the perjury case. West v. State, 228 Ga. App. 713, 492 S.E.2d 576 (decided under former O.C.G.A. § 24-2-1).

Pretrial identifications. — Victim's pretrial identifications of defendant and codefendant, as being the persons riding together in the automobile in which they ultimately were arrested and in which a .25 caliber pistol was found, were relevant within the meaning of former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). If evidence is relevant, no matter how slightly, the evidence generally should be admitted and the weight of the evidence left to the jury. Buckner v. State, 209 Ga. App. 107, 433 S.E.2d 94, 1993 Ga. App. LEXIS 772 (1993) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's identity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. Buice v. State, 289 Ga. App. 415, 657 S.E.2d 326, 2008 Ga. App. LEXIS 108 (2008) (decided under former O.C.G.A. § 24-2-1).

Movie about body disposal. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. Oree v. State, 280 Ga. 588, 630 S.E.2d 390, 2006 Ga. LEXIS 349 (2006) (decided under former O.C.G.A. § 24-2-1).

Expert testimony on Chinese culture which defendant claimed would have cast light on the defendant's motivations, state of mind, and actions was properly excluded since such evidence would not have aided the jury in the jury's search for the truth. Lee v. State, 262 Ga. 593, 423 S.E.2d 249, 1992 Ga. LEXIS 992 (1992) (decided under former O.C.G.A. § 24-2-1).

Stipulation at administrative license suspension hearing relevant. — Defendant's stipulation at the administrative license suspension hearing that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of the defendant's driver's license was relevant to, though certainly not dispositive of, the charge that the defendant was driving under the influence

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of alcohol. Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67, 2014 Ga. App. LEXIS 335 (2014).

Relevance of evidence found. — See Posey v. State, 46 Ga. App. 290, 167 S.E. 340, 1932 Ga. App. LEXIS 128 (1932) (exhibit of child) (decided under former law); Miller v. State, 53 Ga. App. 275, 185 S.E. 372, 1935 Ga. App. LEXIS 1 (1935) (burglary) (decided under former Code 1933, § 38-201); Wynes v. State, 182 Ga. 434, 185 S.E. 711, 1936 Ga. LEXIS 378 (1936) (experiments) (decided under former Code 1933, § 38-201); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259, 1944 Ga. LEXIS 314 (1944) (other person as guilty party) (decided under former Code 1933, § 38-201); Ledbetter v. State, 51 Ga. App. 560, 181 S.E. 120, 1935 Ga. App. LEXIS 405 (1935) (possession of liquor) (decided under former Code 1933, § 38-201); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633, 1949 Ga. App. LEXIS 884 (1949) (chain of circumstances) (decided under former Code 1933, § 38-201); Hatcher v. State, 94 Ga. App. 270, 94 S.E.2d 110, 1956 Ga. App. LEXIS 522 (1956) (unlawful possession of whiskey) (decided under former Code 1933, § 38-201); Yawn v. State, 94 Ga. App. 400, 94 S.E.2d 769, 1956 Ga. App. LEXIS 555 (1956) (stolen goods) (decided under former Code 1933, § 38-201); Duffey v. State, 151 Ga. App. 673, 261 S.E.2d 421, 1979 Ga. App. LEXIS 2742 (1979) (photographic lineup in armed robbery) (decided under former Code 1933, § 38-201); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402, 1979 Ga. App. LEXIS 2748 (1979) (identification procedure) (decided under former Code 1933, § 38-201); Riden v. State, 151 Ga. App. 654, 261 S.E.2d 409, 1979 Ga. App. LEXIS 2737 (1979) (documentary evidence) (decided under former Code 1933, § 38-201); Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, 1980 Ga. App. LEXIS 1762, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114, 1980 U.S. LEXIS 3413 (1980) (statement indicating consciousness of guilt) (decided under former Code 1933, § 38-201); Hudgins v. State, 153 Ga. App. 601, 266 S.E.2d 283, 1980 Ga. App. LEXIS 1919 (1980) (escape from confinement) (decided under former Code 1933, § 38-201); Clark v. State, 149 Ga. App. 641, 255 S.E.2d 110, 1979 Ga. App. LEXIS 1966 (1979) (deadly weapons) (decided under former Code 1933, § 38-201); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894, 1980 Ga. App. LEXIS 2578 (1980) (drug paraphernalia) (decided under former Code 1933, § 38-201); Marshall v. State, 153 Ga. App. 198, 264 S.E.2d 718, 1980 Ga. App. LEXIS 1747 (1980) (contents of paper bag) (decided under former Code 1933, § 38-201); Herron v. State, 155 Ga. App. 791, 272 S.E.2d 756, 1980 Ga. App. LEXIS 2792 (1980) (child molestation case) (decided under former Code 1933, § 38-201); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398, 1981 Ga. LEXIS 834 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398, 1983 U.S. LEXIS 4712 (1983) (identity and background of murder victim) (decided under former Code 1933, § 38-201); Wortham v. State, 158 Ga. App. 19, 279 S.E.2d 287, 1981 Ga. App. LEXIS 2053 (1981) (drug paraphernalia) (decided under former Code 1933, § 38-201); Kelley v. State, 160 Ga. App. 343, 287 S.E.2d 68, 1981 Ga. App. LEXIS 3218 (1981) (value of stolen items) (decided under former Code 1933, § 38-201); Harrell v. State, 249 Ga. 48, 288 S.E.2d 192, 1982 Ga. LEXIS 1112 (1982), overruled in part, Edge v. State, No. S91A1127, 1992 Ga. LEXIS 86 (Ga. Feb. 4, 1992), overruled, Edge v. State, 261 Ga. 865, 414 S.E.2d 463, 1992 Ga. LEXIS 175 (1992) (psychiatric testimony) (decided under former O.C.G.A. § 24-2-1); Williams v. State, 250 Ga. 553, 300 S.E.2d 301, 1983 Ga. LEXIS 1014 (1983), cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983), overruled, Venturino v. State, 306 Ga. 391, 830 S.E.2d 110, 2019 Ga. LEXIS 435 (2019) (murder case) (decided under former O.C.G.A. § 24-2-1); Ponder v. Ponder, 251 Ga. 323, 304 S.E.2d 61, 1983 Ga. LEXIS 748 (1983) (dispute between parents and family member) (decided under former O.C.G.A. § 24-2-1); Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849, 1983 Ga. App. LEXIS 3294 (1983) (theft by taking case) (decided under former O.C.G.A. § 24-2-1); Griffin v. State, 243

Ga. App. 282, 531 S.E.2d 175, 2000 Ga. App. LEXIS 334 (2000), cert. denied, No. S00C1259, 2000 Ga. LEXIS 660 (Ga. Sept. 8, 2000) (fingerprints) (decided under former O.C.G.A. § 24-2-1).

Probative value of the probation officer's testimony about a phone number that the defendant had given to the officer that linked the defendant to the phone from which numerous calls were placed to one of the murder victims on the day of the murders was not substantially outweighed by its prejudicial effect because the testimony of the probation officer was clearly relevant; it had substantial probative value; although other evidence in the record tended to establish the connection between the defendant and one of the murder victims, none of it established a connection as directly or strongly as the testimony of the probation officer; and other evidence informed the jury that the defendant was on probation. Huff v. State, 299 Ga. 801, 792 S.E.2d 368, 2016 Ga. LEXIS 651 (2016).

Trial court did not abuse the court's discretion in allowing the admission of evidence of the defendant's friend's gang affiliation given the state's purpose, to show a connection between the robbery and murder and the foreseeable consequence of the defendant's participation in the robbery of the victim. Davis v. State, 301 Ga. 397, 801 S.E.2d 897, 2017 Ga. LEXIS 527 (2017).

Evidence that the defendant physically abused the mother was admissible at a trial for rape and aggravated child molestation as to the defendant's stepdaughter because the evidence was probative of whether the defendant's behavior created a threatening atmosphere in the home and tended to explain the stepdaughter's reluctance to disclose the abuse. Thomas v. State, 354 Ga. App. 815, 841 S.E.2d 458, 2020 Ga. App. LEXIS 223 (2020).

Trial court did not err denying new trial and allowing state to introduce evidence of pornography found in appellant's bedroom because appellant was specifically charged with several counts of child molestation and allegations included showing children images of adult pornography, thus, evidence of pornography found in bedroom was relevant and carried significant probative weight because it assisted state in proving those allegations. Rider v. State, 366 Ga. App. 260, 883 S.E.2d 374, 2022 Ga. App. LEXIS 547 (2022).

Signs and fliers relevant to show defendant's bent of mind. — Images and language incorporated into the sign and fliers that the defendant displayed or distributed concerning the defendant's child's mother, the victim, at or near the victim's workplace demonstrated the state of the relationship between the defendant and the victim, and were "highly relevant" to show the defendant's abusive bent of mind toward the victim. Hudson v. State, 321 Ga. App. 702, 742 S.E.2d 516, 2013 Ga. App. LEXIS 379 (2013).

Medical examiner's testimony on pain.— Prosecutor did not commit misconduct by eliciting testimony from the chief medical examiner because the examiner's speculation about the pain the victims suffered was a subject within a medical examiner's area of expertise and the testimony was highly relevant to the jury's determination regarding the existence of the statutory aggravating circumstances. The examiner's testimony that a screwdriver that was not the actual murder weapon was consistent with what had caused the victims' injuries was not improper because its purpose was to lay the foundation for the admission of the screwdriver as a demonstrative exhibit. Moody v. State, No. S23P0046, 2023 Ga. LEXIS 98 (Ga. May 16, 2023).

Testimony of medical examiner relevant. — Trial court did not err in permitting a medical examiner to testify that inasmuch as the victim's body was discovered in a wooded area approximately 20 miles from the victim's house, the victim's death was "most likely" a homicide; defendant did not object to the testimony and the testimony was not improper under the circumstances of the case. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-1).

Hypnotic session was relevant evidence. — Witness was properly permitted to testify even though the recording of the witness's hypnotic session was un-

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available and the witness's pre-hypnotic oral statement was not reduced contemporaneously to a writing as the trial court went to great lengths to ensure that the witness's testimony was not tainted or corrupted by hypnotic suggestion and all of the testimony was cumulative of other evidence admitted. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-1).

Officer's testimony relevant. — Trial court properly admitted a police officer's testimony that the officer learned from independent sources that the officer was searching for a suspect named "Little B" as several witnesses referred to defendant by the defendant's nickname and it was necessary to establish that "Little B" and defendant were the same person. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, 2005 Ga. LEXIS 123 (2005), cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478, 2005 U.S. LEXIS 8017 (2005), superseded by statute as stated in Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-2-1).

Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. Robinson v. State, 275 Ga. App. 537, 621 S.E.2d 770, 2005 Ga. App. LEXIS 1029 (2005), cert. dismissed, No. S06C0267, 2006 Ga. LEXIS 178 (Ga. Feb. 27, 2006) (decided under former O.C.G.A. § 24-2-1).

Defendant did not receive ineffective assistance of counsel for the failure of counsel to object to a passing reference to defendant's incarceration as the reason for defendant not being arrested sooner and to the initial arrest as being part of a "roundup"; all of the circumstances connected with a defendant's arrest were admissible, even those that established the commission of another criminal offense, if they were relevant and the testimony was relevant to counter any accusation that defendant's arrest was delayed due to lack of identification. Butler v. State, 277 Ga. App. 57, 625 S.E.2d 458, 2005 Ga. App. LEXIS 1364 (2005), aff'd, 281 Ga. 310, 637 S.E.2d 688, 2006 Ga. LEXIS 979 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err by permitting a law-enforcement officer to testify about the pernicious effects of heroin and addiction because the testimony put in context what heroin was and the testimony was relevant to explain why someone might engage in an enterprise to distribute heroin and possess a trafficking amount, and to explain why heroin was a Schedule I controlled substance. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625, 2016 Ga. App. LEXIS 559 (2016), cert. denied, No. S17C0590, 2017 Ga. LEXIS 411 (Ga. May 15, 2017).

Testimony of nurse treating child relevant. — In a defendant's trial for cruelty to a child, a nurse's testimony as to the nurse's decision to report an incident to explain the hospital's course of conduct regarding a child services agency was relevant to the child's care and future well-being; the trial court had wide discretion in determining relevancy and materiality and, where relevancy was doubtful, the evidence was properly admitted and the weight of the evidence left for the jury's determination. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587, 2006 Ga. App. LEXIS 1321 (2006) (decided under former O.C.G.A. § 24-2-1).

Excluded testimony relevant to explain impetus for defendant's actions. — Trial court erred in excluding testimony from a witness that, during a lengthy conversation with the defendant after the defendant killed the defendant's wife, the defendant told the witness that the wife had been unfaithful, that the defendant did not mean for the wife's death to happen, and the defendant loved the wife, because such testimony was relevant to explain the impetus for the defendant's actions. Allaben v. State, 299 Ga. 253, 787 S.E.2d 711, 2016 Ga. LEXIS 420 (2016).

Written note relevant. — Because a note found in the defendant's truck contained information that could have linked the note's author to the armed robbery charged, such was properly admitted as relevant; any issue as to whether the note was written by the defendant or by someone else was an issue affecting the weight of the evidence, not the admissibility of the evidence, and therefore was for the jury to decide. Clark v. State, 283 Ga. App. 884, 642 S.E.2d 900, 2007 Ga. App. LEXIS 238 (2007) (decided under former O.C.G.A. § 24-2-1).

Possession of a handgun was relevant. — Evidence that the defendant was in possession of a handgun "around the time of the shooting" was relevant and material to a charge of possession of a weapon by a convicted felon. Jones v. State, 282 Ga. 306, 647 S.E.2d 576, 2007 Ga. LEXIS 526 (2007) (decided under former O.C.G.A. § 24-2-1).

In an assault trial, after the defendant claimed that the victim had raped the defendant's sibling, evidence that one of the defendant's parents was indicted for extortion and other offenses in connection with the rape charge and that the parent pled guilty to some charges was properly admitted; the indictment and plea, as well as the fact that the indictment led to the dismissal of the rape charges, were relevant to the issue of the victim's credibility. Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401, 2007 Ga. App. LEXIS 859 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. Jan. 7, 2008) (decided under former O.C.G.A. § 24-2-1).

Because the trial court erroneously excluded evidence relevant to the defendant's claim that there was provocation sufficient to excuse the use of the fighting words the defendant uttered and made the basis of a disorderly conduct charge, the defendant's conviction was reversed; moreover, in determining whether or not there was sufficient provocation for the defendant's use of the fighting words uttered, the jury was entitled to consider all the facts and circumstances tending to prove provocation, not just facts and circumstances contemporaneous with the use of the fighting words. Talmadge v. State, 287 Ga. App. 332, 651 S.E.2d 469, 2007 Ga. App. LEXIS 960 (2007) (decided under former O.C.G.A. § 24-2-1).

Trial court did not abuse the court's discretion in admitting the revolver found in the defendant's vehicle into evidence as it was relevant to whether the defendant had threatened the judge who presided over the defendant's divorce and the judge's family, and to whether the defendant was in the process of executing the steps outlined in a letter to the judge, which included a plan to kill the judge's family, motivated by revenge. Satterfield v. State, 339 Ga. App. 15, 792 S.E.2d 451, 2016 Ga. App. LEXIS 570 (2016).

Testimony about drugs was relevant. — In a child molestation case, the victim's testimony that the defendant gave the victim drugs and that this always led up to sexual intercourse was relevant, as the testimony had some bearing on the issues being tried. Boynton v. State, 287 Ga. App. 778, 653 S.E.2d 110, 2007 Ga. App. LEXIS 1091 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence that a drug defendant went to a hotel room to have sex was relevant and admissible to support the state's theory that the defendant was at the hotel room to exchange sex for drugs. Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366, 2008 Ga. App. LEXIS 110 (2008) (decided under former O.C.G.A. § 24-2-1).

Testimony about blood test relevant. — Trial court did not abuse the court's discretion in allowing an arresting officer to testify that the defendant had requested and received an independent blood test in accordance with the defendant's rights under implied consent laws as the defendant contested the results of the state's blood test, arguing that the results were skewed and unreliable due to the unknown storage conditions of the defendant's blood sample while in route to a lab. Consequently, the fact that the defendant requested and received an independent test which the defendant failed to produce at trial was relevant to a material issue in the case. Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823, 2008 Ga. App. LEXIS 334 (2008), cert. denied, No. S08C1271, 2008 Ga. LEXIS 650 (Ga. July 7, 2008) (decided under former O.C.G.A. § 24-2-1).

Admission of weapon relevant. — There was no merit to the defendant's

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claim that it was error to admit a knife into evidence. The fact that a knife was found on the defendant's person at the time of the defendant's arrest was clearly relevant to the issue of whether the defendant, who was convicted of aggravated assault, had assaulted the victim with a deadly weapon. Brown v. State, 293 Ga. App. 224, 666 S.E.2d 600, 2008 Ga. App. LEXIS 905 (2008) (decided under former O.C.G.A. § 24-2-1).

Because the crimes committed by defendant following the shooting of the victim were relevant to show defendant's attempt to obtain money and vehicles to flee following the shooting, the trial court did not err in admitting the evidence in question. Hardnett v. State, 285 Ga. 470, 678 S.E.2d 323, 2009 Ga. LEXIS 242 (2009) (decided under former O.C.G.A. § 24-2-1).

Discovery of relevant evidence properly allowed. — In a prosecution for DUI, the trial court did not err in denying the defendant's motion to suppress the blood test evidence, as the trial court properly allowed the discovery of notes, memoranda, graphs, or computer printouts pertaining to the blood sample taken, as well as all chain of custody documentation, because they were the only items deemed relevant to the prosecution; suppression of the blood test results was not required as the defendant waived error on appeal as to the absence of one of the two lab testers. Cottrell v. State, 287 Ga. App. 89, 651 S.E.2d 444, 2007 Ga. App. LEXIS 880 (2007), cert. denied, No. S07C1894, 2007 Ga. LEXIS 816 (Ga. Oct. 29, 2007) (decided under former O.C.G.A. § 24-2-1).

In a theft by taking case, the trial court erred in denying the defendant's motion to compel a response to the defendant's subpoena duces tecum as the defendant met the burden of showing the relevance of the evidence sought in the subpoena because the defendant demonstrated that the defendant sought the documents not just for use in cross-examining the pharmacy owner, but also to prove the volume of cash that the pharmacy used to pay its cash-based employees and that the defendant took cash out of the register at the employer's direction to pay those employees and other expenses. Gregg v. State, 331 Ga. App. 833, 771 S.E.2d 486, 2015 Ga. App. LEXIS 244 (2015), cert. denied, No. S15C1171, 2015 Ga. LEXIS 525 (Ga. July 6, 2015).

Evidence cumulative of defendant's testimony. — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that the witness's testimony was relevant to the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29, 2012 Ga. App. LEXIS 75 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-2-1).

Molestation allegations not relevant. — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defendant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29, 2012 Ga. App. LEXIS 75 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-2-1).

Evidence of plea not relevant or admissible. — Because the reasoning behind the robbery by intimidation plea between the defendant and the DeKalb County prosecutor did not appear on the face of the document itself, and the defendant would not have been able to testify as to the prosecutor's reasons for accepting the defendant's plea, the evidence regarding the defendant's plea would not have made the defendant's desired inference that the defendant did not use a gun during the Gwinnett County robbery any more probable than it would have been without the evidence; thus, the trial court

did not err by refusing to allow the defendant to present evidence of the plea. Johnson v. State, 331 Ga. App. 134, 770 S.E.2d 236, 2015 Ga. App. LEXIS 116 (2015), cert. denied, No. S15C1080, 2015 Ga. LEXIS 377 (Ga. May 26, 2015).

Evidence of bar's reputation for violent incidents inadmissible. — When the defendant was convicted of, inter alia, malice murder and attempted murder, the trial court did not err in excluding the proffered evidence of 10 incidents at a bar because the evidence was not relevant to show that the dangerous, violent environment at the bar influenced the defendant's state of mind and made the defendant's extreme reaction to perceived threats from the victims reasonable as the defendant did not contend that the defendant knew about any of the proffered occurrences at the time of the shooting; none of the incidents showed a propensity for violence in either of the victims; and the evidence did not tend to make it more likely that the defendant reasonably believed that deadly force was necessary. Ramirez v. State, 303 Ga. 232, 811 S.E.2d 416, 2018 Ga. LEXIS 129, cert. denied, 139 S. Ct. 110, 202 L. Ed. 2d 69, 2018 U.S. LEXIS 5541 (2018).

Requirements for Appeal

Error waived unless objected to at trial. — Defendants are not entitled to appellate review of the issue of relevancy when the defendants fail to raise the issue at trial. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197, 1983 Ga. App. LEXIS 3128 (1983) (decided under former O.C.G.A. § 24-2-1).

Specific objection showing harmful error must be offered at the time irrelevant and immaterial evidence is presented, and it is too late to set forth for the first time in a ground of a motion for new trial, even though valid. McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612, 1944 Ga. LEXIS 333 (1944) (decided under former Code 1933, § 38-201).

In order to raise on appeal contentions concerning admissibility of evidence, the specific ground of objection must be made at the time the evidence is offered, and a failure to do so will be considered as a waiver; all evidence is admitted as a matter of course unless a valid ground of objection is interposed. Sutphin v. McDaniel, 157 Ga. App. 732, 278 S.E.2d 490, 1981 Ga. App. LEXIS 1993 (1981) (decided under former Code 1933, § 38-201).

Objection to evidence on grounds of prejudice and irrelevancy does not constitute a proper objection and does not therefore present the Court of Appeals with an issue for review. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, 1981 Ga. App. LEXIS 2022, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186, 1981 Ga. LEXIS 982 (1981) (decided under former Code 1933, § 38-201).

Erroneous admission of evidence not grounds for reversal. — Judgment will not be reversed because of the erroneous admission of evidence since at a subsequent stage of the trial, the evidence became relevant and admissible upon an issue later injected into the case. Fuller v. State, 197 Ga. 714, 30 S.E.2d 608, 1944 Ga. LEXIS 332 (1944) (decided under former Code 1933, § 38-201).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 289, 523.

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

Am. Jur. Trials.

Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

The Daubert Challenge to the Admissibility of Scientific Evidence, 60 Am. Jur. Trials 1.

C.J.S.

31A C.J.S., Evidence, § 238 et seq. 32 C.J.S., Evidence, § 798 et seq.

ALR.

Evidence of intemperate habits on question of damages from death or personal injuries, 9 A.L.R. 1405.

Admissibility of evidence as to insur-

ance on issue of negligence in operation or care of automobile, 28 A.L.R. 516.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 A.L.R. 297.

Evidence of experience with intruders on other occasions as admissible on issue of justification in defending premises, 45 A.L.R. 1418.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 56 A.L.R. 141; 74 A.L.R. 849; 95 A.L.R. 388; 105 A.L.R. 1319; 4 A.L.R.2d 761.

Evidence as to what was seen by use of mirror, 57 A.L.R. 409.

Evidence as to threats made to keep witness away from criminal trial, 62 A.L.R. 136.

Admissibility of expressions of pain or suffering by person injured, 64 A.L.R. 557.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 A.L.R. 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 A.L.R. 81.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 A.L.R. 77.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 A.L.R. 170; 150 A.L.R. 623.

Relevancy of race, color, nationality, sex, age, etc., of person whose conduct is in question, 71 A.L.R. 1301; 145 A.L.R. 1362.

Admissibility of test or experiment after accident as bearing on condition of automobile at time of accident, 72 A.L.R. 863.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 A.L.R. 732.

Physical condition of place before or after event as evidence of condition at time of event, 80 A.L.R. 446.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 A.L.R. 685.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 A.L.R. 825.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by the person in question, 82 A.L.R. 963.

Right of expert to give an opinion based on testimony of other witnesses not incorporated in a hypothetical question, 82 A.L.R. 1460.

Admissibility in prosecution for homicide of declarations indicating suicidal disposition on part of deceased, 83 A.L.R. 434.

Admissibility, and effect of admission, in condemnation proceedings of plans and specifications as regards the work to be done on, or the particular use to be made of, the land in question, 89 A.L.R. 879.

Admissibility in action for slander or libel of evidence of aversion or contempt manifested as consequence of libelous or slanderous publication, to show its hurtful tendency, 105 A.L.R. 944.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 A.L.R. 100.

Liability as for malpractice as affected by failure to take or advise the taking of an X-ray picture after operation, or to resort to other means of determining advisability of a supplementary operation or special treatment, 115 A.L.R. 298.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 A.L.R. 1149.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 A.L.R. 1510.

Admissibility in criminal prosecution of evidence of motive of one other than de-

fendant to commit the crime, 121 A.L.R. 1362.

Evidence which indirectly or incidentally suggests poverty or wealth of party not in itself proper matter of proof, 122 A.L.R. 1408.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed, 124 A.L.R. 841.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 A.L.R. 645.

Right, in civil action for malicious prosecution, to prove or rely on facts not known to defendant when he began prosecution or action which show or tend to show guilt or liability of plaintiff, 125 A.L.R. 897.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 A.L.R. 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 A.L.R. 1194.

Admissibility in action for death of evidence as to pecuniary condition of deceased, 128 A.L.R. 1084.

Admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 A.L.R. 1110.

Expert and opinion evidence as regards fire, 131 A.L.R. 1113.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 A.L.R. 1266.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 A.L.R. 1199.

Conduct of jury in nature of demonstration, test, or experiment during authorized view, 150 A.L.R. 958.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 A.L.R. 604.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 159 A.L.R. 1413; 73 A.L.R.2d 769.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 170 A.L.R. 7; 64 A.L.R.2d 1151.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Application of statute excluding testimony of one person because of death of another when invoked by or against one who sues or defends in two capacities, only one of which is within the statute, 172 A.L.R. 714.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death, 1 A.L.R.2d 365.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 4 A.L.R.2d 761.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 A.L.R.2d 205.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 A.L.R.2d 418.

Admissibility of declaration of persons other than members of family as to pedigree, 15 A.L.R.2d 1412.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 A.L.R.2d 304.

Admissibility of evidence as to tire tracks or marks on or near highway, 23 A.L.R.2d 112.

Physiological or psychological truth and deception tests, 23 A.L.R.2d 1306.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased

naming accused as beneficiary, 28 A.L.R.2d 857.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 A.L.R.2d 972.

Mode of establishing that information obtained by illegal wire tapping has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Lack of proper automobile registration or operator's license as evidence of operator's negligence, 29 A.L.R.2d 963.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 A.L.R.2d 190.

Footprints as evidence, 35 A.L.R.2d 856.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 A.L.R.2d 1055.

Admissibility, in railroad crossing accident case, of evidence of other functional failures of railroad crossing devices and appliances of the same kind at other times, 46 A.L.R.2d 935.

Blood grouping tests, 46 A.L.R.2d 1000.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 46 A.L.R.2d 1423.

Admissibility in evidence of rules of defendant in action for negligence, 50 A.L.R.2d 16.

Admissibility in evidence of colored photographs, 53 A.L.R.2d 1102.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 A.L.R.2d 922.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor, 57 A.L.R.2d 1086.

Admissibility in evidence of aerial photographs, 57 A.L.R.2d 1351.

Propriety, in trial of civil action, of use of skeleton or model of human body or part, 58 A.L.R.2d 689.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff, 59 A.L.R.2d 371.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 A.L.R.2d 1083.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 A.L.R.2d 1151.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 A.L.R.2d 1296; 15 A.L.R.5th 119.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 A.L.R.2d 945.

Propriety of permitting plaintiff in personal injury action to exhibit his person to jury, 66 A.L.R.2d 1334.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions, 67 A.L.R.2d 232.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 A.L.R.2d 731.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 A.L.R.2d 903.

Admissibility, on issue of defendant's negligence in respect of condition of place where plaintiff was injured, of evidence of prior accidents or injuries at same place, 70 A.L.R.2d 167; 21 A.L.R.4th 472.

Counsel's right in arguing civil case to read medical or other learned treatises to the jury, 72 A.L.R.2d 931.

Admissibility, in wrongful death action, of photograph of decedent made in his lifetime, 74 A.L.R.2d 928.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 A.L.R.2d 354.

Admissibility of experimental evidence as to explosion, 76 A.L.R.2d 402.

Admissibility of experimental evidence to show visibility or line of vision, 78 A.L.R.2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to

speed or control of motor vehicle, 78 A.L.R.2d 218.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children, 79 A.L.R.2d 819.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 A.L.R.2d 1224.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 A.L.R.2d 733.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part, 83 A.L.R.2d 1097.

Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, 83 A.L.R.2d 1271.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 A.L.R.2d 512.

Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict, 87 A.L.R.2d 849.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 A.L.R.2d 968.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 A.L.R.2d 1064.

Ruling on offer of proof as error, 89 A.L.R.2d 279.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 A.L.R.2d 681.

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, 99 A.L.R.2d 972.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 A.L.R.3d 692.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 A.L.R.3d 993.

Eminent domain: admissibility of photographs or models of property condemned, 23 A.L.R.3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land in issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 A.L.R.3d 1303.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 A.L.R.3d 1082.

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product, 42 A.L.R.3d 780.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability, 47 A.L.R.3d 234.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 A.L.R.3d 8.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence, 53 A.L.R.3d 1005.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 A.L.R.3d 659.

Admissibility of evidence of subsequent repairs or other remedial measures in

products liability cases, 74 A.L.R.3d 1001; 38 A.L.R.4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

Municipal corporation's safety rules or regulations as admissible in evidence in action by private party against municipal corporation or its officers or employees for negligent operation of vehicle, 82 A.L.R.3d 1285.

Products liability: admissibility, against manufacturer, of product recall letter, 84 A.L.R.3d 1220.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 A.L.R.3d 1170.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 A.L.R.3d 227.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 A.L.R.3d 926.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 A.L.R.3d 783.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 A.L.R.3d 545.

Admissibility of photographs of stolen property, 94 A.L.R.3d 357.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 A.L.R.4th 330.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 A.L.R.4th 500.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 A.L.R.4th 1298.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 A.L.R.4th 810.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 A.L.R.4th 472.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution of sexual offense, 31 A.L.R.4th 120.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 A.L.R.4th 229.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 A.L.R.4th 877.

Admissibility of bare footprint evidence, 45 A.L.R.4th 1178.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 A.L.R.4th 621.

Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R.5th 371.

Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 A.L.R.5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to ho-

micide or other criminal offense, 11 A.L.R.5th 871.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 A.L.R.5th 119.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 A.L.R.5th 841.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Admissibility of government factfinding in products liability actions, 29 A.L.R.5th 534.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 A.L.R.5th 615.

Evidence of trailing by dogs in criminal cases, 81 A.L.R.5th 563.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 A.L.R.5th 67.

Admissibility of computer-generated animation, 111 A.L.R.5th 529.

Admissibility and use of evidence of nonuse of bicycle helmets, 2 A.L.R.6th 429.

Admissibility in state criminal case of results of polygraph (lie detector) test Post *Daubert* cases, 10 A.L.R.6th 463.

Admissibility of evidence of prior accidents or injuries at same place, 15 A.L.R.6th 1.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 24 A.L.R.6th 747.

Admissibility of evidence of medical defendant's apologetic statements or the like as evidence of negligence, 97 A.L.R.6th 519.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 A.L.R. Fed. 541.

Construction and application of standard for reviewing challenges to sufficiency of evidence supporting conviction — Supreme Court cases, 76 A.L.R. Fed. 2d 295.

Use of tweets as evidence in civil and criminal trials, 25 A.L.R. Fed.3d 5.

24-4-402. Relevant evidence generally admissible; irrelevant evidence not admissible.

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.

History.

Code 1981, § 24-4-402, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

General admissibility of relevant evidence, Fed. R. Evid. 402.

Editor's notes.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-4-401 and 24-4-403, which may also be applicable to this Code section.

Law reviews.

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

JUDICIAL DECISIONS

Analysis

General Consideration

Irrelevant Evidence in Civil Cases

IRRELEVANT EVIDENCE IN CRIMINAL CASES

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5744, former Code 1933, § 38-201, and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

Irrelevant evidence is inadmissible. — Evidence which does not in any reasonable degree tend to establish the probability of the issues of fact in controversy is irrelevant and inadmissible. Horne v. State, 125 Ga. App. 40, 186 S.E.2d 542, 1971 Ga. App. LEXIS 730 (1971) (decided under former Code 1933, § 38-201).

Most acceptable test for relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491, 1987 Ga. LEXIS 661 (1987) (decided under former O.C.G.A. § 24-2-1).

Evidence of defendants' financial worth. — In a premises liability suit, the trial court erred by excluding evidence of the defendants' security expenditures by failing to determine whether the financial worth of the defendants was relevant to the issue since the plaintiffs contended that such evidence would show that the defendants' increased security expenditures constituted only a small percentage of the defendants' security budget. Cham v. ECI Mgmt. Corp., 353 Ga. App. 162, 836 S.E.2d 555, 2019 Ga. App. LEXIS 611 (2019), cert. denied, No. S20C0600, 2020 Ga. LEXIS 562 (Ga. July 15, 2020), aff'd, 311 Ga. 170, 856 S.E.2d 267, 2021 Ga. LEXIS 85 (2021).

Even when irrelevant evidence is admitted over timely objection, it affords no cause for a new trial, unless the nature of the evidence is such as reasonably to prejudice the rights of the objecting party. Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319, 1926 Ga. App. LEXIS 833 (1926) (decided under former Civil Code 1910, § 5744).

It is not reversible error to admit evidence that is merely irrelevant and immaterial. Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217, 1939 Ga. LEXIS 573 (1939) (decided under former Code 1933, § 38-201); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522, 1980 Ga. App. LEXIS 1987 (1980) (decided under former Code 1933, § 38-201).

Evidence of gang activity relevant. — Evidence that the defendant was with two other gang members at the scene of a shooting was relevant to the material issue of the defendant's association with a criminal street gang; thus, the trial court did not abuse the court's discretion in admitting that evidence. Lang v. State, 344 Ga. App. 623, 812 S.E.2d 16, 2018 Ga. App. LEXIS 99 (2018).

When the defendant was convicted of possession of a firearm by a convicted felon and participation in criminal gang activity, the trial court did not err in admitting evidence that a police investigator, who was qualified as a gang expert, had seized a "book of knowledge" from the house of another gang member as the evidence was relevant to a material issue in the case because a conviction required that there be some nexus between the enumerated act and an intent to further street gang activity; and, based on the book and other information, gang members were required to possess firearms. Lang v. State, 344 Ga. App. 623, 812 S.E.2d 16, 2018 Ga. App. LEXIS 99 (2018).

Harmless error as to victim's gang membership. — Trial court was not required to exclude the evidence of the victim's motorcycle gang membership as any error was harmless since the appellant admitted to shooting the victim, who was a stranger to the appellant at that moment in time and the evidence also showed that the victim was unarmed; thus, it was highly probable that the admission of the victim's alleged gang affiliation would not have contributed to the jury's verdict on the murder charge. Kilpatrick v. State, 308 Ga. 194, 839 S.E.2d 551, 2020 Ga. LEXIS 132 (2020).

Evidence immaterial. — If evidence is offered to prove a fact not in issue, the evidence is then properly said to be immaterial. MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431, 1976 Ga. App.

LEXIS 2522 (1976) (decided under former Code 1933, § 38-201).

Immateriality need not require reversal. — Mere fact that evidence is "immaterial" does not necessarily mean that its admission into evidence constitutes reversible error. Evidence which is immaterial will not always require reversal, since prejudice also must appear. Clarke v. State, 159 Ga. App. 843, 285 S.E.2d 270, 1981 Ga. App. LEXIS 2843 (1981) (decided under former Code 1933, § 38-201).

Probative value of jail phone call not outweighed by prejudicial effect. — Trial court did not err in admitting an audio recording of a five-minute phone call that the defendant made from jail to a friend because the recording was relevant to show that the defendant made statements that were not consistent with either the defendant's statements at the defendant's second police interview or the defense theory of justification presented at trial; and the derogatory terms used by the defendant during the phone call did not create a risk of unfair prejudice that substantially outweighed the recording's probative value as the words that the defendant used had lost much of their shock value in contemporary culture and were unlikely to induce the jury to return a conviction based on a generalized assessment of character. Smith v. State, 302 Ga. 717, 808 S.E.2d 661, 2017 Ga. LEXIS 977 (2017).

Exclusion prohibited establishing possibility of intoxication of driver who abandoned vehicle. — In a personal injury case, the trial court abused the court's discretion by granting the defendant's motion in limine because the excluded evidence was relevant to the most important issue of the case, whether the defendant parked the vehicle in the middle of the road; thus, the trial court's exclusion precluded the plaintiff from establishing that the defendant may have been intoxicated at the time the vehicle was left and/or from opportunities to impeach the defendant's testimony. Barrett v. Burnette, 348 Ga. App. 838, 824 S.E.2d 701, 2019 Ga. App. LEXIS 90 (2019), cert. denied, No. S19C0930, 2019 Ga. LEXIS 780 (Ga. Nov. 4, 2019).

Lottery ticket investigator's statement was relevant. — In a dispute over a $1 million lottery ticket, an investigator's testimony regarding the investigator's conversations with one claimant, including that the claimant did not remember what gas station the claimant purchased the ticket from and that the claimant claimed to always play the numbers on the ticket, which was a quick pick ticket, was highly relevant to the main issue in the case and was properly allowed. Heard v. Payne, 350 Ga. App. 283, 828 S.E.2d 657, 2019 Ga. App. LEXIS 287 (2019), cert. denied, No. S19C1350, 2020 Ga. LEXIS 19 (Ga. Jan. 13, 2020).

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Evidence not relevant. — See Atlantic Coca-Cola Bottling Co. v. Shipp, 170 Ga. 817, 154 S.E. 243, 1930 Ga. LEXIS 247 (1930) (race) (decided under former Civil Code 1910, § 5744); Gaskill v. Brown, 103 Ga. App. 33, 118 S.E.2d 113, 1961 Ga. App. LEXIS 847 (1961) (promissory note) (decided under former Code 1933, § 38-201); Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770, 1963 Ga. App. LEXIS 912 (1963) (accident) (decided under former Code 1933, § 38-201); DeFreese v. Beasley, 114 Ga. App. 832, 152 S.E.2d 772, 1966 Ga. App. LEXIS 928 (1966) (improperly dispensing dangerous drugs) (decided under former Code 1933, § 38-201); Schaefer v. Mayor of Athens, 120 Ga. App. 301, 170 S.E.2d 339, 1969 Ga. App. LEXIS 751 (1969) (accident) (decided under former Code 1933, § 38-201); Butler v. Garrison, 123 Ga. App. 645, 182 S.E.2d 185, 1971 Ga. App. LEXIS 1330 (1971) (materialman's dealing with contractor unrelated to case) (decided under former Code 1933, § 38-201); Lane v. Morrison, 124 Ga. App. 316, 183 S.E.2d 533, 1971 Ga. App. LEXIS 910 (1971) (documentary evidence) (decided under former Code 1933, § 38-201); City Council v. Lee, 153 Ga. App. 94, 264 S.E.2d 683, 1980 Ga. App. LEXIS 1692 (1980) (tort action) (decided under former Code 1933, § 38-201); Ideal Pool Corp. v. Champion, 157 Ga. App. 380, 277 S.E.2d 753, 1981 Ga. App. LEXIS 1828 (1981) (insurance) (decided under former Code 1933, § 38-201); Auto Rental & Leasing, Inc. v. Blizzard, 159 Ga. App. 533, 284 S.E.2d 47, 1981 Ga. App. LEXIS 2684 (1981) (net worth) (decided under former Code 1933, § 38-201); Wyatt

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v. State, 179 Ga. App. 327, 346 S.E.2d 387, 1986 Ga. App. LEXIS 1891 (1986) (nonsuspension of driver's license in DUI case) (decided under former O.C.G.A. § 24-2-1); Craig v. State, 205 Ga. App. 691, 423 S.E.2d 417, 1992 Ga. App. LEXIS 1297 (1992) (driving under the influence of alcohol) (decided under former O.C.G.A. § 24-2-1).

Ethnic identity of unknown driver not irrelevant. — In a wrongful death case where the jury determined that an unknown third driver was 90 percent at fault in causing an accident, it was not error to allow a witness to characterize the third driver as Hispanic. The evidence was relevant to show that the witness was paying sufficient attention and was close enough to the vehicle to identify the driver, and the court would not assume that characterizing someone as Hispanic was prejudicial or that the jurors acted out of prejudice. State Farm v. Nelson, 296 Ga. App. 47, 673 S.E.2d 588, 2009 Ga. App. LEXIS 117 (2009) (decided under former O.C.G.A. § 24-2-1).

Evidence concerning helmet use by rider of motorized skateboard. — In a suit arising from a college student riding a motorized skateboard colliding with a cyclist, getting hurt, and suing the cyclist, the trial court erred by excluding evidence that the skateboarder was not wearing a helmet at the time of the collision as the statutes relied upon by the trial court regulated only bicycles and electric bicycles and did not apply in any way to motorized skateboards. Stockert v. Rogers, 361 Ga. App. 276, 864 S.E.2d 116, 2021 Ga. App. LEXIS 472 (2021).

Evidence in malicious prosecution case. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that plaintiff's past criminal history was relevant, should have thereafter considered whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because those arrests potentially would confuse or mislead the jury. Rivers v. K-Mart Corp., 321 Ga. App. 788, 743 S.E.2d 464, 2013 Ga. App. LEXIS 409 (2013).

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Evidence not relevant. — See Walker v. State, 86 Ga. App. 875, 72 S.E.2d 774, 1952 Ga. App. LEXIS 1088 (1952) (hog stealing) (decided under former Code 1933, § 38-201); Davis v. State, 115 Ga. App. 338, 154 S.E.2d 462, 1967 Ga. App. LEXIS 1101 (1967) (peeping Tom) (decided under former Code 1933, § 38-201); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185, 1968 Ga. App. LEXIS 1479 (1968) (use of dynamite) (decided under former Code 1933, § 38-201); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45, 1969 Ga. App. LEXIS 725 (1969) (burglary) (decided under former Code 1933, § 38-201); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275, 1976 Ga. LEXIS 1014 (1976) (prior criminal record) (decided under former Code 1933, § 38-201); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, 1981 Ga. LEXIS 629, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981) (murder) (decided under former Code 1933, § 38-201).

Because the trial court properly found that testimony tending to show that the defendant's daughter possessed the methamphetamine the defendant was charged with possessing was hearsay, and testimony from the defendant's grandson was irrelevant, the defendant's conviction for possession was affirmed on appeal. Corbin v. State, 287 Ga. App. 194, 651 S.E.2d 101, 2007 Ga. App. LEXIS 871 (2007) (decided under former O.C.G.A. § 24-2-1).

Results of drug test irrelevant. — Trial court did not err in disallowing defendant's testimony as to results of a test for use of illegal drugs. Whether defendant tested negative for drug use at any time is not relevant to, and did not tend to prove or disprove, whether defendant trafficked in or possessed cocaine as charged in the indictment. Montgomery v. State, 204 Ga. App. 534, 420 S.E.2d 67, 1992 Ga. App. LEXIS 904 (1992) (decided under former O.C.G.A. § 24-2-1).

Medical records. — In a malice murder case, the trial court did not err when the court refused to admit medical records indicating the second victim was diagnosed with homicidal ideations sometime after the stabbing and assault as the evi-

dence was not relevant because the diagnosis of homicidal ideation was made sometime after the criminal offenses in the case; and the diagnosis of homicidal ideation allegedly concerned thoughts the second victim had about the second victim's girlfriend and the second victim's child and not any thoughts the second victim had about the first victim, who had been murdered. Drews v. State, 303 Ga. 441, 810 S.E.2d 502, 2018 Ga. LEXIS 109 (2018).

Exclusion of evidence regarding lack of history of mental illness. — Evidence regarding the defendant's lack of history of mental illness was properly excluded because the defendant did not raise any type of mental-health related defense for which evidence of psychological evaluations might have been relevant; the defendant pointed to no legal authority for the proposition that a defendant should be permitted to introduce expert testimony that the defendant had no history of mental illness in order to show that the defendant did not intend to commit a crime; and there was no authority suggesting that evidence of the defendant's lack of mental illness had any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable. Sullivan v. State, 308 Ga. 772, 843 S.E.2d 411, 2020 Ga. LEXIS 347 (2020).

Name of bookie irrelevant. — Even though inquiry concerning a victim's gambling activities in general may have been relevant, the name of the bookie's bookie had no direct or indirect relevancy to defendant's guilt or innocence. Sorrells v. State, 267 Ga. 236, 476 S.E.2d 571 (decided under former O.C.G.A. § 24-2-1).

Expert's testimony on Intoxilyzer 5000 irrelevant. — Trial court did not err when it excluded an expert witness's testimony about the Intoxilyzer 5000 and the proper procedures pertaining to refusals of the breath test because the state was simply required to show that the defendant was a less safe driver as a result of alcohol that the defendant had consumed and the expert's testimony about the breath test was irrelevant. Stone v. State, 248 Ga. App. 190, 546 S.E.2d 787, 2000 Ga. App. LEXIS 1465 (2000) (decided under former O.C.G.A. § 24-2-1).

Trial court did not abuse the court's discretion in excluding expert evidence defendant sought to introduce that allegedly would have attacked the results of defendant's breath test in defendant's driving while under the influence of alcohol case as the expert evidence was too remote and uncertain to be relevant to the issue for which defendant sought to introduce the evidence, that of whether the breath test machine malfunctioned. Viau v. State, 260 Ga. App. 96, 579 S.E.2d 52, 2003 Ga. App. LEXIS 263 (2003), cert. denied, No. S03C1022, 2003 Ga. LEXIS 682 (Ga. July 14, 2003) (decided under former O.C.G.A. § 24-2-1).

Images of child pornography. — Trial court did not err in limiting the defendant's cross-examination of the co-defendant as to images of child pornography found on the co-defendant's phone because the trial court permitted the defendant's counsel to question the co-defendant as to whether the co-defendant was testifying against the defendant in an attempt to curry favor with the state immediately after the defendant asked the co-defendant about the images. Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561, 2019 Ga. App. LEXIS 69 (2019).

Videotape evidence irrelevant and excluded. — In action alleging obstruction of an officer, the trial court did not err in excluding a videotape of the party from evidence as not relevant because the videotape could not have been used to impeach the deputy's testimony; the videotape did not depict the encounter between the deputy and defendant but only depicted events prior to the deputy's arrival at defendant's home. Schroeder v. State, 261 Ga. App. 879, 583 S.E.2d 922, 2003 Ga. App. LEXIS 801 (2003), cert. denied, No. S03C1574, 2003 Ga. LEXIS 913 (Ga. Oct. 20, 2003) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in excluding a videotape of a statement defendant gave to a detective at the time of the defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled on other

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grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-1).

Threadbare evidence based on bare suspicion of a third party held inadmissible and excluded. — Defendant's proffered evidence that a third party told the proffered witness that the third party had killed people before and buried the people in the woods and that the third party then asked the witness if the witness remembered a policeman, who did not work for the city anymore, was properly excluded as it was too threadbare to be admissible and did nothing more than toss a bare suspicion in the direction of a third party. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-1).

Questions about drug involvement irrelevant. — Trial court properly limited defendant's cross-examination of a drug dealer who defendant claimed was the actual shooter who killed the victim by excluding all questions about the drug dealer's involvement in selling drugs as those questions were irrelevant to the murder trial. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, 2005 Ga. LEXIS 123 (2005), cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478, 2005 U.S. LEXIS 8017 (2005), superseded by statute as stated in Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-2-1).

While a defendant was entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant was tried, the trial court did not abuse the court's discretion in excluding evidence that an individual the defendant went to go visit on the night of the arrest was a known drug dealer and had been arrested on drug charges, as there was no evidence tending to connect that person to the marijuana found in the defendant's vehicle; hence, the evidence failed to raise a reasonable inference of the defendant's innocence, and did not directly connect the other person with the corpus delicti, or show that the other person recently committed a crime of the same or similar nature. Gerlock v. State, 283 Ga. App. 229, 641 S.E.2d 240, 2007 Ga. App. LEXIS 18 (2007) (decided under former O.C.G.A. § 24-2-1).

Questions about relationship with nondefendant irrelevant. — Trial court did not abuse the court's discretion in disallowing a defendant's cross-examination of a victim's mother, about her marriage to the defendant's son as to whether the mother was "debating" with her husband "over someone giving the other person venereal disease," on relevancy grounds as the line of questioning involved the mother's relationship with her husband, rather than with the defendant. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240, 2006 Ga. App. LEXIS 972 (2006) (decided under former O.C.G.A. § 24-2-1).

Expert on alco-sensor test properly excluded. — Trial court did not abuse the court's discretion in refusing to admit the testimony of a defendant's expert because the mistake charged to an arresting officer in administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. Oliver v. State, 294 Ga. App. 299, 669 S.E.2d 162, 2008 Ga. App. LEXIS 1225 (2008) (decided under former O.C.G.A. § 24-2-1).

Admission of challenged evidence deemed harmless error. — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error, because it was highly improbable that such failure contributed to the verdict

given the overwhelming evidence of the defendant's guilt. Goldey v. State, 289 Ga. App. 198, 656 S.E.2d 549, 2008 Ga. App. LEXIS 37 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of abuse of victim's sibling irrelevant. — In a child molestation case involving the defendant's child, the trial court properly excluded as irrelevant evidence that the child's stepparent had sexually molested the child's sibling. There was no evidence that the child had been molested by the stepparent or by anyone else besides the defendant, and the defendant did not show how the child might have been affected or improperly influenced by the sibling's allegations. French v. State, 288 Ga. App. 775, 655 S.E.2d 224, 2007 Ga. App. LEXIS 1181 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence regarding victim's use of seatbelt. — Trial court properly excluded evidence of seatbelt-use because evidence of the victim's failure to wear a seatbelt was irrelevant to causation and inadmissible in a criminal case as it did not tend to make it either more or less probable that an accident caused by the defendant proximately caused the victim's death, in violation of the statutes for homicide by vehicle in the first degree predicated on a hit-and-run offense and for hit and run. State v. Mondor, 306 Ga. 338, 830 S.E.2d 206, 2019 Ga. LEXIS 449 (2019).

RESEARCH REFERENCES

ALR.

Admissibility of evidence of medical defendant's apologetic statements or the like as evidence of negligence, 97 A.L.R.6th 519.

Admissibility of rap lyrics or videos in criminal prosecutions, 43 A.L.R.7th Art. 1.

Use of tweets as evidence in civil and criminal trials, 25 A.L.R. Fed.3d 5.

24-4-403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History.

Code 1981, § 24-4-403, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons, Fed. R. Evid. 403

Editor's notes.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-4-401 and 24-4-402, which may also be applicable to this Code section.

Law reviews.

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For annual survey on trial practice and procedure, see 70 Mercer L. Rev. 253 (2018).

For annual survey on evidence, see 71 Mercer L. Rev. 103 (2019).

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

For article, "Character Evidence in the Civil Setting," see 26 Ga. St. B.J. 20 (Dec. 2020).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-201 and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

Evidence which is relevant may be excluded because the probative worth or value of the evidence is outweighed by the tendency of the evidence confuse the issues, or the jury. MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431, 1976 Ga. App. LEXIS 2522 (1976) (decided under former Code 1933, § 38-201).

Trial court properly excluded the patients' request to admit photographs of their stillborn fetus in their medical malpractice action as there was no dispute that the fetus suffered from skin peeling, and while the issue was slightly probative in the case, it was substantially outweighed by the danger of unfair prejudice. Steele v. Atlanta Maternal-Fetal Medicine, 271 Ga. App. 622, 610 S.E.2d 546, 2005 Ga. App. LEXIS 51 (2005), cert. denied, No. S05C1009, 2005 Ga. LEXIS 486 (Ga. June 30, 2005), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147, 2009 Ga. LEXIS 395 (2009) (decided under former O.C.G.A. § 24-2-1).

Unfair prejudice must substantially outweigh probative value to exclude evidence. — After the state filed a notice of intent to present other acts evidence seeking to admit evidence of prior bad acts through the testimony of three witnesses, and the trial court denied the state's motion, the trial court did not apply the correct standard regarding the exclusion of relevant evidence when the court found only that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice and failed to analyze whether such prejudice substantially outweighed any probative value. State v. Jackson, 351 Ga. App. 675, 832 S.E.2d 654, 2019 Ga. App. LEXIS 465 (2019).

Application of incorrect legal standard. — Trial court erred by excluding evidence of defendant's two prior shootings because the court's analysis under O.C.G.A. § 24-4-403 employed an erroneous legal standard, as the court stated that the evidence of one incident was "highly prejudicial" and "not probative" but the court was required to assess the danger of unfair prejudice, and the court stated that the second incident was "more prejudicial than probative" but the proper standard required the court to determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. State v. Harris, No. S23A0090, No. S23A0091, 2023 Ga. LEXIS 103 (Ga. May 16, 2023).

Evidence of silence or failure to report crime evaluated on case-by-case basis. — Judicial rule excluding all comment upon a defendant's silence or failure to come forward to report a crime as more prejudicial than probative, Mallory v. State, 261 Ga. 625, 409 S.E.2d 839 (1991), was abrogated by Georgia's new Evidence Code; now such silence or failure to come forward must be evaluated on a case-by-case basis under O.C.G.A. § 24-4-403. State v. Orr, 2019 Ga. LEXIS 317.

Trial court did not abuse the court's discretion in admitting testimony regarding the appellant's prior acts of sexual assault because that evidence was relevant to the appellant's intent, identity, and propensity and three other family members testified that the appellant engaged in the same conduct of rubbing their genitals and inserting the defendant's finger into their vaginas when the witnesses were the same age as the victim, which testimony was relevant to show the appellant's propensity and that it was the appellant who molested the

victim. Dixon v. State, 350 Ga. App. 211, 828 S.E.2d 427, 2019 Ga. App. LEXIS 274 (2019).

Federal interpretation on exclusion of relevant evidence for "unfair prejudice". — The Fifth Circuit held that a trial court's exclusion of evidence under Fed. R. Evid. 403 as prejudicial in a bench trial was improper; excluding relevant evidence in a bench trial because the evidence is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure since Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. In a bench trial, the same judge can also exclude those improper inferences from the judge's mind in reaching a decision. Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 1981 U.S. App. LEXIS 20535 (5th Cir. 1981).

Risk of prejudice reduced by limiting instruction. — Admission of prior acts evidence was not an abuse of discretion as the similarity between the charged offense and an altercation two days earlier in which the defendant poked the victim with a knife made the former act highly probative of the defendant's intent and the risk of undue prejudice to the defendant was reduced by the court's limiting instruction, charging the jury that the evidence could not be used to infer that the defendant was of a character that would commit such crimes. Powell v. State, 332 Ga. App. 437, 773 S.E.2d 399, 2015 Ga. App. LEXIS 319 (2015).

Federal interpretation on discretion afforded for admission of evidence. — The Eleventh Circuit noted that, in making the Fed. R. Evid. 403 determination as to whether the probative value of evidence is substantially outweighed by its prejudicial effect, the trial court is accorded broad discretion that will be reviewed only for clear abuse. United States v. King, 713 F.2d 627, 1983 U.S. App. LEXIS 24467 (11th Cir. 1983), cert. denied, 466 U.S. 942, 104 S. Ct. 1924, 80 L. Ed. 2d 470, 1984 U.S. LEXIS 1885 (1984).

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Evidence of sexual activities prejudicial. — Trial court should have excluded a significant amount of needlessly cumulative evidence of the defendant's sexual activities before the day of the child's death because the probative value of the evidence was trivial at best and the unfair prejudice wholly outweighed whatever minimal probative value the sexual interactions with minors had in establishing the existence of the first link (and only the first link) of the defendant's alleged motive for killing the child. Harris v. State, 314 Ga. 238, 875 S.E.2d 659, 2022 Ga. LEXIS 169 (2022).

Admission of evidence that victim was molested at age of six. — Trial court did not err in excluding the evidence that the victim was molested at the age of six because even if the evidence arguably bore some minimal relevance to defendant's guilt in the case, the trial court acted within the court's discretion in concluding that the minor probative value of any such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or waste of time. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

When evidence of other crime admissible. — Trial court's ruling that the other-acts evidence would not be admitted was vacated because the appellate court could not discern whether the trial court considered whether the defendants had taken affirmative steps to withdraw intent as an element to be proved by the state or whether it compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27, 2015 Ga. App. LEXIS 498 (2015).

In the defendant's DUI trial, the state offered evidence concerning the defendant's December 2011 DUI for the valid purpose of proving the defendant's knowledge and intent, and the probative value of the 2011 DUI was not substantially outweighed by the danger of unfair preju-

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dice or the confusion of issues or misleading the jury. The state had proffered sufficient evidence, in the form of both the officer's testimony and the certified conviction, that the defendant in fact committed the prior act. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851, 2017 Ga. App. LEXIS 306 (2017), overruled in part, McClure v. State, 306 Ga. 856, 834 S.E.2d 96, 2019 Ga. LEXIS 643 (2019).

In a robbery case, the trial court erred by finding that the prosecutor's "in her place" proffer in support of a pretrial notice under O.C.G.A. § 24-4-404(b) seeking to admit evidence of another robbery committed by the defendant provided insufficient proof that the defendant committed the other acts, in the absence of objection by the defendant. State v. Battle, 344 Ga. App. 565, 812 S.E.2d 1, 2018 Ga. App. LEXIS 68 (2018).

By placing intent at issue by claiming at trial that the defendant's delusions completely negated criminal intent, the state needed evidence that the defendant acted with intent to commit the crimes of murder and possession of a firearm; thus, the trial court did not abuse the court's discretion in admitting evidence of a prior New York crime since as to both crimes, the defendant used a handgun to assault people that the defendant perceived had committed an offense against the defendant. Castillo-Velasquez v. State, 305 Ga. 644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

Trial court did not abuse the court's discretion by admitting evidence that the defendant had pled guilty to voluntary manslaughter in 1997 because it was relevant to the issue of intent, which the state was required to prove for the malice murder charge. The trial court did not err by finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the state had a high need for the evidence to counter the defense that the defendant had been coerced into participating in the crimes, there were significant similarities between the crimes, and the defendant admitted to shooting the prior victim. Frazier v. State, 309 Ga. 219, 845 S.E.2d 579, 2020 Ga. LEXIS 460 (2020).

Trial court did not abuse the court's discretion when the court concluded that the evidence of two prior acts were relevant because the 2002 attack showed that the defendant, when affronted by a romantic partner, would call on male friends to help subdue the partner, as well as the 2003 vase-throwing incident with the defendant biting the victim, were both strikingly similar to the assault upon the defendant's boyfriend, which resulted in the boyfriend's death. Morgan v. State, 354 Ga. App. 754, 841 S.E.2d 430, 2020 Ga. App. LEXIS 216 (2020).

Trial court did not abuse the court's discretion in admitting the two prior acts of child molestation against the defendant especially given the strong presumption in favor of admissibility; the defendant's prior acts against two other women when they were young girls were relevant and probative regarding the defendant's intent and propensity to commit the charged crimes against the victim as there was no showing either on direct or cross-examination that the witnesses' memories were at issue. Sturgis v. State, 356 Ga. App. 219, 842 S.E.2d 82, 2020 Ga. App. LEXIS 240 (2020).

Trial court did not err in denying the defendant's motion to exclude evidence of a prior armed robbery conviction because the two armed robberies were similar in that, in both robberies, the defendant followed the victim home, robbed them at gun point just outside of the front door, and then fled the scene with the help of accomplices, weighing in favor of admission. Jernigan v. State, 357 Ga. App. 415, 848 S.E.2d 707, 2020 Ga. App. LEXIS 551 (2020).

Trial court did not abuse the court's discretion by failing to exclude evidence of the defendant's prior convictions for forgery and theft by deception because, given the clear questions raised about the defendant's intent, the claim to the police that the defendant and the victim were involved in a drug-dealing scheme, and the fact that all the incidents involved efforts by the defendant to obtain funds through deceit, any unfair prejudice did not substantially outweigh the probative value of

the other acts evidence. Austin v. State, 356 Ga. App. 839, 849 S.E.2d 689, 2020 Ga. App. LEXIS 539 (2020).

There was no abuse of discretion in the trial court's application of the balancing test with regard to six prior instances when the defendant previously exposed the defendant's penis to a female in a public place and masturbated because all of the incidents were significantly similar and lessened the possibility that the incident at issue was an accident. Mike v. State, 358 Ga. App. 113, 853 S.E.2d 887, 2021 Ga. App. LEXIS 14 (2021).

Trial court did not abuse the court's discretion by admitting testimony and photographs regarding the defendant's entry into the victim's wife's sister's back yard in the middle of the night to leave flowers, valentine cards, and a note for the wife because the evidence was necessary to complete the story of the crime as it shed light on the defendant's motives in the defendant's single-minded and continuing pursuit of the wife without any apparent concern over the victim's murder or the defendant's previous threats. Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice particularly in light of the trial court's caution that the witnesses were not to testify to the defendant's arrest for the severed charges or to mention those charges by name. Gialenios v. State, 310 Ga. 869, 855 S.E.2d 559, 2021 Ga. LEXIS 79, overruled in part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

Trial court did not abuse its discretion by admitting evidence related to shootings at another location as intrinsic evidence because the evidence had significant probative value, as the State needed evidence to show the connection between defendant, defendant's gang membership, and the charged crimes, and the prejudicial effect of the evidence was mitigated by the trial court's instruction limiting the jury's consideration of the evidence. Johnson v. State, 312 Ga. 481, 863 S.E.2d 137, 2021 Ga. LEXIS 625 (2021).

Trial court did not abuse its discretion by not excluding defendant's prior offenses of child molestation under this section, even though they occurred nearly 30 years before the instant crimes, because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, as the prior offenses were similar to the instant crimes, and the State needed the evidence to show defendant's motive and intent and to rebut the defense that the victim had fabricated the claims of child molestation. Wilson v. State, 312 Ga. 174, 860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Evidence of a prior assault, a prior murder, and a prior robbery by the defendant was admissible intrinsic evidence, as the prior acts were part of the chain of events leading to the charged crimes and were probative to explaining the context of the charged crimes. Heade v. State, 312 Ga. 19, 860 S.E.2d 509, 2021 Ga. LEXIS 475 (2021).

Trial court did not err by refusing to exclude the extrinsic evidence under O.C.G.A. § 24-4-403 because the prosecutorial need for the evidence was high to counter the defense that defendant had not been in a car chase with another driver and nothing defendant did caused the other driver to lose control, although the videos referred to racing and drifting those acts were consistent with the acts of reckless and aggressive driving that defendant engaged in while eluding the other driver, the risk of prejudice was minimal, and the trial court gave a limiting instruction. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Trial court erred in granting the defendant's motion in limine to exclude any evidence of another robbery because, although the trial court assumed the evidence could be relevant to identity or motive, the trial court did not appear to have considered the admissibility of the evidence to show modus operandi, plan, or preparation; the trial court seemed to have ignored the prosecutorial need for the evidence, given the defendant's own concession at the hearing that the evidence was the only link between him and the 2016 robbery; and the trial court failed to properly apply the Rule 403 balancing test. State v. Anderson, 365 Ga. App. 75, 877 S.E.2d 639, 2022 Ga. App. LEXIS 390 (2022).

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Probative value of other acts evidence was not substantially outweighed by the danger of unfair prejudice to defendant because the evidence was needed to counter defendant's theory of self-defense. Freeman v. State, 365 Ga. App. 332, 878 S.E.2d 578, 2022 Ga. App. LEXIS 440 (2022).

Trial court did not err by admitting evidence of defendant's 1988 convictions for rape and aggravated sodomy because it was relevant to show defendant's intent. Because defendant attacked the victims' credibility, the State was able to use the evidence to bolster their credibility by showing that their circumstances were not unique. The trial court gave the jury a limiting instruction and the State tendered a certified copy of defendant's 1988 convictions at trial. Brooks v. State, 365 Ga. App. 711, 880 S.E.2d 226, 2022 Ga. App. LEXIS 497 (2022).

In child molestation case, trial court abused discretion in determining whether prior acts evidence was admissible under O.C.G.A. § 24-4-403, because trial court's assessment of mini-trial risk was not tailored to prior acts evidence presented by state at hearing on motion. State v. Berman, 367 Ga. App. 447, 2023 Ga. App. LEXIS 167 (2023).

Admission of out of state convictions proper. — Trial court did not abuse the court's discretion when the court admitted the defendant's prior Florida convictions because the defendant put intent at issue and, contrary to the defendant's contention that the prior crimes and the instant crimes were not sufficiently similar, all involved defendant acquiring or attempting to acquire high-end vehicles through fraud or deceit. Clarke v. State, 356 Ga. App. 580, 848 S.E.2d 192, 2020 Ga. App. LEXIS 492 (2020).

Evidence of victim's prior crimes properly excluded. — Trial court did not err by refusing to allow the defendant to introduce evidence that in 2013 the other driver had attempted to abduct a teenage girl from a bus and then attempted to flee because it was not relevant, as whether the driver attempted to overcharge defendant was of no consequence to the determination of the issues in the case and the issue for determination was not whether the driver left the scene of the accident but rather whether the defendant caused the accident by brake checking the driver and causing the driver to lose control. The probative value of the evidence was substantially outweighed by the risk of prejudice. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Evidence of prior acts admissible although defendant acquitted of charges. — In the defendant's trial for the shooting death of a drug dealer, the trial court properly ruled that a prior similar incident was so similar that evidence showing the defendant's involvement in the prior incident was admissible under O.C.G.A. § 24-4-404(b), despite the defendant's acquittal of charges in that case; however, the trial court erred in excluding evidence of that victim's murder out of "an abundance of caution," which was not a ground for excluding evidence under O.C.G.A. § 24-4-403. State v. Atkins, 304 Ga. 413, 819 S.E.2d 28, 2018 Ga. LEXIS 600 (2018).

Evidence of multiple serious violent acts admitted to show intent. — Appellant's convictions for felony murder, aggravated assault, and knife-possession offenses were reversed because the Georgia Supreme Court could not say that the trial court's erroneous admission of the voluminous evidence that the appellant had previously committed multiple serious violent acts did not contribute to the guilty verdicts that the jury returned. Strong v. State, 309 Ga. 295, 845 S.E.2d 653, 2020 Ga. LEXIS 467 (2020).

Admission of other acts evidence in murder trial constituted harmless error. — Trial court abused the court's discretion admitting 2005 shooting evidence of the appellant's firing a handgun, but that error was harmless in light of the array of other strong evidence demonstrating the appellant's guilt and considering it was an evidentiary error and not of constitutional dimensions; given the overall strength of the other evidence of the appellant's guilt, the Georgia Supreme Court held that it was highly probable that erroneously admitted evidence

of the 2005 shooting did not contribute to the jury's verdict. Jackson v. State, 306 Ga. 69, 829 S.E.2d 142, 2019 Ga. LEXIS 392 (2019).

In a case in which the defendant was convicted of malice murder and possession of a firearm during the commission of a felony, although the trial court erred in admitting the evidence of the prior shooting as there were limited similarities and minimal prosecutorial need for the evidence, and the prior act was not at all relevant for the purpose of showing motive, the error was harmless as it was highly probable that the error in admitting the evidence about the shooting did not contribute to the verdict given the strong independent evidence of the defendant's guilt and the trial court's thorough instructions. Thomas v. State, 314 Ga. 681, 878 S.E.2d 493, 2022 Ga. LEXIS 255 (2022).

Evidence of motive from family violence and extramarital affairs. — When the state sought to introduce the defendant's prior arrest for family violence battery against another woman to show the defendant's motive and intent in killing the victim, given that the state intended to call the defendant's wife as a witness, the extramarital nature of the defendant's relationship with the victim in 2021 would be in evidence, and evidence that the defendant had an extramarital affair with the other woman in 2017 had exceedingly low prejudicial impact; thus, that aspect of the other-acts evidence was entitled to very little weight in the trial court's balancing of the probative value against any unfair prejudice, and the trial court erred in that regard. State v. Williams, No. S23A0420, 2023 Ga. LEXIS 89 (Ga. May 2, 2023).

Evidence improperly admitted to show course of conduct. — Defendant was granted a new trial because the evidence of a subsequent armed robbery was not admissible to show motive since that later act was not connected to the murders, and the only similarities it shared with the murders were the all-too-common elements of guns and an assortment of co-conspirators. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899, 2017 Ga. LEXIS 950 (2017).

Similarities between attacks sufficient for admission. — Superior court did not err by allowing a witness to testify because the evidence was properly admitted to prove a plan, as there were striking similarities between defendant's attack on the witness and instant offense, the evidence had substantial probative value because the defense at trial was that defendant was not the perpetrator, and the state offered sufficient evidence for the jury to conclude that defendant committed the acts, as the witness testified and identified defendant as her attacker, and the state offered photographs depicting defendant's bite marks on the witness. Burrell v. State, 363 Ga. App. 491, 870 S.E.2d 918, 2022 Ga. App. LEXIS 178 (2022).

Medical records on mental health. — Trial counsel was not ineffective for failing to present available evidence corroborating the defendant's testimony about the defendant's mental health because trial counsel correctly recognized that under the rule of completeness, the state could have sought to admit portions of the medical records from prison, as well as medical records from other facilities, that were unfavorable to the defendant. Castillo-Velasquez v. State, 305 Ga. 644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

Victim's false accusation of sexual abuse improperly barred. — Trial court erred in granting the state's motion in limine to exclude evidence that the alleged victim had previously made a false accusation of sexual abuse against another individual based on a lack of specificity and a creation unfair prejudice and confusion of the issues because it was not clear how a false accusation could contain adequate specificity about an incident that never occurred; and because evidence of an allegation against a totally unrelated third party did not seem to present danger of unfair prejudice or confusion of the issues in the prosecution against one defendant, for sexual acts committed on one day, against one individual. Burns v. State, 345 Ga. App. 822, 813 S.E.2d 425, 2018 Ga. App. LEXIS 226 (2018), aff'd, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

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Trial court did not abuse the court's discretion by allowing the admission of evidence regarding the defendant's prior drug possession arrest because the evidence of prior drug activity was highly probative of intent to sell a controlled substance for which the defendant was on trial and the prior act of drug possession happened while the defendant was driving a car in the same area where the sale of the methamphetamine during the first buy occurred. Moton v. State, 351 Ga. App. 789, 833 S.E.2d 171, 2019 Ga. App. LEXIS 488 (2019).

Lower appellate court properly reversed the ruling excluding the victim's admittedly false statement of sex because the false allegation plainly described the event involving someone else at a separate time; thus, there was no basis for confusion and, as such, O.C.G.A. § 24-4-403 did not pose a bar to the jury learning about the victim's false statement. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Georgia Supreme Court overruled Smith v. State, 259 Ga. 135 (1989) and similar holdings, which held that Georgia's Rape Shield statute (now O.C.G.A. § 24-4-412), as it then existed, did not prohibit testimony of previous false allegations by the victim as the court held that although Smith's bright-line test was not unworkable, neither was the alternative of applying familiar and usual rules of evidence, which trial courts routinely do every day. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Trial court did not err in permitting testimony that when the victim obtained a temporary protective order for the victim, the victim also obtained a temporary protective order for a client, the mother of the defendant's child, to provide context for previous interactions between the victim and the defendant and to explain the dynamic between them as the testimony was very brief and the defendant offered no persuasive argument for why the trial court's decision not to exclude the testimony was an abuse of discretion. Maynard v. State, 355 Ga. App. 84, 842 S.E.2d 532, 2020 Ga. App. LEXIS 261 (2020).

Evidence of defendant making victim participate in online sexual performance. — Trial court did not err in denying the defendant's motion in limine to exclude evidence that the defendant made the victim participate in online sexual performances because the evidence was relevant to the defendant's intent, identity, and propensity to commit the crimes against the victim and the probative value of the evidence was great because the evidence provided a narrative of how the victim's abuse began, how the grooming process began, and why the victim delayed disclosure. Hamby v. State, 358 Ga. App. 105, 853 S.E.2d 874, 2021 Ga. App. LEXIS 11 (2021).

Images of child pornography. — Trial court did not err in limiting the defendant's cross-examination of the co-defendant as to images of child pornography found on the co-defendant's phone because the trial court permitted the defendant's counsel to question the co-defendant as to whether the co-defendant was testifying against the defendant in an attempt to curry favor with the state immediately after the defendant asked the co-defendant about the images. Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561, 2019 Ga. App. LEXIS 69 (2019).

Trial court did not err denying new trial and allowing state to introduce evidence of pornography found in appellant's bedroom because appellant was specifically charged with several counts of child molestation and allegations included showing children images of adult pornography, thus, evidence of pornography found in bedroom was relevant and carried significant probative weight because it assisted state in proving those allegations. Rider v. State, 366 Ga. App. 260, 883 S.E.2d 374, 2022 Ga. App. LEXIS 547 (2022).

Probative value of drug evidence outweighed by prejudicial effect. — Evidence recovered by law enforcement during a search of the co-indictee's home, including marijuana, baggies, and a digital scale, was clearly relevant and admissible as the defendant and the co-indictee

were jointly charged with conspiracy to distribute marijuana based upon their attempt to sell marijuana to the victim prior to the victim's death; furthermore, for the same reasons, the defendant failed to show that the admission of that evidence was more prejudicial than probative. Thorpe v. State, 304 Ga. 266, 818 S.E.2d 547, 2018 Ga. LEXIS 545 (2018).

Trial court did not abuse the court's discretion by denying the appellant's pretrial motion to exclude evidence of the purchase and use of marijuana because the evidence was intrinsic since it explained who an individual was and why the appellant believed that the victim would have cash to steal; thus, the drug evidence was necessary to complete the story of the crime for the jury. McCammon v. State, 306 Ga. 516, 832 S.E.2d 396, 2019 Ga. LEXIS 505 (2019).

Trial court erred in admitting evidence of the facts underlying a prior conviction for possession with intent to distribute marijuana and possession of a firearm during the commission of a crime because, inter alia, the defendant's knowledge was not at issue, and the danger of unfair prejudice was significant where the only direct evidence of guilt came from the testimony of a single witness. Wright v. State, 362 Ga. App. 867, 870 S.E.2d 484, 2022 Ga. App. LEXIS 112 (2022).

Admission of evidence of the alleged use, sale, or purchase of illegal substances by defendant during the murder trial did not outweigh its probative value because it was necessary to complete the story of the crime and to explain why defendant and the victim were engaged in an ongoing feud that led to the shootings and because defendant relied on the botched drug transaction and ensuing dispute to attempt to justify the shootings. Jackson v. State, 2023 Ga. LEXIS 22.

Prejudicial impact outweighed probative value in child abuse case. — While the physician's opinion regarding the victim's hymen being intact and then later not intact was compelling evidence that the victim had been sexually abused, it was much less probative of the question of whether it was the defendant who had molested the victim because the defendant lacked access to the victim during the relevant time period and, thus, should not have been admitted into evidence. State v. Chapman, 322 Ga. App. 82, 744 S.E.2d 77, 2013 Ga. App. LEXIS 456 (2013).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11, 2017 Ga. App. LEXIS 176 (2017).

During the defendant's trial for cruelty to a child, the trial court abused the court's discretion by admitting the defendant's wife's testimony that the wife observed the defendant molesting their two-year-old daughter a day or two after the incident giving rise to the instant charge because the acts were not similar and involved different children, the wife's testimony was not probative of whether the defendant committed the charged crime, and the evidence was extremely prejudicial. The error was not harmless because the defendant denied the charge at trial and the jury acquitted the defendant of family violence battery against the wife despite the wife's testimony. Maqrouf v. State, 349 Ga. App. 174, 825 S.E.2d 569, 2019 Ga. App. LEXIS 134 (2019), overruled in part, Flowers v. State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Trial court erred in allowing the state to introduce evidence of the Department of Family and Children Services (DFCS) safety plan and placement of the child because the potential for prejudice substantially outweighed any probative value of the safety plan and accompanying testimony given that the safety plan referred to the mother as the "maltreater," which could have given the jury the impression that the mother was guilty. Hines v. State, 353 Ga. App. 710, 839 S.E.2d 208, 2020 Ga. App. LEXIS 71 (2020).

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Even if the evidence that the victim had made a prior allegation of child molestation arguably bore some minimal relevance to the defendant's guilt, the trial court acted within its discretion in concluding that the minor probative value of any such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or waste of time. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

Prejudicial impact outweighed probative value in child's death. — In an action arising from the death of defendant's son after being left in a hot car, the trial court abused its discretion by admitting evidence that the defendant hired a prostitute because the unfair prejudicial effect of the evidence was substantially greater than any probative value where the evidence showed not only that the defendant repeatedly cheated on his wife but also that in doing so, committed three more sex-related crimes. Harris v. State, 314 Ga. 238, 875 S.E.2d 659, 2022 Ga. LEXIS 169 (2022).

Prejudicial impact outweighed probative value in rape case. — Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

In a rape case, the record showed that the trial court made a common sense assessment of the circumstances surrounding the use of the other acts evidence, including prosecutorial need, similarity between the other acts and the charged offense, temporal remoteness, the likelihood of jury confusion by a trial involving three separate incidents, and the unfair prejudice that would flow from the introduction of prior crimes involving allegations of child molestation; thus, the state did not show that the trial court applied the wrong legal standard, misunderstood the nature or scope of the court's discretion, or clearly abused that discretion in excluding the evidence of the other acts in the defendant's case. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

In a rape case, the trial court was not unaware that excluding evidence under this rule was an extraordinary remedy that should be applied sparingly because the trial judge stated that the judge would have been happy to allow the other acts evidence if the judge thought the evidence was appropriate, but the trial court believed that the state was attempting to compensate for a weak case by piling on bad character evidence of scant probative value in an effort to undermine the presumption of innocence; and the trial court was clearly concerned that the admission of the other acts would transform what should be a straightforward case into a trial involving three separate incidents, distracting the jury from the issues central to the crime charged. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

Trial court did not commit reversible error when the court permitted the state to bring the first victim into the courtroom because evidence of the first victim's condition was clearly relevant to the state's cruelty to children in the first and second charges, including that the defendant caused the first victim bodily harm by rendering the first victim's brain, a member of the first victim's body, useless by violently shaking the victim, causing permanent brain damage; the probative

value of viewing the victim was not substantially outweighed by the danger of unfair prejudice; and under the Crime Victims' Bill of Rights statute, O.C.G.A. § 17-7-1 et seq., the first victim had the right to be present at the trial. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258, 2015 Ga. App. LEXIS 427, overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS 793 (2015).

Trial court did not err by admitting evidence that the defendant committed prior acts of child molestation as the circumstances were similar, the age of the victim during the abuse overlapped with the age of the victim in the instant case, and the manner of abuse was the same, making the prior offense highly probative with regard to the defendant's intent. Eubanks v. State, 332 Ga. App. 568, 774 S.E.2d 146, 2015 Ga. App. LEXIS 359 (2015).

Probative value not outweighed by prejudicial effect in child sexual abuse case. — Trial court was authorized to conclude that admission of the defendant's federal convictions for possession and distribution of child pornography was not unfairly prejudicial because the state had a need for the evidence based on the victim's delayed outcry and the defendant's attack on the victim's credibility, including testimony from the defendant's mother that the victim never complained about anything hurting when the mother babysat and admitting telling detectives that the victim was a liar because the doors in the mother's home locked. Wrice v. State, 354 Ga. App. 895, 842 S.E.2d 301, 2020 Ga. App. LEXIS 241 (2020).

Probative value not outweighed by prejudicial effect in murder case. — Probative value of the probation officer's testimony about a phone number that the defendant had given to the officer that linked the defendant to the phone from which numerous calls were placed to one of the murder victims on the day of the murders was not substantially outweighed by its prejudicial effect because the testimony of the probation officer was clearly relevant; it had substantial probative value; although other evidence in the record tended to establish the connection between the defendant and one of the murder victims, none of it established a connection as directly or strongly as the testimony of the probation officer; and other evidence informed the jury that the defendant was on probation. Huff v. State, 299 Ga. 801, 792 S.E.2d 368, 2016 Ga. LEXIS 651 (2016).

In a malice murder and aggravated assault case, the trial court abused the court's discretion by admitting the defendant's 2006 convictions for aggravated assault for the purpose of showing intent because, by asserting self-defense, the defendant did not deny the intent to inflict injury, but claimed authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another; and because the prior aggravated assaults were clearly more prejudicial than probative as the fact that the defendant had committed an assault on another person nine years earlier had nothing to do with the defendant's reason for shooting the victim, and really had no purpose other than to show the defendant's propensity toward violence. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

In the defendant's murder trial, the trial court erred in allowing the state to introduce an AK-47 rifle and ammunition found in the defendant's home for impeachment purposes under O.C.G.A. § 24-6-621 after the defendant testified that the defendant's spouse had removed the murder weapon from the home because the defendant "never wanted to see a gun in [her] life." The evidence was not unduly prejudicial under O.C.G.A. § 24-4-403 and was not emphasized by the state. Dunbar v. State, 309 Ga. 252, 845 S.E.2d 607, 2020 Ga. LEXIS 461 (2020).

Trial court did not abuse the court's discretion by deciding that the probative value of the evidence of the beating was not substantially outweighed by the danger of unfair prejudice because the evidence showed the nature of the parties' relationship and the defendant's motive in shooting the victim. There was nothing inherent in the evidence that would create a risk that the defendant would be convicted on a ground different from proof specific to the offense charged. Flowers v.

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State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Trial court did not erroneously admit an inmate's testimony that the defendant confessed to shooting the victims because the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice as the circumstances on which the defendant relied — including the absence of certain details and the inmate's altercation with the defendant's friends — did not undermine the probative value of the defendant's confession; and the inmate's testimony about the defendant's confession — whether credible or not — was undoubtedly probative. Thomas v. State, 310 Ga. 579, 853 S.E.2d 111, 2020 Ga. LEXIS 928 (2020).

Trial court did not abuse its discretion by admitting evidence that defendant had physically assaulted the victim before his death because it was admissible as to defendant's intent and the prior acts were highly probative given that defendant's squeezing the victim around the rib cage was the same type of act alleged to have caused his death and the acts occurred within two years of the victim's death. Hounkpatin v. State, 313 Ga. 789, 873 S.E.2d 201, 2022 Ga. LEXIS 153 (2022).

Trial court did not abuse its discretion by admitting testimony that prior to the murder defendant owned dirt bikes, the victim had expressed an interest in purchasing one, and one was stolen during a test drive because defendant's motive for shooting the victim was relevant and probative given that only weeks had passed between the bike being stolen and the victim's murder, and defendant admitted shooting someone he believed had stolen one of his bikes. Jordan v. State, 313 Ga. 841, 874 S.E.2d 67, 2022 Ga. LEXIS 161 (2022).

Trial court did not abuse its discretion by admitting evidence that a rifle and shell casings were stolen from a police officer's apartment, which the State alleged were used in the victim's murder, because the admission of the physical evidence was not hearsay and because the evidence was relevant and probative, as the weapon and ammunition were stolen four months before the murder, they were the same caliber used in the murder, the exact number of branded cartridges stolen were found at the murder scene, and defendant's known associate lived next door to where the burglary occurred. Jordan v. State, 313 Ga. 841, 874 S.E.2d 67, 2022 Ga. LEXIS 161 (2022).

Probative value of girlfriend's testimony not outweighed by prejudicial effect. — Trial court did not abuse its discretion in determining that the probative value of the former girlfriend's testimony was not substantially outweighed by its prejudicial effect because the State's theory of the case, that defendant falsely accused the victim of armed robbery as a means to control, harass, and intimidate her after she broke up with him, would lack context and seem much less believable without a showing as to why defendant would falsely accuse the victim of armed robbery. Whitson v. State, 359 Ga. App. 757, 860 S.E.2d 70, 2021 Ga. App. LEXIS 279 (2021).

Probative value outweighed by prejudicial effect in robbery case. — Although evidence of the defendant's prior robberies was relevant for the purpose of showing intent, the evidence was improperly admitted as the prosecutorial need for the other act evidence was minimal; the probative value of the other robberies was quite low; and the probative value of the other act evidence was outweighed by its prejudicial impact suggesting that the defendant was a serial robber. Further, the admission of the evidence was not harmless because it was not so overwhelming or so marginal that the jury's verdict was not likely to be impacted. Sloan v. State, 351 Ga. App. 199, 830 S.E.2d 571, 2019 Ga. App. LEXIS 425 (2019).

Evidence of bar's reputation for violent incidents inadmissible. — When the defendant was convicted of, inter alia, the malice murder of the first victim and the attempted murder of the second victim, to the extent that the bar's reputation for violent incidents influenced the defendant's state of mind, that reputation and its effect on the defendant was well established through other evidence admitted at trial; thus, even if the proffered incidents had some marginal rel-

evance to the defendant's self-defense claim, any slight probative value was substantially outweighed by considerations of a waste of time or needless presentation of cumulative evidence, and the trial court acted within the court's discretion in excluding the evidence. Ramirez v. State, 303 Ga. 232, 811 S.E.2d 416, 2018 Ga. LEXIS 129, cert. denied, 139 S. Ct. 110, 202 L. Ed. 2d 69, 2018 U.S. LEXIS 5541 (2018).

Overdrawn checking account. — Trial court did not err when the court allowed the state to introduce evidence that, on the date of the death of the defendant's wife, the defendant received an email notifying the defendant that the defendant had insufficient funds in the defendant's bank account because it was within the discretion of the trial court to conclude that the evidence was relevant to show that the defendant was under some degree of financial stress and had some reason to be upset on the day of the killing; and the prejudicial effect of the evidence, if any, was minimal and not unfair. McClain v. State, 303 Ga. 6, 810 S.E.2d 77, 2018 Ga. LEXIS 68 (2018).

Use of firearms and demonstrative aids. — Defendant failed to show that the trial court abused the court's discretion in allowing the state to use firearms as demonstrative aids after the trial court agreed with the state that the demonstration was somewhat probative to support the state's theory of the case and rebut the defense theory and the only potential prejudice that the defendant pointed to was jury confusion over whether the guns displayed in court were actually the guns used in the commission of the alleged crimes, which was addressed when the jury was informed the guns were not. Robinson v. State, 308 Ga. 543, 842 S.E.2d 54, 2020 Ga. LEXIS 293 (2020).

Jail deputy's body camera. Trial court did not abuse its discretion by concluding that a jail deputy's body-camera recording was admissible under O.C.G.A. § 24-4-403 because the defendant's statement "I'm a murderer" was highly probative since he was charged with murder and at trial he claimed he shot the victim in self-defense, the video allowed the jury to assess defendant's credibility directly, and the two-minute video, presented with almost no narrative testimony, was not overly prejudicial. Early v. State, 313 Ga. 667, 872 S.E.2d 705, 2022 Ga. LEXIS 133 (2022).

Admission of the prior rape was proper because the need for the evidence was high where the case boiled down to the defendant's word against the victim's, and the prior incident was similar to the charged offense in that both victims were females close in age, in both instances the defendant made contact with the victims under the auspices of business and a professional relationship, and in both the defendant purchased things or attempted to give things to the victim, and the risk of unfair prejudice was relatively low. Williams v. State, 366 Ga. App. 114, 881 S.E.2d 1, 2022 Ga. App. LEXIS 531 (2022).

Evidence of gang membership improperly admitted. — Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. Lingo v. State, 329 Ga. App. 528, 765 S.E.2d 696, 2014 Ga. App. LEXIS 728 (2014).

Evidence of gang activity. — Trial court did not abuse the court's discretion by admitting evidence of the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573, 2017 Ga. LEXIS 890 (2017).

Trial court did not abuse the court's discretion in finding that the probative value of the evidence related to the defendant's gang affiliation was not substan-

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tially outweighed by the danger of unfair prejudice as there was nothing inherent in that evidence to create a risk that the defendant would be convicted on a ground different from proof specific to the offenses charged. Williams v. State, 356 Ga. App. 19, 846 S.E.2d 190, 2020 Ga. App. LEXIS 403 (2020).

In the defendant's murder trial, defense counsel opened the door to evidence from two witnesses about the defendant's gang activities and prior murders by suggesting that the witnesses had named the defendant as the shooter because the witnesses were afraid of the actual shooter; this evidence was relevant under O.C.G.A. § 24-4-401 and not unduly prejudicial under O.C.G.A. § 24-4-403. Strother v. State, 305 Ga. 838, 828 S.E.2d 327, 2019 Ga. LEXIS 341 (2019).

Trial court did not abuse the court's discretion when the court admitted extrinsic evidence of gang activity because the lawyer's statements during opening that the defendant was a member of a gang and that the defendant was in a bind with that gang were not evidence, and the state still had to prove that the defendant was a member of a criminal street gang as well as a connection between that gang and the crimes at issue. Jordan v. State, 307 Ga. 450, 836 S.E.2d 86, 2019 Ga. LEXIS 801 (2019).

Prosecutorial need for the other acts evidence showing gang membership was high because, without it, it was unclear what motive the defendant would have had to shoot the victim in a crowded park merely because the victim was in a dispute with another gang member. Armstrong v. State, 310 Ga. 598, 852 S.E.2d 824, 2020 Ga. LEXIS 926 (2020).

Trial court did not err in not excluding the gang evidence as that evidence was not just highly probative but indeed necessary to prove several of the essential elements of the Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., offense, including the existence of the gang, the first defendant's participation therein, and the nexus between the crimes and the gang's interests. Butler v. State, 310 Ga. 892, 855 S.E.2d 551, 2021 Ga. LEXIS 75 (2021).

Evidence of gang beating of murder victim. — Trial court did not abuse the court's discretion by admitting into evidence a video recording of gang members beating the murder victim, who was a person that left the gang, despite the appellant not appearing in the video because the video of the gang beat-in was highly probative to establish the appellant's motive for the murder and its relationship to gang activity. Carston v. State, 310 Ga. 797, 854 S.E.2d 684, 2021 Ga. LEXIS 19 (2021).

Crime spree evidence. — In the defendant's burglary trial, evidence of five uncharged burglaries was admissible because the uncharged and six charged burglaries were part of a two-week crime spree committed by a burglary crew of which the defendant was a part, even if the defendant did not directly participate in some; the uncharged crimes did not fall within O.C.G.A. § 24-4-404(b). Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494, 2016 Ga. App. LEXIS 42 (2016).

Weapons and ammunition as evidence. — Trial court did not err by admitting evidence of the weapons and ammunition officers found when the defendant was arrested because the evidence was relevant as consciousness of guilt and the evidence was not unduly prejudicial as the state had a great need for the evidence given that it was a circumstantial case and the state did not argue that the gun and ammunition were used in the drive-by shootings. Harris v. State, 313 Ga. 225, 869 S.E.2d 461, 2022 Ga. LEXIS 37 (2022).

Evidence of plan to commit separate robbery same day not unduly prejudicial. — In the defendant's robbery trial, evidence that the group had planned to execute another robbery the same day was intrinsic under O.C.G.A. § 24-4-404; it established the members of the group, confirmed the group's goal, and explained how the conspiracy had transformed into the robbery of the victims when they showed up flashing cash around. Because the evidence was intrinsic, it was not subject to the notice re-

quirements of Rule 404(b). The evidence was not unduly prejudicial. Brown v. State, 350 Ga. App. 104, 828 S.E.2d 110, 2019 Ga. App. LEXIS 250 (2019).

Prejudice of cocaine conviction must substantially outweigh probative value. — Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative value; however, the error was harmless because the admission of the victim's prior conviction would have been cumulative of the victim's own damaging testimony. Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261, 2014 Ga. App. LEXIS 596 (2014).

Evidence needlessly cumulative. — Although the trial court allowed the first neighbor to testify about the defendant's interest in contacting law enforcement, the trial court did not abuse the court's discretion when the court excluded the testimony of the second neighbor about the defendant's interest in contacting law enforcement because the jury heard the recording of the defendant's 911 calls, the jury was well aware that the defendant was interested in contacting law enforcement just prior to the shooting, and the testimony of a second neighbor about that interest would have had little probative value and would have been needlessly cumulative. Corley v. State, 308 Ga. 321, 840 S.E.2d 391, 2020 Ga. LEXIS 172 (2020).

Probative value of stipulation not outweighed by prejudicial impact. — Because the final decision at the administrative license suspension hearing, which contained the defendant's stipulation that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of defendant's driver's license, was neither of scant or cumulative probative force nor introduced by the state merely for the sake of its prejudicial effect, and because its probative value was not substantially outweighed by its prejudicial effect, the trial court properly allowed admission of the final decision in the defendant's criminal case over the defendant's objection. Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67, 2014 Ga. App. LEXIS 335 (2014).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because the evidence was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414, 2016 Ga. App. LEXIS 547 (2016).

Implicit finding that probative value not outweighed by prejudicial effect. — Notwithstanding the defendant's waiver of the enumeration of error that the trial court erred by admitting the prior bad acts without undertaking the balancing test, it presented no basis for reversal because the appellate court's review of the record showed that, although the trial court did not make specific findings regarding whether the probative value of the prior crimes was outweighed by its prejudicial impact, it explicitly referenced the balancing test and noted that the evidence had to satisfy the balancing test rule; thus, by admitting the evidence, the trial court implicitly found that the evidence was admissible pursuant to the balancing test rule. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743, 2017 Ga. App. LEXIS 25 (2017), cert. denied, No. S17C1084, 2017 Ga. LEXIS 581 (Ga. June 30, 2017).

Probative value outweighed prejudice in use of previous DUI conviction. — Defendant's conviction for driving under the influence (DUI) and other crimes was affirmed because the defendant's prior DUI conviction was properly admitted since the conviction was relevant to the issue of the defendant's knowledge of the consequences of both

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consenting to and refusing the tests, and its probative value outweighed any prejudice. Kim v. State, 337 Ga. App. 155, 786 S.E.2d 532, 2016 Ga. App. LEXIS 281 (2016).

Defendant's trial counsel was not ineffective for failing to object to the evidence of the defendant's prior driving under the influence conviction as the evidence was properly introduced by the state to show knowledge or awareness on the defendant's part; was not offered solely for its prejudicial effect; and was not merely of scant or cumulative probative value. Gibbs v. State, 341 Ga. App. 316, 800 S.E.2d 385, 2017 Ga. App. LEXIS 190 (2017), cert. denied, No. S17C1673, 2017 Ga. LEXIS 865 (Ga. Oct. 2, 2017).

Prior refusal of breath test in DUI case. — Trial court did not err by denying the state's request to introduce evidence of the defendant's prior refusal to take a state-administered breath test during the defendant's DUI trial because the Supreme Court of Georgia has previously held that a defendant's refusal to submit to a breath test may not be admitted into evidence at a subsequent criminal trial. State v. Voyles, 355 Ga. App. 903, 846 S.E.2d 170, 2020 Ga. App. LEXIS 409 (2020).

Probative value outweighed any undue prejudice in criminal case. — In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense's theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested, in that the defendant had admitted to being present but denied participating in the armed robbery. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899, 2015 Ga. App. LEXIS 219 (2015).

Trial court did not abuse the court's discretion by admitting evidence from another burglary because the defendant pled not guilty to the burglary charges, thus making intent a material issue, and the defendant's actions in committing the other burglary and pawning the class ring involved the same mental state as burglarizing a house to obtain gold jewelry to sell for cash; thus, the evidence from the other burglary was relevant to establish intent. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

Evidence of an earlier altercation between the defendant and a former girlfriend was admissible in the aggravated assault of the victim, the former girlfriend's brother, because the state of mind required for the charged offense of aggravated assault against the victim was the same as the state of mind required for the uncharged act against the former girlfriend, which could have constituted an aggravated assault; the other act was probative of the issue of the defendant's intent, which defense counsel argued to the jury was the biggest issue in the case; and the evidence was sufficient to show that the prior bad act occurred and that the defendant was the person who accosted and threatened the former girlfriend with the knife. Wilson v. State, 336 Ga. App. 60, 783 S.E.2d 662, 2016 Ga. App. LEXIS 115 (2016).

Appellant failed to establish that trial counsel was ineffective for failing to object to the admission of the autopsy photographs as the photographs were relevant and a competent attorney in the position of appellant's trial lawyers would have had every reason to believe that an objection to the autopsy evidence based on O.C.G.A. § 24-4-403 would fail, even if the appellant did not affirmatively dispute the state's proof that the victim was shot to death. Moss v. State, 298 Ga. 613, 783 S.E.2d 652, 2016 Ga. LEXIS 203 (2016).

In a DUI case, the trial court did not abuse the court's discretion in finding that the probative value of evidence of the defendant's prior conviction was not substantially outweighed by the prejudicial effect of the evidence, after finding that the circumstances surrounding the prior

conviction were similar to the circumstances involving the charged offenses and the charged offenses occurred five to six years after the extrinsic offense, when the defendant would have known it was less safe because it was less safe before. Jones v. State, 335 Ga. App. 563, 782 S.E.2d 466, 2016 Ga. App. LEXIS 34 (2016), aff'd, 301 Ga. 544, 802 S.E.2d 234, 2017 Ga. LEXIS 542 (2017).

Trial court did not abuse the court's discretion in determining that the prejudicial value of the gun did not substantially outweigh the probative value as it was very probative as rebuttal to the defense that the defendant did not intend to threaten or terrorize but only to warn the judge's family. Satterfield v. State, 339 Ga. App. 15, 792 S.E.2d 451, 2016 Ga. App. LEXIS 570 (2016).

Probative value of the other act evidence was not substantially outweighed by its prejudicial effect as it was unlikely that the jury would be more inflamed in any appreciable measure by the relatively minor other acts evidence than the jury already was by the heinous sexual offenses against children with which the defendant was actually charged. The impact of the other acts evidence was thus relatively minimal. Gerbert v. State, 339 Ga. App. 164, 793 S.E.2d 131, 2016 Ga. App. LEXIS 599 (2016).

Other acts evidence was relevant and admissible and the trial court did not abuse the court's discretion in declining to exclude the evidence regarding two earlier instances in which the defendant obstructed a law enforcement officer because there was a significant connection between the other acts evidence and the required element of the defendant's knowledge, giving the other acts evidence probative value; and the defendant's knowledge was a material issue in the case. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156, 2016 Ga. App. LEXIS 608 (2016).

Other acts evidence that the defendant resorted to violence towards other women who did not accede to the defendant's demands was needed to counter the defense and support the defense case that the defendant intentionally hit the victim after the victim refused the defendant's sexual advances. This evidence added significantly to the other proof used to establish that the defendant hit the victim, and although prejudicial, any prejudice did not substantially outweigh the probative value of the evidence. Harris v. State, 338 Ga. App. 778, 792 S.E.2d 409, 2016 Ga. App. LEXIS 546 (2016).

Probative value of the defendant's prior armed robberies was not substantially outweighed by the danger of unfair prejudice because the prior crimes involved very little, if any, planning, and were committed by the defendant alone, while the evidence in the instant case showed that the charged offense involved at least two perpetrators who committed the crime after a certain degree of planning with apparent inside information. The only similarities between the prior acts and the current offense was the use of a handgun to take money. Arrington v. State, 355 Ga. App. 361, 844 S.E.2d 256, 2020 Ga. App. LEXIS 315 (2020).

Defendant's prior conviction for possession of cocaine with intent to distribute was not a conviction that raised the risk of a verdict tainted by improper considerations in the defendant's trial for murder and, therefore, there was no error in the state's refusal to stipulate to the fact of the prior conviction. Stephens v. State, 307 Ga. 731, 838 S.E.2d 275, 2020 Ga. LEXIS 48 (2020).

Prejudicial impact outweighed probative value in use of previous DUI conviction. — In a driving under the influence (DUI) per se case, the defendant's prior DUI conviction was improperly admitted to show intent as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the jury could infer intent from the defendant's act of driving after admittedly consuming alcohol without considering the prior DUI, and there was a danger of interjecting unfair prejudice at trial; however, admission of that evidence was harmless as the direct evidence of the defendant's guilt for the DUI-per se charge was overwhelming as the defendant admitted to consuming alcohol, and the breath tests showed the defendant's blood alcohol content was substantially in excess of 0.08 grams. Jones v.

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State, 301 Ga. 544, 802 S.E.2d 234, 2017 Ga. LEXIS 542 (2017).

High danger of prejudicial impact from admission of drug evidence. — There was no abuse of discretion in the trial court's exclusion of evidence that the victim sold or used drugs after the court weighed the evidence as required by O.C.G.A. § 24-4-403 and concluded that the scant probative value of evidence regarding drug use or sale at the party was substantially outweighed by the high danger of unfair prejudice. Jones v. State, 358 Ga. App. 584, 855 S.E.2d 761, 2021 Ga. App. LEXIS 95 (2021).

Probative value not outweighed by prejudicial effect in theft by taking case. — In a theft by taking case, because intent was put in issue by the defendant, evidence of the other acts that two witnesses paid the defendant money but never received completed cabinets nor a refund of the witnesses' money was relevant and admissible under O.C.G.A. § 24-4-404(b); furthermore, the probative value of the similar acts was not outweighed by their prejudicial effect pursuant to O.C.G.A. § 24-4-403. Graham v. State, 337 Ga. App. 664, 788 S.E.2d 555, 2016 Ga. App. LEXIS 384 (2016).

Trial court did not abuse the court's considerable discretion when the court admitted the photograph depicting the contents of the trunk of the victim's car showing numerous items found in the trunk, including the victim's body wrapped in a comforter, a gasoline-soaked towel, several articles of clothing, and a photograph of an unidentified young girl sitting in a field because the photographs' potential for prejudice did not substantially outweigh its probative value as the exhibit was of particular importance because it showed how the victim's body was located in relation to both the gasoline-soaked towel and the bottom of the trunk; and the jury heard no testimony about the photograph of the girl. Cheley v. State, 299 Ga. 88, 786 S.E.2d 642, 2016 Ga. LEXIS 394 (2016).

Probative value not outweighed by prejudicial effect. — Probative value of the similar transaction evidence was not outweighed by its prejudicial effect given the similarity between the robbery crimes and the fact that the trial court instructed the jury that the similar transaction evidence could only be considered for the limited purpose of showing the defendant's knowledge and intent. McCoy v. State, 332 Ga. App. 626, 774 S.E.2d 179, 2015 Ga. App. LEXIS 370 (2015).

Failure to come forward about murder. — Defendant's contention that trial counsel was ineffective for failing to object under O.C.G.A. § 24-4-403 to the various questions and answers concerning the defendant's failure to come forward to law enforcement concerning the victim's murder was without merit because the defendant's strategy of self-defense was not prejudiced as the evidence strongly suggested that the crime was not self-defense. The evidence showed that the defendant tied up the victim, left the victim in a locked and alarmed residence, fled in the victim's vehicle and with the victim's property, and then sped away when a police officer attempted to initiate a traffic stop. Jackson v. State, 306 Ga. 266, 830 S.E.2d 99, 2019 Ga. LEXIS 443 (2019).

Incomplete record on appeal hampered review of application of balancing test. — Because the defendant in the defendant's notice of appeal designated only certain portions of the record for inclusion in the record on appeal, the appellate record did not include, among other things, opening statement and closing argument of defense counsel, and the portion of the record where the defense would have presented its case-in-chief or rested without presenting any such evidence; and, given that incomplete record, the defense theory of the case was unclear, which hampered the appellate court's review of the trial court's application of the balancing test in O.C.G.A. § 24-4-403. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87, 2017 Ga. App. LEXIS 589 (2017), aff'd, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

In light of the need to consider all the circumstances surrounding the extrinsic offense in an analysis under O.C.G.A. § 24-4-403, the defendant failed to meet the defendant's burden to demonstrate

error by the partial record the defendant designated on appeal. Adams v. State, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

Photographs of the victim of a crime are admissible. — Trial court did not abuse the court's discretion in admitting the autopsy photographs of the victim because the photographs were relevant as the medical examiner testified that the photographs showed the internal injuries that caused the victim's death that were not evident from the pre-incision photographs; the fact that the defendant might not have disputed the cause of death did not diminish the relevance of the photographs; and the trial court considered whether the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672, 2015 Ga. LEXIS 498 (2015).

In the defendant's trial for the murder of a family friend as the victim was showering, crime scene photos showing the victim's genitals were not required to be excluded under O.C.G.A. § 24-4-403 because the photos were probative of the question of whether the victim was killed with malice. Plez v. State, 300 Ga. 505, 796 S.E.2d 704, 2017 Ga. LEXIS 54 (2017).

Trial court did not err in allowing certain autopsy photographs of the victim to be admitted because the challenged photographs did not depict the victim's autopsy incisions, and the photographs were not especially gory or gruesome in the context of autopsy photographs in a murder case; the photographs were relevant to show the nature and location of the victim's injuries, which corroborated the state's evidence of the circumstances of the killing; contrary to the defendant's assertion, the victim did not die solely from manual strangulation, but also from blunt force head trauma, and the photographs illustrated the nature and extent of the physical beating and resulting trauma sustained by the victim; and exclusion based on unfair prejudice was not warranted. Pike v. State, 302 Ga. 795, 809 S.E.2d 756, 2018 Ga. LEXIS 56 (2018).

After the defendant was convicted of, inter alia, malice murder, the trial court did not abuse the court's discretion in finding that the probative value of the photograph depicting the gunshot wounds to the victim's body was not substantially outweighed by the risk of unfair prejudice to the defendant because photographic evidence that fairly and accurately depicted a body and was offered for a relevant purpose was not generally inadmissible merely because it was gruesome. Favors v. State, 305 Ga. 366, 825 S.E.2d 164, 2019 Ga. LEXIS 129 (2019).

Trial court did not err by overruling the defendant's objection to the admission of 17 autopsy photos because the medical examiner testified that none were duplicative and, thus, the probative value was not outweighed by the danger of the photograph's prejudicial effect. Moore v. State, 307 Ga. 290, 835 S.E.2d 610, 2019 Ga. LEXIS 731 (2019).

Trial court did not err by admitting a pre-autopsy photograph of the victim's upper body to show the jury precisely where the victim was shot and to explain to the jury the effect the bullet had in lacerating the victim's lung and liver as the photograph was not graphic and did not show any autopsy cuts. Allen v. State, 307 Ga. 707, 838 S.E.2d 301, 2020 Ga. LEXIS 46 (2020).

Trial court did not abuse the court's discretion by admitting into evidence an autopsy photograph showing the victim's exposed brain because the photograph was relevant as evidence of the severity of the victim's injury, the single photograph was not particularly gory or gruesome, and the court concluded that the trial court did not abuse the court's discretion in deciding that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice. Flowers v. State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Trial counsel was not ineffective for failing to object to the crash-scene photographs depicting the deceased passenger's body in the vehicle wreckage as the photographs were not especially gory or gruesome; and photographic evidence that fairly and accurately depicted a body or crime scene and was offered for a relevant purpose was not generally inadmissible merely because the photograph was grue-

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some. Calhoun v. State, 308 Ga. 146, 839 S.E.2d 612, 2020 Ga. LEXIS 138 (2020).

Photographs more prejudicial than probative. — With no serious question as to the victim's existence of identity, any probative value of the photographs of the victim while in life, depicting the victim alone and with family, was outweighed by the cumulative prejudice therefrom, and the trial court erred in admitting the photographs. Ragan v. State, 299 Ga. 828, 792 S.E.2d 342, 2016 Ga. LEXIS 653 (2016).

Trial court did not abuse the court's discretion in admitting a photograph showing the defendant in possession of a gun because the photograph was relevant to show that the defendant, at some point, possessed the type of gun used in the crimes at issue; and the probative value of the evidence was not substantially outweighed by its prejudice, as even evidence that a defendant owned and frequently carried a pistol did not impute to the defendant generally bad character. Lyons v. State, 309 Ga. 15, 843 S.E.2d 825, 2020 Ga. LEXIS 361 (2020).

In an action arising from the death of defendant's son after being left in a hot car, the trial court abused its discretion by admitting nine separate exhibits showing full-page pictures of the defendant's erect penis because the unfair prejudicial impact of the pictures was quite high. Harris v. State, 314 Ga. 238, 875 S.E.2d 659, 2022 Ga. LEXIS 169 (2022).

Photographs not more prejudicial and therefore admissible. — Defendant's conviction for malice murder was upheld because trial court did not abuse discretion by concluding that probative value of photograph's depiction of defendant holding rifle was not substantially outweighed by danger of unfair prejudice as it was relevant to show that defendant, at some point, possessed type of gun used in crimes at issue. Perkins v. State, 313 Ga. 885, 873 S.E.2d 185, 2022 Ga. LEXIS 154 (2022).

Social media messages admissible. — Trial court did not abuse the court's discretion in admitting social media messages from the defendant to one of the codefendants because the messages were relevant as the messages showed that the defendant and the codefendant were still on good terms while they were both being prosecuted for the murder, which tended to make it less likely that the defendant was an unwitting bystander to a murder carried out solely by the two codefendants; and there was no danger of unfair prejudice from the messages. Wilson v. State, 315 Ga. 728, 883 S.E.2d 802, 2023 Ga. LEXIS 29 (2023).

Harmless error in admission of Facebook photo. — Even if the trial court erred in admitting the three photographs posted to Facebook under O.C.G.A. § 24-4-404(b) in the defendant's felony murder trial, the error was harmless because the state presented strong independent evidence of the defendant's guilt as a party to the felony murder, including a photo depicting the defendant holding the handgun used in the murder and that the defendant's phone was used to order the pizza the victim attempted to deliver. Lofton v. State, 309 Ga. 349, 846 S.E.2d 57, 2020 Ga. LEXIS 474 (2020).

"Selfie" videos prejudicial. — Even if the "selfie" videos of the defendant talking about ways to make money, including robbery, were relevant, the videos were properly excluded because the videos included statements as to the defendant's involvement in drug dealing, an illegal activity that had no relevance to the charged crime, but references to which would have been highly prejudicial. State v. Spriggs, 338 Ga. App. 655, 791 S.E.2d 440 (2016).

Homemade rap video admissible. — Homemade rap video was properly admitted into evidence because the video was relevant as it connected the defendant and the codefendants to the murder weapon, and it implicated one of the codefendants in a robbery, very close in time to the crimes in this case, making it more likely that it was the defendant and the codefendants who possessed the murder weapon and used it to kill the victim; the video provided further evidence of a conspiracy by showing the defendant and the codefendants together in the days after the shooting, brandishing a gun of the same model as the murder weapon, and boasting of having committed a robbery;

and, although the video might have cast the defendant in an unflattering light, it did not do so unfairly. Wilson v. State, 315 Ga. 728, 883 S.E.2d 802, 2023 Ga. LEXIS 29 (2023).

Video of police interview admissible. — Trial court did not abuse its discretion by holding that O.C.G.A. § 24-4-403 did not bar the admission of a video recording of defendant's statement to the police because the content of the interview was highly probative of defendant's guilt, as it helped establish his presence at the murder scene with the other suspects and the victim and the motive for the crime, and the investigator testified about the interview and the incriminating statements defendant made. The technical difficulties and extra time associated with playing the recording did not deprive it of probative value. Barrett v. State, 312 Ga. 676, 864 S.E.2d 403, 2021 Ga. LEXIS 653 (2021).

Post-incision autopsy photo. — Trial court did not err when the court admitted into evidence a post-incision autopsy photo because, although the trial court did not cite the text of O.C.G.A. § 24-4-403 in the court's ruling, the court discussed the photo's relevance and potential prejudice, implicitly conducting the proper analysis. Albury v. State, 314 Ga. 459, 877 S.E.2d 548, 2022 Ga. LEXIS 231 (2022).

Photos were arguably objectionable. — Three photos from the hospital series that did not depict the victim at all were arguably objectionable by counsel and an objection may have been sustained under O.C.G.A. § 24-4-403 as to relevancy but no ineffective assistance of counsel was shown based on the other evidence against the appellant being strong and the appellant failing to show a reasonable probability that the result of the trial would have been different. Davis v. State, 299 Ga. 180, 787 S.E.2d 221, 2016 Ga. LEXIS 407 (2016).

Photo arrays suggestive, not prejudicial. — Since both the victim and the victim's brother testified that they knew the defendant prior to the incident, and at trial, both identified the defendant as the person who shot the victim, even if the photo arrays were suggestive, the victim and the brother each had an independent basis for the identification of the defendant and the defendant suffered no prejudice. Williams v. State, 353 Ga. App. 821, 840 S.E.2d 32, 2020 Ga. App. LEXIS 90 (2020).

Officer's identification of defendant in photographs proper. — Trial court did not abuse the court's discretion in allowing an officer to identify the defendant in the social media photographs presented at trial because the officer established years of familiarity with the defendant, and that the officer became familiar with the defendant in the officer's capacity as a law enforcement officer, or even in the officer's capacity as a gang expert, did not prevent the officer from providing identification testimony as a lay witness. Bullard v. State, 307 Ga. 482, 837 S.E.2d 348, 2019 Ga. LEXIS 843 (2019).

Use of social media posts. — Trial court did not err by admitting evidence of the defendant's social media posts because the fact that the defendant claimed to possess a gun that could have been used in the drive-by shootings had a tendency to make it more probable that one of the weapons used in the shootings belonged to the defendant. Defendant failed to show that the evidence was unfairly prejudicial because the evidence was used to show, in a circumstantial case in which no murder weapon was found, that the defendant had in the defendant's possession a week before the shootings a type of gun that could have been used in those shootings. Harris v. State, 313 Ga. 225, 869 S.E.2d 461, 2022 Ga. LEXIS 37 (2022).

Probative value of jail phone call not outweighed by prejudicial effect. — Trial court did not err in admitting an audio recording of a five-minute phone call that the defendant made from jail to a friend because the recording was relevant to show that the defendant made statements that were not consistent with either the defendant's statements at the defendant's second police interview or the defense theory of justification presented at trial; and the derogatory terms used by the defendant during the phone call did not create a risk of unfair prejudice that substantially outweighed the recording's probative value as the words that the defendant used had lost much of their

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shock value in contemporary culture and were unlikely to induce the jury to return a conviction based on a generalized assessment of character. Smith v. State, 302 Ga. 717, 808 S.E.2d 661, 2017 Ga. LEXIS 977 (2017).

Trial court did not err by admitting a recording of a jail phone call during which defendant discussed the decision to remove the victim from life support because the contents of the call were relevant to the jury's consideration of intent and could have refuted any suggestion that the victim's injuries were caused by accident. Whited v. State, 315 Ga. 598, 883 S.E.2d 342, 2023 Ga. LEXIS 4 (2023).

Recorded jail phone call admissible. — In a recorded jail call in which the defendant told the defendant's girlfriend that the defendant had messed up, the trial court did not abuse the court's discretion in admitting the call into evidence because, although the defendant's statement might have cast the defendant in a prejudicial light, it was not an unfairly prejudicial light; and the evidence was probative as the evidence indicated that after the shooting the defendant believed the defendant had done something wrong. Bannister v. State, 306 Ga. 289, 830 S.E.2d 79, 2019 Ga. LEXIS 437 (2019).

Exclusion prohibited establishing possibility of intoxication of driver who abandoned vehicle. — In a personal injury case, the trial court abused the court's discretion by granting the defendant's motion in limine because the excluded evidence was relevant to the most important issue of the case, whether the defendant parked the vehicle in the middle of the road; thus, the trial court's exclusion precluded the plaintiff from establishing that the defendant may have been intoxicated at the time the vehicle was left and/or from opportunities to impeach the defendant's testimony. Barrett v. Burnette, 348 Ga. App. 838, 824 S.E.2d 701, 2019 Ga. App. LEXIS 90 (2019), cert. denied, No. S19C0930, 2019 Ga. LEXIS 780 (Ga. Nov. 4, 2019).

Admission of National Precursor Log Exchange records in methamphetamine manufacture case. — State was permitted to introduce National Precursor Log Exchange records showing purchases of pseudoephedrine by the defendant and the defendant's co-conspirator over the defendant's objection that the prejudicial effect of such evidence outweighed its probative value because the records were probative of the fact that both the defendant and the defendant's co-conspirator had, on numerous prior occasions, purchased pseudoephedrine, which was a key precursor in the manufacture of methamphetamine; in several of the records, the defendant listed the residence where the methamphetamine and evidence of methamphetamine production were found at the defendant's home address; and the defendant's address was a contested issue in the case. Cummings v. State, 345 Ga. App. 702, 814 S.E.2d 806, 2018 Ga. App. LEXIS 270 (2018), cert. denied, No. S18C1280, 2018 Ga. LEXIS 728 (Ga. Nov. 15, 2018).

Evidence admissible. — With regard to images and notes introduced during an investigator's testimony, trial counsel's failure to make an objection on the ground that the evidence was more prejudicial than probative did not meet the defendant's burden under Strickland because the state argued that the evidence was representative of the types of images viewed by the defendant, not that they were the images the defendant viewed, and the images were helpful in demonstrating the type of content in the defendant's phone and web activity. Holzheuser v. State, 351 Ga. App. 286, 828 S.E.2d 664, 2019 Ga. App. LEXIS 430 (2019), cert. denied, 308 Ga. 401, 841 S.E.2d 735, 2020 Ga. LEXIS 246 (2020).

Prior murder admissible. Evidence of a prior murder by the defendant was relevant to motive because the evidence demonstrated the defendant's willingness to use violence when the defendant or someone close to the defendant was cheated in a drug deal. Bradshaw v. State, 296 Ga. 650, 769 S.E.2d 892, 2015 Ga. LEXIS 144 (2015).

Drug evidence admissible. Defendant failed to establish that the trial court abused the court's discretion by admitting evidence of the defendant's 2001 conviction for possessing cocaine with the intent

to distribute because the defendant placed the defendant's intent in issue by pleading not guilty to the charges of trafficking in cocaine and possessing cocaine with the intent to distribute; the defendant did nothing to remove intent as an issue as the defendant told law enforcement that the defendant did not live in the house throughout which the drugs and drug-distribution paraphernalia were found; and the prior conviction was relevant as the defendant's participation in the earlier crime required the same intent as the charged crimes. Gunn v. State, 342 Ga. App. 615, 804 S.E.2d 118, 2017 Ga. App. LEXIS 359 (2017), cert. denied, No. S18C0166, 2018 Ga. LEXIS 217 (Ga. Apr. 16, 2018).

Prior sexual assault evidence admissible — When the defendant was convicted of two counts of aggravated sodomy and one count each of family violence aggravated assault, family violence battery, terroristic threats, and family violence simple battery against a live-in girlfriend, evidence of prior sexual assaults was properly admitted because it was relevant to show the defendant's intent, which was put in issue when the defendant entered a plea of not guilty; the prior sexual assaults were sufficiently similar to the charged sexual assaults; the state was able to use the evidence to bolster the victim's credibility by demonstrating that the victim's circumstances were not unique; and any risk of unfair prejudice was mitigated by the trial court's limiting instruction. Benning v. State, 344 Ga. App. 397, 810 S.E.2d 310, 2018 Ga. App. LEXIS 37 (2018).

Evidence admissible to combat attacks on victim's credibility. — Trial court did not err in admitting evidence of two other acts because the probative value of the other acts was great given the state's need for evidence to combat the defendant's attacks on the victim's credibility and negate the defense of consent, and the extrinsic acts, which involved the defendant's attempt at non-consensual sexual gratification with women the defendant did not know, were not of such a heinous nature that the acts were likely to incite the jury to an irrational decision. Cross v. State, 354 Ga. App. 355, 839 S.E.2d 265, 2020 Ga. App. LEXIS 82 (2020), cert. denied, No. S20C1227, 2020 Ga. LEXIS 855 (Ga. Nov. 16, 2020).

Evidence of ammunition admissible. — Trial court did not err in admitting evidence of ammunition found in the defendant's home because although the ammunition's probative value was limited, the prejudicial impact was limited too, the testimony clearly conveyed that the connection between the ammunition and the bullet with which the victim was shot was tenuous, if there were any connection at all, and the other evidence against the defendant was strong. Davidson v. State, 304 Ga. 460, 819 S.E.2d 452, 2018 Ga. LEXIS 629 (2018).

Admission of testimony of law enforcement officer regarding drugs. — Trial court did not err by permitting a law-enforcement officer to testify about the pernicious effects of heroin and addiction because the testimony put in context what heroin was and the testimony was relevant to explain why someone might engage in an enterprise to distribute heroin and possess a trafficking amount, and to explain why heroin was a Schedule I controlled substance. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625, 2016 Ga. App. LEXIS 559 (2016), cert. denied, No. S17C0590, 2017 Ga. LEXIS 411 (Ga. May 15, 2017).

Admission of letter written by defendant. — Trial court properly admitted a letter in the defendant's trial for convictions in connection with a drive-by shooting because the state properly authenticated the letter as authored by the defendant since the letter was given to the prosecution by defense counsel and was properly introduced as evidence of the defendant's guilty consciousness relating to the shooting and the letter's relevance was substantially outweighed by any danger of unfair prejudice. Amey v. State, 337 Ga. App. 480, 788 S.E.2d 80, 2016 Ga. App. LEXIS 361 (2016).

Videotape evidence inadmissible in armed robbery. — In an action for armed robbery, aggravated assault, and other crimes, the trial court erred when the court admitted evidence of a second robbery, including the video and defendant's shoes, as more probative than

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prejudicial as the prosecutorial need for the introduction of the video of the second robbery was minimal since the male victim repeatedly identified the defendant as the assailant. Allen v. State, 365 Ga. App. 599, 879 S.E.2d 666, 2022 Ga. App. LEXIS 476 (2022).

Evidence of videotape admissible in DUI case. — Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245, 2017 Ga. App. LEXIS 68 (2017), cert. denied, No. S17C1278, 2017 Ga. LEXIS 678 (Ga. Aug. 14, 2017).

Video recordings from officers' body cameras probative. — After the defendant murdered the defendant's two infant daughters by drowning the children, the video-recordings of the crime scene taken from the body cameras of two police officers who responded to the defendant's 911 call were relevant and admissible, with the exception of the last four minutes of the second recording, because those portions as a whole were relevant to show the children's manner of death; the video-recordings were not needlessly cumulative of the manner of death as the state was not required to stipulate to the cause of death and the circumstances surrounding the murders; and the video-recordings were probative of matters other than the manner of death, including rebutting the defendant's insanity defense. Morgan v. State, 307 Ga. 889, 838 S.E.2d 878, 2020 Ga. LEXIS 102 (2020).

In the defendant's trial for the murder of the defendant's girlfriend's 17-month-old daughter, the trial court did not err in admitting other-acts evidence under O.C.G.A. § 24-4-404(b) that showed the defendant's violent behavior toward the defendant's former spouses and their children because these violent acts proved intent and lack of mistake or accident. Intent was in issue because the defendant denied harming the victim. Naples v. State, 308 Ga. 43, 838 S.E.2d 780, 2020 Ga. LEXIS 96 (2020).

Evidence of defendants' financial worth. — In a premises liability suit, the trial court erred by excluding evidence of the defendants' security expenditures by failing to determine whether the financial worth of the defendants was relevant to the issue since the plaintiffs contended that such evidence would show that the defendants' increased security expenditures constituted only a small percentage of the defendants' security budget. Cham v. ECI Mgmt. Corp., 353 Ga. App. 162, 836 S.E.2d 555, 2019 Ga. App. LEXIS 611 (2019), cert. denied, No. S20C0600, 2020 Ga. LEXIS 562 (Ga. July 15, 2020), aff'd, 311 Ga. 170, 856 S.E.2d 267, 2021 Ga. LEXIS 85 (2021).

Evidence of arrest following high speed chase properly admitted. — Trial court did not abuse the court's discretion by allowing the evidence of the defendant's arrest following the high-speed chase because the evidence was intrinsic as both necessary to complete the story of the crimes and inextricably intertwined with the evidence regarding the charged offenses since the evidence established a connection between the defendant and the stolen gun used in the bank robbery and the probative value was not substantially outweighed by the danger of unfair prejudice under the circumstances. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162, 2019 Ga. App. LEXIS 494 (2019).

Police body-cam recording of shooting victim admissible. — In the defendant's murder trial, the trial court did not err under O.C.G.A. § 24-4-403 in allowing a police body-camera recording that depicted the victim with the victim's blood pooling on the ground and flowing from the victim's head and face as the victim waited for an ambulance because, although the recording was disturbing, the recording was relevant and probative to show the crime scene, the victim's injuries, and the victim and the victim's fiancee's condition and demeanor as the victims spoke to officers about the shooting.

Varner v. State, 306 Ga. 726, 832 S.E.2d 792, 2019 Ga. LEXIS 593 (2019).

Evidence of domestic abuse admitted. — In the defendant's trial for the murder of a former girlfriend's 13-month-old daughter, evidence that the defendant had abused the child's mother was not introduced for one of the purposes listed in O.C.G.A. § 24-4-404(b), but rather to show the mother's possible fear under O.C.G.A. § 24-6-622, which allowed evidence of a witness's feelings towards the parties and the witness's relationship to the parties. Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019).

Domestic issue admissible. — When the defendant was convicted of felony murder and aggravated assault in connection with the shooting death of the victim, the defendant's brother-in-law, the evidence regarding the prior incident in which the defendant hit and pushed the defendant's sister was admissible as intrinsic evidence because the evidence explained why the victim and the defendant's sister were persistent with their requests that the defendant leave, and why the victim followed the defendant outside of the home to ensure that the defendant left; and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Clark v. State, 306 Ga. 367, 829 S.E.2d 306, 2019 Ga. LEXIS 399 (2019), cert. denied, 140 S. Ct. 1108, 206 L. Ed. 2d 180, 2020 U.S. LEXIS 1059 (2020).

Character evidence admissible for intent. — Trial court did not abuse the court's discretion in finding that the defendant's prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant's position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. Curry v. State, 330 Ga. App. 610, 768 S.E.2d 791, 2015 Ga. App. LEXIS 26 (2015), cert. dismissed, No. S16C0519, 2016 Ga. LEXIS 278 (Ga. Apr. 4, 2016).

Trial court did not abuse the court's discretion by excluding evidence of one appellant's intent as to the reconveyance of certain funds because no abuse of discretion occurred by excluding evidence of a cumulative nature that could have confused the jury about the primary issue under consideration and created a re-trial. Interfinancial Midtown, Inc. v. Choate Constr. Co., 343 Ga. App. 793, 806 S.E.2d 255, 2017 Ga. App. LEXIS 479 (2017).

Fleeing as consciousness of guilt. — Trial court did not abuse the court's discretion by admitting evidence that the defendant fled a police roadblock because any prejudicial impact from the flight evidence presented was outweighed by its probative value as the evidence showed that the defendant had a guilty conscience for the defendant's participation in the home invasion and wanted to avoid being apprehended. Jenkins v. State, 313 Ga. 81, 868 S.E.2d 205, 2022 Ga. LEXIS 13 (2022).

Probative value not substantially outweighed by danger of unfair prejudice. — Defendant's recorded telephone conversations made from jail were relevant and admissible: (1) to show the defendant's consciousness of guilt for the armed robbery as the defendant admonished a witness for divulging the defendant's name to the police; the defendant asked the witness if the witness told the police that the defendant had a gun; and the defendant told the witness that the police pressure should not get to the witness as the witness had not done anything; and (2) to corroborate the witness's testimony that the defendant had told the witness not to give the defendant's name to the police; further, the probative value of the recorded telephone calls was not substantially outweighed by the danger of unfair prejudice. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831, 2016 Ga. App. LEXIS 401 (2016).

Under a plain error review, since the defendant failed to object at trial, the trial court did not abuse the court's discretion by allowing various autopsy photographs to be admitted into evidence at trial because the photos were not particularly gory or gruesome and were relevant to show the nature and location of the vic-

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tim's injuries, which corroborated the account of the shooting given by the eyewitnesses who saw the defendant. Benton v. State, 301 Ga. 100, 799 S.E.2d 743, 2017 Ga. LEXIS 326 (2017).

Trial court did not err in granting the state's motion to present evidence of the armed robbery of a residence two days before the victim's murder because the evidence of the armed robbery was admissible to show the motive to commit the victim's murder as the defendant and the co-defendant were concerned that the victim would turn them into the police; evidence of motive was relevant even if the evidence incidentally placed the defendant's character in issue; there was sufficient proof that the defendant committed the prior armed robbery; and the trial court did not err in finding that the probative value of the evidence outweighed any prejudice from admission. Pike v. State, 302 Ga. 795, 809 S.E.2d 756, 2018 Ga. LEXIS 56 (2018).

Trial court did not abuse the court's discretion in admitting a school photograph of the victim taken approximately eight months before the aggravated sexual battery because the photograph had probative value. The photograph tended to show that around the time of the incident that the victim looked like a child, not an adult, thereby making the defendant's claim that the defendant mistook the victim for the victim's mother less probable; and there was evidence that the victim's appearance at the time of the incident did not differ markedly from the photograph taken eight months earlier, but there was evidence that the victim's appearance changed between the incident and the November 2015 trial at which the victim testified. Marroquin v. State, 346 Ga. App. 161, 816 S.E.2d 91, 2018 Ga. App. LEXIS 346 (2018).

Trial court did not abuse the court's discretion by excluding other acts evidence involving the defendant having exposed oneself to a female customer inside the same store from which the defendant had offered the victim a ride home because undue prejudice might have resulted from the admission of the other acts evidence and created a likelihood that the jury might convict the defendant because of the other perverted behavior. State v. Isham, 348 Ga. App. 356, 823 S.E.2d 47, 2019 Ga. App. LEXIS 9 (2019).

Trial court abused its discretion by ruling that evidence of prior acts of sexual assault were inadmissible in a rape case because the introduction of that evidence was not unfairly prejudicial as the prejudice stemmed from a proper use of the evidence to prove the defendant's propensity to engage in non-consensual sex with an unconscious or semi-conscious partner; and the probative value of the evidence was substantial as the defendant argued that the victim consented. State v. Ippisch, 366 Ga. App. 501, 883 S.E.2d 162, 2023 Ga. App. LEXIS 17 (2023).

Probative value of drug evidence outweighed by prejudicial effect. — Defendant's prior criminal conviction for possession of cocaine with intent to distribute was properly admitted because the defendant's current and prior crimes for possession of cocaine with intent to distribute were identical, and the intent required to prove the crimes was necessarily the same; the evidence of the prior crime was highly relevant to the issue of the defendant's unlawful possession of cocaine with the intent to distribute or sell it; the evidence was important to the state's case, thereby enhancing its probative value; and any prejudice resulting from the admission of the prior conviction was mitigated by the limiting instruction the trial court gave when the evidence was introduced and in its final charge to the jury. Burgess v. State, 349 Ga. App. 635, 824 S.E.2d 99, 2019 Ga. App. LEXIS 68 (2019), cert. denied, No. S19C0984, 2019 Ga. LEXIS 739 (Ga. Nov. 4, 2019), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

Evidence of prior incarceration. — Trial court did not abuse the court's discretion in admitting improper character evidence of the appellant regarding the appellant's previous incarceration because the appellant's brief statement about being in jail with the individual who assisted in the crime was relevant and admissible to show that the men knew

each other prior to the crimes at issue. Easley v. State, 352 Ga. App. 1, 833 S.E.2d 591, 2019 Ga. App. LEXIS 519 (2019).

Admission of sexual intercourse with two other victims. — Trial court did not abuse the court's discretion in admitting the evidence that the defendant had engaged in sexual intercourse with two other victims who were around the same age as the 14-year-old victim as the defendant put the defendant's intent at issue in the case, and the probative value of the extrinsic acts evidence was not substantially outweighed by the prejudicial effect of the evidence. Boyd v. State, 351 Ga. App. 469, 829 S.E.2d 163, 2019 Ga. App. LEXIS 265 (2019).

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Evidence in medical malpractice cases. — In a medical malpractice action, given that the admission of expert testimony that the doctor breached the standard of care in performing two 1998 surgeries on the patient would have arguably forced that doctor to defend against time-barred malpractice claims, the trial court was authorized to conclude that the substantially prejudicial impact of that evidence far outweighed any probative value. Miller v. Cole, 289 Ga. App. 471, 657 S.E.2d 585, 2008 Ga. App. LEXIS 121 (2008) (decided under former O.C.G.A. § 24-2-1).

In a medical malpractice case arising out of a mother's premature delivery of her baby, the trial court did not err in admitting the doctor's note on the mother's chart that the doctor had examined her, which was later marked through with a note "patient not seen, out of room," was probative of the doctor's untruthfulness under O.C.G.A. § 24-6-608(b)(1), given that the mother had not left her room that day. The note was not unduly prejudicial under O.C.G.A. § 24-4-403. Cent. Ga. Women's Health Ctr., LLC v. Dean, 342 Ga. App. 127, 800 S.E.2d 594, 2017 Ga. App. LEXIS 202 (2017), cert. denied, No. S17C1952, 2018 Ga. LEXIS 119 (Ga. Feb. 19, 2018).

Isolated closing remark in medical malpractice case did not require new trial. — Hospital's passing statement during closing argument that the defendants were not getting rich while taking care of people was not linked to any argument about whether the defendants should be found liable, their ability to pay any judgment, the amount of damages that should be awarded, the relative wealth of the parties, or any improper evidence of their financial condition; thus, the isolated remark and the trial court's sympathy charge was not so prejudicial as to require a new trial. Thomas v. Alligood, 358 Ga. App. 703, 856 S.E.2d 80, 2021 Ga. App. LEXIS 113 (2021).

Evidence of FTC order as to medical procedures may be admissible when the probative value of the evidence is not substantially outweighed by the fact that the admission of the evidence will create undue prejudice, confuse the issues, or mislead the jury. Pound v. Medney, 176 Ga. App. 756, 337 S.E.2d 772, 1985 Ga. App. LEXIS 2416 (1985) (decided under former O.C.G.A. § 24-2-1).

Prejudicial impact outweighed probative value in contract action. — In a breach of contract suit brought by a contractor who was engaged to advertise a computer program, the trial court properly excluded as irrelevant evidence regarding the purported illegality of the sale of the program as the reason why the defendants stopped selling the program was irrelevant to the issue of whether the contractor was owed commissions from past sales; even if it was relevant, the trial court was authorized to conclude that the substantially prejudicial impact of the evidence far outweighed any probative value. Smith v. Saulsbury, 286 Ga. App. 322, 649 S.E.2d 344, 2007 Ga. App. LEXIS 759 (2007) (decided under former O.C.G.A. § 24-2-1).

Improper prejudice from admission of criminal record during damage phase of trial. — Trial court did not abuse the court's discretion in ruling that the probative value of the defendant's criminal record, introduced during the damages stage only when the jury could be instructed on the proper use of the evidence, was not substantially outweighed by the danger of improper prejudice. Rivers v. K-Mart Corp., 329 Ga. App. 495, 765 S.E.2d 671, 2014 Ga. App. LEXIS 721 (2014).

Prejudicial effect of evidence of insurance coverage. — Pedestrian and

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the pedestrian's spouse sued a driver over an auto accident. The trial court properly refused to allow plaintiffs to ask whether the driver had entered into an agreement with their uninsured motorist (UM) carrier in exchange for testifying as the trial court could have reasonably concluded that the prejudice resulting from revealing the UM policy outweighed any probative value of evidence of the carrier's waiver of subrogation claims against the driver. McClellan v. Evans, 294 Ga. App. 595, 669 S.E.2d 554, 2008 Ga. App. LEXIS 1279 (2008) (decided under former O.C.G.A. § 24-2-1).

No prejudicial effect of evidence of insurance coverage. — Even if the trial court failed to perform the balancing test under O.C.G.A. § 24-4-403 before admitting evidence that the defendant was the beneficiary of insurance policies on the husband's life in order to prove motive, any error was harmless given the overall strength of the evidence, including evidence of the defendant's decreased interest in the marriage and that the scene appeared to be staged to look like a break in. Ballin v. State, 307 Ga. 494, 837 S.E.2d 343, 2019 Ga. LEXIS 832 (2019).

Allowing evidence of witness's compensation. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Statement of employee nurse of defendant relevant. — Trial court did not abuse the court's discretion in admitting the testimony of the plaintiff's daughter over the defendant's objection as an admission by a party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674, 2014 Ga. App. LEXIS 566 (2014).

RESEARCH REFERENCES

ALR.

Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

Admissibility of rap lyrics or videos in criminal prosecutions, 43 A.L.R.7th Art. 1.

24-4-404. Character evidence not admissible to prove conduct; exceptions; evidence of other crimes.

(a) Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for:

(1) Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under paragraph (2) of this subsection, evidence of the same trait of character of the accused offered by the prosecution;

(2) Subject to the limitations imposed by Code Section 24-4-412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim

offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; or

(3) Evidence of the character of a witness, as provided in Code Sections 24-6-607, 24-6-608, and 24-6-609.

(b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

History.

Code 1981, § 24-4-404, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Character evidence; crimes or other acts, Fed. R. Evid. 404.

Law reviews.

For note discussing res gestae, see 3 Ga. B.J. 69 (1940).

For article, "Admissibility of Evidence of a Party's Prior Intemperate Habits on the Issue of Intoxication at the Time of An Accident," see 17 Mercer L. Rev. 347 (1966).

For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010).

For annual survey on evidence law, see 66 Mercer L. Rev. 81 (2014).

For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

For annual survey on evidence law, see 68 Mercer L. Rev. 1019 (2017).

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For article, "Legitimizing Character Evidence," see 68 Emory L.J. 443 (2019).

For annual survey on evidence, see 70 Mercer L. Rev. 1023 (2019).

For annual survey on evidence, see 71 Mercer L. Rev. 103 (2019).

For article, "Character Evidence in the Civil Setting," see 26 Ga. St. B.J. 20 (Dec. 2020).

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Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3680, former Code 1868, § 3704, former Code 1873, § 3757, former Code 1882, § 3757, former Civil Code 1895, § 5159, former Penal Code 1895, § 993, former Civil Code 1910, § 5745, former Penal Code 1910, § 1019, former Code 1933, § 38-202, and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Construction with O.C.G.A. § 24-4-413. — Provisions of O.C.G.A. § 24-4-413(a) supersede the provisions of O.C.G.A. § 24-4-404(b) in sexual assault cases. O.C.G.A. § 24-4-413(a) is the more specific statute regarding admission of prior acts of child molestation and is, therefore, controlling over O.C.G.A. § 24-4-404(b). Steele v. State, 337 Ga. App. 562, 788 S.E.2d 145, 2016 Ga. App. LEXIS 369 (2016).

Character defined. — Character in legal parlance has the same meaning as reputation; that is, what one's fellows say about one. Simpkins v. State, 149 Ga. App. 763, 256 S.E.2d 63, 1979 Ga. App. LEXIS 2022 (1979) (decided under former Code 1933, § 38-202).

Character evidence restricted to general reputation. — Admissibility of character evidence depends upon the general reputation of the person in the community, not what the witness knows personally about the subject. Smith v. State, 153 Ga. App. 519, 265 S.E.2d 852, 1980 Ga. App. LEXIS 1879 (1980) (decided under former Code 1933, § 38-202).

Use of character evidence. — Evidence as to character is irrelevant and inadmissible unless the evidence is used to show the character of the witness for veracity, or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266, 1970 Ga. App. LEXIS 717 (1970) (decided under former Code 1933, § 38-202).

Evidence regarding the character of a defendant is generally inadmissible unless the defendant puts defendant's character in issue, and evidence of independent offenses committed by a defendant is generally inadmissible due to the inherently prejudicial nature and minimal probative value of the evidence. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813, 1992 Ga. App. LEXIS 1037 (1992) (decided under former O.C.G.A. § 24-2-2).

General character of parties and especially their conduct in other transactions are irrelevant matters unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct. Vaughn v. Metro. Prop. & Cas. Ins. Co., 260 Ga. App. 573, 580 S.E.2d 323, 2003 Ga. App. LEXIS 427 (2003) (decided under former O.C.G.A. § 24-2-2).

When character is relevant, it must be the general character and not one specific act. Stanley v. Hudson, 78 Ga. App. 834, 52 S.E.2d 567, 1949 Ga. App. LEXIS 992 (1949) (decided under former Code 1933, § 38-202); Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770, 1963 Ga. App. LEXIS 912 (1963) (decided under former Code 1933, § 38-202).

Introduction of character by defendant. — Defendant may offer proof of defendant's good character as a relevant fact tending to make defendant's guilt doubtful. Rentfrow v. State, 123 Ga. 539, 51 S.E. 596, 1905 Ga. LEXIS 531 (1905) (decided under former Penal Code 1895, § 993); Ware v. State, 18 Ga. App. 107, 89 S.E. 155, 1916 Ga. App. LEXIS 146 (1916) (decided under former Penal Code 1910, § 1019).

Introduction of character by prosecution. — State cannot put the general character of the defendant in a criminal case in issue. Moulder v. State, 9 Ga. App. 438, 71 S.E. 682, 1911 Ga. App. LEXIS 594 (1911) (decided under former Penal Code 1910, § 1019).

When defendant puts the defendant's character in issue, it is the right of the state to show that the character is bad. Strickland v. State, 12 Ga. App. 640, 77 S.E. 1070, 1913 Ga. App. LEXIS 674

(1913) (decided under former Penal Code 1910, § 1019).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405 and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621). Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729, 2004 Ga. App. LEXIS 174 (2004) (decided under former O.C.G.A. § 24-2-2).

Questioning of witness about potential offer by defendant to pay for testimony. — Trial court properly denied a motion for mistrial based on the prosecution's question to a witness as to whether a defendant offered money to the witness to testify on the defendant's behalf because evidence that the defendant attempted to influence the witness's testimony could be offered to show consciousness of guilt, and in any event, any harm was mitigated by the fact that the witness answered in the negative. Branton v. State, 292 Ga. App. 104, 663 S.E.2d 414, 2008 Ga. App. LEXIS 708 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. Oct. 6, 2008) (decided under former O.C.G.A. § 24-2-2).

Admitting evidence of independent offenses. — Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813, 1992 Ga. App. LEXIS 1037 (1992) (decided under former O.C.G.A. § 24-2-2).

Transactions of a similar nature or like character to those charged in the petition in which the defendant had engaged previously to the one in question are admissible in evidence. Deckner-Willingham Lumber Co. v. Turner, 171 Ga. 240, 155 S.E. 1, 1930 Ga. LEXIS 324 (1930) (decided under former Civil Code 1910, § 5745).

Similar acts are admissible in evidence, if committed or proposed at or about the same time, and when the same motive reasonably may be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against the defendant in the petition; this is so in transactions of similar nature or like character in which the defendant had engaged previously to the one in question. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365, 1957 Ga. App. LEXIS 745 (1957) (decided under former Code 1933, § 38-202).

Similar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time and place. Genins v. Geiger, 144 Ga. App. 244, 240 S.E.2d 745, 1977 Ga. App. LEXIS 2657 (1977) (decided under former Code 1933, § 38-202).

Offense with no factual similarity not admissible. — While evidence of the defendant's prior drug offenses was relevant at trial for felony possession of more than one ounce of marijuana and admissible in light of the extensive limiting instructions regarding other acts given to the jury, which reduced the risk of undue prejudice, the trial court erred in admitting evidence of the defendant's prior arrest and conviction for family violence because there was no factual similarity between the battery offense and the charged offense. Watkins v. State, 353 Ga. App. 606, 839 S.E.2d 41, 2020 Ga. App. LEXIS 47 (2020).

Cross-examination as to specific acts or transactions. — When the good character of a defendant is put in issue, evidence as to general bad character with respect to the particular trait may be shown in rebuttal; but in so doing it is not permissible to prove specific acts, except on crossexamination for the purpose of testing the knowledge of the defendant's witnesses, and except for the purpose of

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impeaching knowingly false statements made by the defendant personally to the jury or by the defendant's witnesses on cross-examination. Mimbs v. State, 189 Ga. 189, 5 S.E.2d 770, 1939 Ga. LEXIS 694 (1939) (decided under former Code 1933, § 38-202); Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246, 1951 Ga. App. LEXIS 783 (1951) (decided under former Code 1933, § 38-202); Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962); Horton v. State, 228 Ga. 690, 187 S.E.2d 677, 1972 Ga. LEXIS 886 (1972) (decided under former Code 1933, § 38-202); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-202); Compher v. Georgia Waste Sys., 155 Ga. App. 819, 273 S.E.2d 200, 1980 Ga. App. LEXIS 2805 (1980) (decided under former Code 1933, § 38-202); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411, 1980 Ga. App. LEXIS 2808 (1980) (decided under former Code 1933, § 38-202).

Transactions with third parties. — It was error for the court to permit the defendant, over objection, to be interrogated on cross-examination about a transaction between the defendant and a third party, which was entirely separate and distinct. Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662, 1944 Ga. App. LEXIS 332 (1944) (decided under former Code 1933, § 38-202); Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318, 1968 Ga. App. LEXIS 1436 (1968) (decided under former Code 1933, § 38-202); Dennis v. Dennis, 227 Ga. 164, 179 S.E.2d 238, 1971 Ga. LEXIS 626 (1971) (decided under former Code 1933, § 38-202).

"Mug shots" and other court appearances. — Admission in evidence of a "mug shot" of the defendant does not inject the defendant's character into evidence nor does the mere presence of the defendant on trial in some other court without more inject the defendant's character into evidence. Creamer v. State, 229 Ga. 704, 194 S.E.2d 73, 1972 Ga. LEXIS 744 (1972) (decided under former Code 1933, § 38-202); Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862, 1980 Ga. App. LEXIS 2836 (1980) (decided under former Code 1933, § 38-202); Jones v. State, 156 Ga. App. 56, 274 S.E.2d 99, 1980 Ga. App. LEXIS 2877 (1980) (decided under former Code 1933, § 38-202); Price v. State, 159 Ga. App. 662, 284 S.E.2d 676, 1981 Ga. App. LEXIS 2757 (1981) (decided under former Code 1933, § 38-202).

Bolstering of testimony. — It is permissible to strengthen a witness's testimony by evidence of matters showing its consistency and reasonableness, and tending to indicate that the facts probably were as stated by the witness. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318, 1968 Ga. App. LEXIS 1436 (1968) (decided under former Code 1933, § 38-202).

Evidence of a compromise is inherently harmful in spite of anything a judge might say in instructing a jury as to the weight to be given such evidence, and to allow testimony concerning evidence of compromise deprives a defendant of a fair and impartial trial. Boyd v. State, 146 Ga. App. 359, 246 S.E.2d 396, 1978 Ga. App. LEXIS 2354 (1978), overruled in part as stated in Jackson v. State, 302 Ga. App. 412, 691 S.E.2d 553, 2010 Ga. App. LEXIS 147 (2010) (decided under former Code 1933, § 38-202).

Similar transaction hearing sufficient despite only summary of testimony. — Similar transaction hearing was sufficient even though, instead of calling a witness to testify, the state merely proffered a summary of a witness's testimony; the state introduced no hearsay evidence during trial, and the defendant had ample opportunity to cross-examine the similar transaction witness at trial. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729, 2006 Ga. App. LEXIS 1217 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (Ga. Jan. 22, 2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

State may mention similar transaction evidence in opening statement. — State did not commit error by referencing the 2003 similar transaction evidence in the state's opening statement because,

even if the defendant had properly preserved that objection for appellate review, the defendant had not provided any authority for the contention that a prosecutor could not refer in opening statement to similar transaction evidence which had already been ruled admissible. Nguyen v. State, 330 Ga. App. 812, 769 S.E.2d 558, 2015 Ga. App. LEXIS 76 (2015).

Standard of review. — Absent an abuse of discretion, a trial court's ruling as to the admissibility of similar transaction evidence will not be disturbed. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197, 2003 Ga. App. LEXIS 594 (2003) (decided under former O.C.G.A. § 24-2-2).

Appellate court will not disturb a trial court's determination that similar transaction evidence is admissible absent an abuse of discretion. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415, 2004 Ga. App. LEXIS 830 (2004) (decided under former O.C.G.A. § 24-2-2).

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Question established credibility. — Testimony was not prejudicial to the plaintiff when defense counsel asked the defendants' expert witness whether the expert had participated in a particular religious program and to describe the program. This question served only to help introduce the witness to the jury and to contribute to establishment of the expert's credibility; it did not present a basis for reversing the jury's verdict. Brannen v. Prince, 204 Ga. App. 866, 421 S.E.2d 76, 1992 Ga. App. LEXIS 1032 (1992), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147, 2009 Ga. LEXIS 395 (2009) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence on failure to pay. — In a complaint alleging failure to pay pursuant to a contract for accounting services, it was not an abuse of discretion to allow testimony which stated that the charges of other accountants and attorneys who worked for the defendant on the same project were approximately twice as much as their original estimates and that the defendant had failed to pay when the plaintiffs claimed that their charges were also double the amount originally estimated due to delays caused by the defendant in light of the similarity of the transactions involved and the issue of bad faith. Candler v. Davis & Upchurch, 204 Ga. App. 167, 419 S.E.2d 69, 1992 Ga. App. LEXIS 836 (1992) (decided under former O.C.G.A. § 24-2-2).

In an action involving an insurer's attempt to cancel a policy for nonpayment of a premium, evidence of the insured's history of tardy payment of bills was properly excluded. State Farm Mut. Auto. Ins. Co. v. Drury, 222 Ga. App. 196, 474 S.E.2d 64 (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in ruling that a widow could not introduce evidence of an insurer's conduct towards insureds in two prior cases in which the court refused to honor incontestability clauses to demonstrate bad faith because the trial court was entitled to find that the prior cases were materially dissimilar from the widow's case, given that neither of those cases involved coverage under the group policy at issue and the revisions to the certificate of insurance forms made that year. Flynt v. Life of the South Ins. Co., 312 Ga. App. 430, 718 S.E.2d 343, 2011 Ga. App. LEXIS 973 (2011), cert. denied, No. S12C0461, 2012 Ga. LEXIS 305 (Ga. Mar. 19, 2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's character is admissible in fraud cases. German American Mut. Life Ass'n v. Farley, 102 Ga. 720, 29 S.E. 615, 1897 Ga. LEXIS 680 (1897) (decided under former Civil Code 1895, § 5159); Mays v. Mays, 153 Ga. 835, 113 S.E. 154, 1922 Ga. LEXIS 179 (1922); Wimberly v. Toney, 175 Ga. 416, 165 S.E. 257, 1932 Ga. LEXIS 261 (1932) (decided under former Civil Code 1910, § 5745); Kilgore v. United States, 467 F.2d 22, 1972 U.S. App. LEXIS 7427 (5th Cir. 1972). (decided under former Code 1933, § 38-202).

While evidence of the insured's general good character is relevant and admissible in a suit on the insured's policy of insurance, since the insurer defends on the ground that the insured perpetrated a fraud on the insurer in procuring the insured's policy; yet, in a case where such fraud is shown by witnesses who swear positively to facts sustaining the defense of fraud, the jury is not authorized to find

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from evidence of the insured's good character alone that the plaintiff has shown plaintiff's right to recover by a preponderance of evidence. Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1, 1954 Ga. LEXIS 538 (1954) (decided under former Code 1933, § 38-202).

Other transactions showing fraud. — Evidence that parties charged with having been engaged in a fraudulent scheme to defraud laborers and materialmen in a building transaction had proposed, or had been engaged in, similar fraudulent schemes, is admissible to show fraudulent intent in the transaction in controversy, if it is shown that the other transactions were fraudulent and that the transactions were so connected in point of time and otherwise with the one in issue as to make it apparent that all were proposed or carried out in pursuance of a common fraudulent purpose. Deckner-Willingham Lumber Co. v. Turner, 171 Ga. 240, 155 S.E. 1, 1930 Ga. LEXIS 324 (1930) (decided under former Civil Code 1910, § 5745).

Other transactions showing fraud are admissible to show intent. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365, 1957 Ga. App. LEXIS 745 (1957) (decided under former Code 1933, § 38-202).

In an action for fraud involving a construction contract, evidence of unrelated contract disputes that defendant had purportedly evincing fraudulent intent was admissible. John W. Rooker & Assocs., Inc. v. Wilen Mfg. Co., 211 Ga. App. 519, 439 S.E.2d 740, 1993 Ga. App. LEXIS 1573 (1993) (decided under former O.C.G.A. § 24-2-2).

Character irrelevant in negligence cases. — In actions arising out of automobile collisions, the issue is the negligence or nonnegligence of the operator at the time and place of the event, and each such transaction is to be ascertained by its own circumstances and not by the reputation or character of the parties. Grannemann v. Salley, 95 Ga. App. 778, 99 S.E.2d 338, 1957 Ga. App. LEXIS 918 (1957) (decided under former Code 1933, § 38-202).

Reputation of a defendant or defendant's employee for exercising care in the defendant's actions is not admissible to show that due care was exercised on the occasion in question. Georgia Ports Auth. v. Mitsubishi Int'l Corp., 156 Ga. App. 304, 274 S.E.2d 699, 1980 Ga. App. LEXIS 2952 (1980) (decided under former Code 1933, § 38-202).

In an action arising out of an auto accident, evidence of deceased's prior drug and alcohol use and prior conduct was irrelevant to the question of liability and the issue of damages. Taylor v. RaceTrac Petroleum, Inc., 238 Ga. App. 761, 519 S.E.2d 282 (decided under former O.C.G.A. § 24-2-2).

Evidence of quality of work from other employees. — In a suit to recover commissions advanced to an agent prior to termination of the agent's employment, testimony from the agent's other employers that the service the agent had rendered the agent's customers was not valuable, was properly excluded; the agent's conduct in transactions involving other employers was not relevant, and would unduly prejudice the jury. Duggan Ins. Agency, Inc. v. Altschul, 195 Ga. App. 458, 394 S.E.2d 119, 1990 Ga. App. LEXIS 585 (1990) (decided under former O.C.G.A. § 24-2-2).

Evidence physician failed board exam irrelevant. — In a medical malpractice case, the court's refusal to allow evidence that a physician did not pass the physician's board examination was not an abuse of discretion. Williams v. Memorial Medical Ctr., Inc., 218 Ga. App. 107, 460 S.E.2d 558, 1995 Ga. App. LEXIS 660 (1995), cert. denied, No. S95C1787, 1995 Ga. LEXIS 1136 (Ga. Oct. 27, 1995) (decided under former O.C.G.A. § 24-2-2).

References to prior "case" against a medical malpractice defendant did not require mistrial. — In a medical malpractice case, although a patient's counsel's two brief references to another "case" in cross-examination of the defense expert were arguably improper under O.C.G.A. § 24-4-404(a), the references did not explicitly impute any prior negligence to the doctor or indicate that the doctor had previously been sued; the references were insufficient to fatally infect the verdict and require a mistrial. Southwestern Emergency Physicians, P.C. v. Quinney,

347 Ga. App. 410, 819 S.E.2d 696, 2018 Ga. App. LEXIS 538 (2018).

Evidence on lack of CPA license. — Trial court did not err in precluding the corporation's purported impeachment evidence about why the investor had not obtained the investor's CPA license as the evidence was irrelevant to the issues being tried. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97, 2003 Ga. App. LEXIS 756 (2003), cert. denied, No. S03C1673, 2003 Ga. LEXIS 965 (Ga. Nov. 10, 2003) (decided under former O.C.G.A. § 24-2-2).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (decided under former O.C.G.A. § 24-2-2).

Outdated financial affidavit was relevant to claim that a spouse hid or dissipated assets. — In a divorce proceeding, it was not an abuse of discretion to reject the relevancy objection of a spouse to the admission of a financial affidavit that the spouse prepared several months before the trial on the ground that the affidavit was prejudicial because the affidavit made it appear that the spouse had attempted to hide assets; the relevancy objection was properly rejected because it was the position of the other spouse that the spouse had hidden or dissipated assets during the pendency of the divorce proceedings. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284, 2006 Ga. LEXIS 987 (2006), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar acts in negligence cases. — Allegation that the defendant in a personal injury suit was aware that other persons had slipped and fallen under substantially the same circumstances was not subject to special demurrer as immaterial and irrelevant matter. Belk-Matthews Co. of Macon v. Thompson, 94 Ga. App. 331, 94 S.E.2d 516, 1956 Ga. App. LEXIS 537 (1956) (decided under former Code 1933, § 38-202).

It is a general rule that in a suit for negligence, evidence of similar acts or omissions on other and different occasions is not admissible. Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715, 1970 Ga. App. LEXIS 837 (1970) (decided under former Code 1933, § 38-202); .

As a general rule in all negligence actions, evidence of similar acts or omissions is not admissible; however, if proof of a similar accident or similar method of acting tends to prove some fact of the case on trial, the testimony falls within an exception — such as to show knowledge of a defect or causation, or to rebut a contention that it was impossible for the accident to happen in the manner claimed, or to show the prior existence of a dangerous condition or hazardous situation. Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199, 1979 Ga. App. LEXIS 2150 (1979) (decided under former Code 1933, § 38-202).

In an action alleging that the owner of an apartment complex breached a duty to keep the premises safe, the trial court did not abuse the court's discretion when the court refused to admit evidence of a carjacking that occurred near the complex because the carjacking occurred on a public street and in a location of unknown proximity to the complex. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135, 2011 Ga. App. LEXIS 945 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. Mar. 5, 2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of absence of similar acts in negligence cases. — If evidence of prior similar acts of negligence is not admissible, it follows that evidence of the absence of any such prior acts is equally inadmissible. Williams v. Naidu, 168 Ga. App. 539, 309 S.E.2d 686, 1983 Ga. App. LEXIS 2843 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of injuries sustained by other parties on prior occasions may be admitted for the purpose of showing that the defendant had been given notice of a dangerous condition and was thus negligent in allowing the condition to continue. Norfolk S. Ry. v. Thompson, 208 Ga.

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App. 240, 430 S.E.2d 371, 1993 Ga. App. LEXIS 454 (1993), cert. denied, No. S93C1115, 1993 Ga. LEXIS 764 (Ga. July 1, 1993) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior impairment from injuries admissible. — Trial court properly denied a nurse's motion in limine to exclude evidence of injuries that the nurse sustained in a prior car accident pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in an action against a medical practice, arising from alleged injuries that the nurse sustained when an office door opened and hit the nurse in the face and head, as the injuries in the doorway accident were related to the prior injuries because the nurse claimed a permanent impairment to the nurse's ability to work in both situations; the nurse's claim that the permanent impairment claims from the injuries were not substantially similar went to the weight of the evidence and not to the admissibility. Kilday v. Kennestone Physicians Ctr., L.P., 296 Ga. App. 818, 676 S.E.2d 271, 2009 Ga. App. LEXIS 329 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of subsequent careless occurrence excluded. — Testimony of a police officer, regarding the subsequent occurrence of a dog breaking loose and running into a bite-victim's yard, should have been excluded since the only logical purpose of such testimony was to raise the inference that if the dog owners were careless in their management of the dog on one occasion, the owners were probably careless on the occasion in question. Torrance v. Brennan, 209 Ga. App. 65, 432 S.E.2d 658, 1993 Ga. App. LEXIS 767 (1993) (decided under former O.C.G.A. § 24-2-2).

In product liability actions, evidence of other incidents involving the product is admissible and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity; without a showing of substantial similarity, the evidence is irrelevant as a matter of law. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877, 1995 Ga. App. LEXIS 704 (1995), aff'd in part and rev'd in part, 267 Ga. 226, 476 S.E.2d 565, 1996 Ga. LEXIS 731 (1996), vacated in part, 224 Ga. App. 187, 481 S.E.2d 6, 1997 Ga. App. LEXIS 6 (1997) (decided under former O.C.G.A. § 24-2-2).

Evidence plaintiff filed prior lawsuit not irrelevant. — Testimony elicited from plaintiff in a negligence action during cross-examination which showed that plaintiff had been involved in a single lawsuit 22 years prior to trial was not irrelevant or prejudicial because it was not indicative of litigiousness. Wages v. Sibran, Inc., 171 Ga. App. 14, 318 S.E.2d 679, 1984 Ga. App. LEXIS 2082 (1984) (decided under former O.C.G.A. § 24-2-2).

Evidence of continuing process. — Preparation of 125 turkeys was a continuous process which took some time to complete. The jury could properly infer from the evidence showing and tending to show a lack of negligence in the handling of all of the turkeys during the continuance of the undertaking that the same lack of negligence attended the handling of the one turkey by which plaintiffs were injured. Carsten v. Wilkes Supermarket of Gwinnett County, Inc., 181 Ga. App. 834, 353 S.E.2d 922, 1987 Ga. App. LEXIS 1563 (1987) (decided under former O.C.G.A. § 24-2-2).

In a wrongful death action against a truck manufacturer based on product liability and negligence, evidence that no truck of the type and design involved had ever been recalled or had been the subject of a regulatory proceeding was relevant and admissible to show that defendant's design and manufacture was not negligent. Browning v. Paccar, Inc., 214 Ga. App. 496, 448 S.E.2d 260, 1994 Ga. App. LEXIS 943 (1994) (decided under former O.C.G.A. § 24-2-2).

Insurer's mishandling of related claim. — Trial court, in an employee's action against an employer for failure to pay no-fault insurance benefits, properly excluded evidence of the insurer's mishandling of a related workers' compensation claim on the issue of punitive damages. Williams v. Aetna Cas. & Sur. Co., 182 Ga. App. 684, 356 S.E.2d 690, 1987 Ga. App. LEXIS 1771 (1987) (decided under former O.C.G.A. § 24-2-2).

Witness's testimony that defendant had a reputation for hurting people was admissible to explain the witness's reason for lying even though it incidentally put the defendant's character in issue. Smith v. State, 165 Ga. App. 669, 302 S.E.2d 414, 1983 Ga. App. LEXIS 1971 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of severance pay under similar circumstances. — In a suit to recover severance pay by employee remaining on job until sale of the company was consummated, the trial court did not err in allowing two former employees to testify that those employees had received severance pay upon their voluntary departure from the company after the sale of the corporation. Amax, Inc. v. Fletcher, 166 Ga. App. 789, 305 S.E.2d 601, 1983 Ga. App. LEXIS 2332 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior claims against defendant. — In an action alleging that defendant jewelry store substituted a flawed diamond in a ring plaintiff brought in to be re-set, the trial court did not err in excluding evidence of prior disputes between defendant and other customers. Ament v. Bennett's Fine Jewelry, 249 Ga. App. 683, 549 S.E.2d 501, 2001 Ga. App. LEXIS 596 (2001) (decided under former O.C.G.A. § 24-2-2).

General partners' (GPs') motion for a new trial was properly denied as evidence of a GP's involvement in a prior suit was properly admitted. The prior suit was relevant to show a course of conduct because the prior suit also involved a breach of a partnership agreement, a breach of fiduciary duty, a nursing home, and accusations that the GP violated the plain language of the partnership agreement by failing to pay the limited partners their preferred returns. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310, 2006 Ga. App. LEXIS 895 (2006) (decided under former O.C.G.A. § 24-2-2).

Character evidence was admissible in the following cases. — See McNabb v. Lockhart & Thomas, 18 Ga. 495, 1855 Ga. LEXIS 228 (1855) (reputation of one charged with loss of money) (decided under former Code 1863, § 3680); DuBose v. DuBose, 75 Ga. 753, 1885 Ga. LEXIS 224 (1885) (character of spouse charged with cruelty) (decided under former Code 1882, § 3757); McClure v. State Banking Co., 6 Ga. App. 303, 65 S.E. 33, 1909 Ga. App. LEXIS 270 (1909) (character of one accused of forgery) (decided under former Civil Code 1895, § 5159); Georgia Southern & Florida Ry. v. Ransom, 5 Ga. App. 740, 63 S.E. 525, 1909 Ga. App. LEXIS 115 (1909) (character of employee against whom damages were sought for insulting conduct) (decided under former Civil Code 1895, § 5159); Conley v. Conley, 152 Ga. 184, 108 S.E. 777, 1921 Ga. LEXIS 37 (1921) (character of spouse charged with adultery) (decided under former Civil Code 1910, § 5745); Dalton v. Jackson, 66 Ga. App. 625, 18 S.E.2d 791, 1942 Ga. App. LEXIS 251 (1942) (character in civil action for rape) (decided under former Code 1933, § 38-202); Murray v. Clayton, 151 Ga. App. 720, 261 S.E.2d 455, 1979 Ga. App. LEXIS 2766 (1979); Shivers v. Webster, 224 Ga. App. 254, 480 S.E.2d 304 (action to enforce oral promise) (decided under former O.C.G.A. § 24-2-2).

Admission of character evidence in deprivation proceeding. — Evidence that a father had emotionally abused and neglected a child by repeatedly beating and threatening to kill the child's mother in the child's presence, along with evidence that the father also repeatedly beat the first wife, was relevant to whether the cause of the child's deprivation was likely to continue under O.C.G.A. § 15-11-94 and was admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Davis v. Rathel, 273 Ga. App. 183, 614 S.E.2d 823, 2005 Ga. App. LEXIS 440 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence that parent missed medical appointments for child. — Evidence of the mother's missed health care appointments for her child did not relate to her conduct in other transactions, as contemplated by former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), but was probative of causation, and thus, was admissible in the mother's medical malpractice action against the health care providers who reviewed the child's case before the child died. Fulton-DeKalb Hosp. Auth. v. Dawson, 270 Ga.

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376, 509 S.E.2d 28 (decided under former O.C.G.A. § 24-2-2).

Evidence of parent's alleged suicide attempt in custody modification case. — In ruling on a parent's petition to modify custody, as the trial court made no finding of the existence of family violence under O.C.G.A. § 19-9-3(a)(4), whether the other parent had sought the help of a mental health professional or had attempted to commit suicide many years earlier was not probative of any material issue in the case. Therefore, such evidence was properly excluded. Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152, 2009 Ga. App. LEXIS 544 (2009) (decided under former O.C.G.A. § 24-2-2).

Character evidence was inadmissible in the following cases. — See Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18, 1890 Ga. LEXIS 145 (1890) (beneficiary's character in insurance case) (decided under former Code 1882, § 3757); Stanley v. Willingham, 93 Ga. App. 421, 91 S.E.2d 791, 1956 Ga. App. LEXIS 757 (1956) (decided under former Code 1933, § 38-202); Dennis v. Dennis, 227 Ga. 164, 179 S.E.2d 238, 1971 Ga. LEXIS 626 (1971) (evidence from spouse's former divorce) (decided under former Code 1933, § 38-202); Ginsberg v. Termotto, 175 Ga. App. 265, 333 S.E.2d 120, 1985 Ga. App. LEXIS 2075 (1985) (evidence of past good act irrelevant to issue of liability for utility expenses) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior consensual adulterous relationship not admitted. — Evidence of a dentist's prior consensual adulterous relationship was properly excluded from the evidence as the evidence was irrelevant to a former employee's claim against the dentist for assault and battery and would only have served to impugn the general character of the dentist. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285, 2008 Ga. App. LEXIS 766 (2008) (decided under former O.C.G.A. § 24-2-2).

Character evidence is admissible in termination of parental rights cases. — Evidence of a parent's character is admissible in a termination of parental rights proceeding as the proceeding inherently involves character issues, specifically the parent's ability to provide proper parental care and control; while most civil cases require the factfinder to determine the truth only with regard to the discrete transactions in issue, termination cases require the factfinder to predict a parent's future conduct and ability to parent. Davis v. Rathel, 273 Ga. App. 183, 614 S.E.2d 823, 2005 Ga. App. LEXIS 440 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible in negligent hiring and retention claim. — Evidence of a dentist's harassment of other employees and a patient was admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) as to a former employee's claim of negligent hiring and retention because the evidence tended to show that the dental center that hired the dentist should have known that the dentist posed a risk of committing the same type of harassing behavior against the former employee. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285, 2008 Ga. App. LEXIS 766 (2008) (decided under former O.C.G.A. § 24-2-2).

Pastor testifying to truthfulness of parties. — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under oath because the claims of the husband and wife did not involve the general character of the parties pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); the error was not harmless because the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570, 2011 Ga. App. LEXIS 191 (2011) (decided under former O.C.G.A. § 24-2-2).

Criminal Cases

1. In General

Proper admission of similar transaction evidence requires the state to make three affirmative showings: (1) that the evidence is sought for a proper purpose; (2) that sufficient evidence exists to

establish that the accused committed the similar transaction; and (3) that sufficient connection exists between the similar transaction and the crime charged so that proof of the former tends to prove the latter. Rice v. State, 217 Ga. App. 456, 458 S.E.2d 368, 1995 Ga. App. LEXIS 483 (1995) (decided under former O.C.G.A. § 24-2-2).

Test of admissibility of evidence of other criminal acts by the defendant is not the number of similarities between the two incidents, rather, such evidence may be admitted if the evidence is substantially relevant for some purpose other than to show a probability that the defendant committed the crime on trial because the defendant is a man of criminal character; similarity is an important factor in determining the admissibility of the extrinsic crime, however, it is not the only factor, nor is it necessarily the controlling factor. The ultimate issue for admissibility is whether the evidence of other crimes has relevance to the issues in the trial of the case at bar. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263, 2003 Ga. App. LEXIS 249 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence because all of the crimes occurred in a relatively small area and reflected a similar modus operandi; the crimes were sufficiently similar to the crime against the victim. Alatise v. State, 291 Ga. 428, 728 S.E.2d 592, 2012 Ga. LEXIS 571 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction testimony that 15 years before, the defendant had bitten the witness's parent. The evidence was offered to show intent and course of conduct; in both the previous incident and the one for which the defendant was being tried, the defendant bit the party with whom the defendant was fighting, drew blood and inflicted visible injuries, used the tools at hand, and involved multiple other parties; and the trial court did not err in finding that the evidence was more probative than prejudicial despite its age. Dunham v. State, 315 Ga. App. 901, 729 S.E.2d 45, 2012 Ga. App. LEXIS 469 (2012), cert. denied, No. S12C1572, 2012 Ga. LEXIS 926 (Ga. Oct. 29, 2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence because the state introduced the evidence for the purpose of showing defendant's state of mind and course of conduct. Lewis v. State, 317 Ga. App. 218, 735 S.E.2d 1, 2012 Ga. App. LEXIS 536 (2012), cert. denied, No. S12C1986, 2012 Ga. LEXIS 977 (Ga. Nov. 19, 2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because the defendant failed to carry the burden of making a clear showing that the joint trial was prejudicial and a denial of due process as evidence of another crime committed by the co-defendant did not directly implicate the defendant and the trial court gave appropriate limiting instructions, indicating that the similar transaction evidence could be considered only as to the co-defendant. Brooks v. State, 332 Ga. App. 396, 772 S.E.2d 838, 2015 Ga. App. LEXIS 310 (2015), cert. denied, No. S15C1434, 2015 Ga. LEXIS 587 (Ga. Sept. 8, 2015), cert. denied, No. S15C1548, 2015 Ga. LEXIS 573 (Ga. Sept. 8, 2015).

Trial court did not err in admitting evidence of a prior incident involving an attempted rape to show intent given the significant similarities in the crimes including evidence that in both cases the defendant went to a place intending to steal and at some point in the process used a deadly weapon to assault the victim and pulled down the victim's underwear but did not complete a rape. Kirby v. State, 304 Ga. 472, 819 S.E.2d 468, 2018 Ga. LEXIS 631 (2018).

By placing intent at issue by claiming at trial that the defendant's delusions completely negated criminal intent, the state needed evidence that the defendant acted with the intent to commit the crimes of murder and possession of a firearm; thus, the trial court did not abuse the court's discretion in admitting evidence of a prior New York crime since, as to both crimes, the defendant used a handgun to assault people that the defendant perceived had committed an offense against the defendant. Castillo-Velasquez v. State, 305 Ga.

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644, 827 S.E.2d 257, 2019 Ga. LEXIS 234 (2019).

Trial court did not abuse the court's discretion by allowing the admission of evidence regarding the defendant's prior drug possession arrest because the evidence of prior drug activity was highly probative of intent to sell a controlled substance for which the defendant was on trial and the prior act of drug possession happened while the defendant was driving a car in the same area where the sale of the methamphetamine during the first buy occurred. Moton v. State, 351 Ga. App. 789, 833 S.E.2d 171, 2019 Ga. App. LEXIS 488 (2019).

Trial court did not abuse the court's discretion in admitting the two prior acts of child molestation against the defendant especially given the strong presumption in favor of admissibility; the defendant's prior acts against two other women when they were young girls were relevant and probative regarding the defendant's intent and propensity to commit the charged crimes against the victim as there was no showing either on direct or cross-examination that the witnesses' memories were at issue. Sturgis v. State, 356 Ga. App. 219, 842 S.E.2d 82, 2020 Ga. App. LEXIS 240 (2020).

Trial court did not err in admitting evidence of prior difficulties between the defendant and the victim because the evidence demonstrated the lengthy history of the animosity between the two and, therefore, shed further light on what may have motivated the defendant to commit the two shootings and the evidence demonstrated the nature of the relationship between the defendant and the victim. Sherrod v. State, 355 Ga. App. 441, 844 S.E.2d 508, 2020 Ga. App. LEXIS 330 (2020).

Trial court did not err in permitting the introduction of other-acts evidence concerning the defendant's use of a firearm to enter a hotel room after ruling that the state could introduce the evidence to show identity and intent and to rebut any justification defense presented by the defendant, and the trial court gave the jury a limiting instruction to that effect both at the time the other-acts witness testified and at the close of trial. Campbell v. State, 359 Ga. App. 391, 858 S.E.2d 83, 2021 Ga. App. LEXIS 207 (2021).

Superior court did not err by allowing a witness to testify because the evidence was properly admitted to prove a plan, as there were striking similarities between defendant's attack on the witness and instant offense, the evidence had substantial probative value because the defense at trial was that defendant was not the perpetrator, and the state offered sufficient evidence for the jury to conclude that the defendant committed the acts, as the witness testified and identified the defendant as her attacker, and the state offered photographs depicting the defendant's bite marks on the witness. Burrell v. State, 2022 Ga. App. LEXIS 154, 363 Ga. App. 491, 870 S.E.2d 918, 2022 Ga. App. LEXIS 178 (Ga. Ct. App. 2022).

Evidence admissible to show intent and absence of mistake or accident. — Trial court did not err by admitting the defendant's prior convictions because the prior convictions were relevant to show intent and the absence of mistake or accident after the defendant pled not guilty and, although the prior convictions for wrongful impersonation, identity theft, and credit card theft were not factually similar to the current charges, each one involved deceit as a means to gain a pecuniary benefit and, thus, the prior convictions were probative to the assessment of the defendant's intent to commit the charged crimes. Taylor v. State, 358 Ga. App. 773, 856 S.E.2d 368, 2021 Ga. App. LEXIS 129 (2021).

Admission proper to show intent. — Other acts evidence was admitted for a proper purpose after the defendant pled not guilty and made intent a material issue. Harris v. State, 313 Ga. 653, 872 S.E.2d 732, 2022 Ga. LEXIS 128 (2022).

Section not applicable to intrinsic evidence. — Nurse's testimony that the defendant told the nurse, when being admitted to the hospital, that the defendant had smoked marijuana earlier that day was not subject to an objection under O.C.G.A. § 24-4-404(b) because it was intrinsic evidence. Gibbs v. State, 340 Ga. App. 723, 798 S.E.2d 308, 2017 Ga. App. LEXIS 126 (2017), aff'd, 303 Ga. 681, 813 S.E.2d 393, 2018 Ga. LEXIS 200 (2018).

Trial court properly admitted the testimony of two witnesses because evidence that the defendant was engaged in the business of dealing drugs was intrinsic to the crimes with which the defendant was charged; that the defendant's drug dealing had slowed was relevant to understanding the defendant's motive to attempt a robbery of the victim; and that the defendant had sold drugs to both witnesses was an integral and natural part of their accounts of the circumstances surrounding the shooting. Priester v. State, 309 Ga. 330, 845 S.E.2d 683, 2020 Ga. LEXIS 465 (2020).

Intrinsic evidence admissible. — Trial court did not err by admitting evidence from a burglary that took place an hour before the victim's shooting as intrinsic evidence because the evidence showed an event that occurred both close in time and space to the charged offenses and helped to explain to the jury that the events at the apartments were part of a series of attempted burglaries by the defendant that day. Anderson v. State, 313 Ga. 178, 869 S.E.2d 401, 2022 Ga. LEXIS 33 (2022).

Evidence of other crimes part of same series of transactions admissible. — Trial court did not err in admitting evidence of two other acts because the crimes on trial and the other acts committed a few hours later were part of the same series of transactions, evidence of the other acts completed the story of the crimes on trial, and the other acts were inextricably intertwined with the crimes on trial; thus, the evidence was intrinsic. Parham v. State, 355 Ga. App. 720, 845 S.E.2d 689, 2020 Ga. App. LEXIS 377 (2020).

Trial counsel was not ineffective for failing to object to the admission of the defendant's alleged prior bad acts because evidence that the defendant physically abused the babysitter could have explained why the babysitter did not report the defendant's child molestation to police; and the evidence involving the defendant's treatment of the babysitter was admissible as intrinsic evidence as that evidence pertained to the chain of events in the case and was linked by time and circumstances with the charged offenses because the statement of one of the children to the child's mother that the babysitter was going to call the police immediately led to the children's outcry to their mother; thus, the evidence was not barred by O.C.G.A. § 24-4-404. Espinosa v. State, 352 Ga. App. 698, 834 S.E.2d 558, 2019 Ga. App. LEXIS 652 (2019).

When the defendant was convicted of felony murder and aggravated assault in connection with the shooting death of the victim, the defendant's brother-in-law, the evidence regarding the prior incident in which the defendant hit and pushed the defendant's sister was admissible as intrinsic evidence because the evidence explained why the victim and the defendant's sister were persistent with their requests that the defendant leave, and why the victim followed the defendant outside of the home to ensure that the defendant left; and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Clark v. State, 306 Ga. 367, 829 S.E.2d 306, 2019 Ga. LEXIS 399 (2019), cert. denied, 140 S. Ct. 1108, 206 L. Ed. 2d 180, 2020 U.S. LEXIS 1059 (2020).

Degree of similarity that is required. — When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity; all that is required is that the incidents are sufficiently similar such that proof of the earlier event helps prove an element of the later crime. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415, 2004 Ga. App. LEXIS 830 (2004) (decided under former O.C.G.A. § 24-2-2).

Unlike similar transactions, prior difficulties between the defendant and the victim are not independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus; hence, evidence of motive, even though not an essential element of a crime, had such great probative value that it outweighed the inherent prejudice of such evidence, even if it incidentally placed the defendant's character in issue.

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LeBlanc v. State, 283 Ga. App. 434, 641 S.E.2d 646, 2007 Ga. App. LEXIS 79 (2007) (decided under former O.C.G.A. § 24-2-2).

Unfair prejudice must substantially outweigh probative value to exclude evidence. — After the state filed a notice of intent to present other acts evidence seeking to admit evidence of prior bad acts through the testimony of three witnesses, and the trial court denied the state's motion, the trial court did not apply the correct standard regarding the exclusion of relevant evidence when the court found only that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice and failed to analyze whether such prejudice substantially outweighed any probative value. State v. Jackson, 351 Ga. App. 675, 832 S.E.2d 654, 2019 Ga. App. LEXIS 465 (2019).

Admission of similar transaction evidence not plain error. — Although the defendant might have been entitled to a ruling that the 2003 similar transaction evidence be excluded had the defendant made the appropriate motion, the trial court did not commit plain error by admitting the 2003 similar evidence because any error would not have met the second prong of the plain error analysis — that the legal error be clear and obvious — as the relevant issue of using a prior driving under the influence conviction in a current driving under the influence trial was not decided by court of appeals until two months after the defendant's trial. Nguyen v. State, 330 Ga. App. 812, 769 S.E.2d 558, 2015 Ga. App. LEXIS 76 (2015).

Any error was harmless. — Any error in admitting evidence under O.C.G.A. § 24-4-404(b) was harmless because the state spent a minimal amount of time eliciting evidence concerning a prior incident and there was no contention that the state mentioned or relied upon the incident during the state's closing argument to the jury. Taylor v. State, 306 Ga. 277, 830 S.E.2d 90, 2019 Ga. LEXIS 441 (2019).

Any error in the admission of the evidence of the 2012 burglary at trial was harmless because the evidence of the defendant's guilt was strong as the defendant was identified by two eyewitnesses; the defendant's cell phone was found in the bedroom where the victim was shot; and the jury was aware of the prior burglary as the state introduced a certified copy of the defendant's status as a first offender probationer in order to establish certain charges within the indictment. Subar v. State, 309 Ga. 805, 848 S.E.2d 109, 2020 Ga. LEXIS 607 (2020).

In a case in which the defendant was convicted of malice murder in connection with the strangulation death of the defendant's cellmate, the admission of the defendant's prior convictions was harmless as the evidence was irrelevant to causation, which was the central disputed issue at trial; and the evidence of the defendant's guilt was overwhelming as the defendant told two officers that the defendant had killed the cellmate by choking the cellmate to death, and the cellmate's autopsy showed that the cellmate's injuries were consistent with strangulation and suffocation. Tiraboschi v. State, 312 Ga. 198, 862 S.E.2d 276, 2021 Ga. LEXIS 577 (2021).

Because the state introduced strong independent evidence of the defendant's guilt, any error in admitting some of the other acts evidence was harmless as multiple witnesses corroborated the account of what transpired at the trailer of one of the victims and the physical evidence supported their account that the defendant forcibly entered and brandished a crowbar at two of the victims while a minor child was nearby; and the properly admitted evidence from two victims corroborated each other's accounts of the treatment they received from the defendant, including being subjected to multiple forms of physically abusive and threatening behavior, being restrained against their wills, and being injected by the defendant with intravenous drugs. Fincher v. State, 363 Ga. App. 439, 870 S.E.2d 833, 2022 Ga. App. LEXIS 147 (2022).

Although the trial court erred in admitting evidence of three prior incidents to show plan, preparation, knowledge, and motive because they all involved incidents that took place after the defendant had

been drinking and only showed that the defendant had the propensity to be abusive, violent, and angry after drinking and were not part of a common scheme, the admission of that evidence was harmless given the substantial evidence against the defendant. Pritchett v. State, 314 Ga. 767, 879 S.E.2d 436, 2022 Ga. LEXIS 262 (2022).

Evidence of gang activity. — Sufficient evidence, including expert testimony, supported the appellants' convictions because the evidence established that the appellants were associated with a criminal street gang and that the armed robbery and aggravated assault the appellants engaged in constituted criminal street gang activity and were intended to further the interests of the gang. Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67, 2016 Ga. LEXIS 769 (2016).

Trial court did not abuse the court's discretion by admitting evidence of the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573, 2017 Ga. LEXIS 890 (2017).

Because the evidence regarding the defendant's gang affiliation was intrinsic to the crimes charged, completing the story and explaining the defendant's authority within the gang, association with the shooters, and role in the crimes, the trial court did not err in admitting that evidence. Fleming v. State, 306 Ga. 240, 830 S.E.2d 129, 2019 Ga. LEXIS 434 (2019).

Trial court did not err by admitting evidence that the defendant was affiliated with a gang because evidence of the defendant's gang affiliation, including photographs of the defendant holding firearms and displaying gang signs and the defendant's gang-related tattoos, was relevant to and probative of the defendant's motive for committing the crime charged. Armstrong v. State, 310 Ga. 598, 852 S.E.2d 824, 2020 Ga. LEXIS 926 (2020).

Harmless error as to victim's gang membership. — Trial court was not required to exclude the evidence of the victim's motorcycle gang membership as any error was harmless since the appellant admitted to shooting the victim, who was a stranger to the appellant at that moment in time and the evidence also showed that the victim was unarmed; thus, it was highly probable that the admission of the victim's alleged gang affiliation would not have contributed to the jury's verdict on the murder charge. Kilpatrick v. State, 308 Ga. 194, 839 S.E.2d 551, 2020 Ga. LEXIS 132 (2020).

Online evidence of gang activity. — Trial court did not err in denying the defendant's motion for a mistrial after the state introduced into evidence images obtained from the defendant's page on a social media website because that evidence was not improper character evidence; rather, the evidence showed the defendant's association with a gang and was, therefore, vital to the state's case regarding the Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., allegations and also relevant to show the defendant's motive for the murder of a rival gang member. Jackson v. State, 306 Ga. 706, 832 S.E.2d 809, 2019 Ga. LEXIS 599 (2019).

Database match of DNA profile admissible. — Testimony concerning a CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555, 2011 Ga. App. LEXIS 491 (2011) (decided under former O.C.G.A. § 24-2-2).

Alternative suspect. — Trial court did not abuse the court's discretion by denying the defendant's motion to present evidence of alleged violent acts by two other children because the court did not prevent the defendant from testifying about incidents in which the children hurt the victim or other children prior to the victim's death and the DFCS records defendant wanted admitted showed that the incidents in question occurred three or four years after the victim's death. Hounkpatin

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v. State, 313 Ga. 789, 873 S.E.2d 201, 2022 Ga. LEXIS 153 (2022).

Evidence of another individual's crimes, not defendant's other crimes. — Trial court did not err in denying the defendant's motion for a mistrial when the investigator provided some context to a discussion thread on the defendant's page on a social media website because the investigator clarified that the victim, not the defendant, was the primary suspect in the December 2014 shooting; and the investigator's testimony regarding the December 2014 shooting was not evidence of the defendant's other crimes. Jackson v. State, 306 Ga. 706, 832 S.E.2d 809, 2019 Ga. LEXIS 599 (2019).

Evidence of other crime not generally admissible. — Testimony as to a crime other than that for which the defendant is being tried is not ordinarily admissible. Loughridge v. State, 181 Ga. 261, 182 S.E. 12, 1935 Ga. LEXIS 69 (1935) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724, 1947 Ga. App. LEXIS 430 (1947) (decided under former Code 1933, § 38-202); Wiggins v. State, 80 Ga. App. 258, 55 S.E.2d 842, 1949 Ga. App. LEXIS 817 (1949) (decided under former Code 1933, § 38-202); Mims v. State, 207 Ga. 118, 60 S.E.2d 373, 1950 Ga. LEXIS 419 (1950) (decided under former Code 1933, § 38-202); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798, 1958 Ga. App. LEXIS 575 (1958) (decided under former Code 1933, § 38-202); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185, 1968 Ga. App. LEXIS 1479 (1968) (decided under former Code 1933, § 38-202); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45, 1969 Ga. App. LEXIS 725 (1969) (decided under former Code 1933, § 38-202); Nooner v. State, 131 Ga. App. 563, 206 S.E.2d 660, 1974 Ga. App. LEXIS 1471 (1974) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (decided under former Code 1933, § 38-202).

Testimony that a defendant engaged in other criminal transactions is prejudicial to the defendant in the case for which the defendant is on trial, not because it has no probative value but because it has too much, as tending to indicate that defendant is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which defendant is accused. Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889, 1969 Ga. App. LEXIS 1277 (1969) (decided under former Code 1933, § 38-202).

General rule is that in a criminal trial evidence which in any manner shows or tends to show that the accused has committed other criminal acts is irrelevant and inadmissible as that evidence tends to place the accused's character into evidence. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App. LEXIS 2204 (1981) (decided under former Code 1933, § 38-202); Bankston v. State, 159 Ga. App. 342, 283 S.E.2d 319, 1981 Ga. App. LEXIS 2600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311, 1982 U.S. LEXIS 467 (1982).

Proof of other crimes is never admissible (except in cases when the defendant has personally put the defendant's character in issue) where its chief or only probative value consists in showing that the defendant is, by reason of the defendant's bad character, more likely to have committed the crime than the defendant otherwise would have been. To admit such evidence, it must have relevancy and probative value from some other point of view. Jones v. State, 159 Ga. App. 634, 284 S.E.2d 651, 1981 Ga. App. LEXIS 2781 (1981) (decided under former Code 1933, § 38-202).

Trial court did not abuse the court's discretion in admitting evidence of prior and subsequent bad acts because the defendant's prior and subsequent physical abuse of the victim was relevant to showing the type of relationship that existed between them, as well as the defendant's motive, intent, and bent of mind in committing the charged offenses. Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14, 2012 Ga. App. LEXIS 564 (2012) (decided under former O.C.G.A. § 24-2-2).

Admission of other crimes, wrongs, or acts did not constitute plain error. — Trial court did not commit plain error in admitting evidence that the defendant had, in the weeks leading up to the bur-

glary, followed the victim's 15-year-old sister because the victim's mother personally saw the defendant fleeing the victim's home; the victim's father identified the defendant as the man in the photographs taken by the victim as the defendant prowled around their house before breaking in; the victim identified the defendant to police and at trial as the man who broke into the home and attempted to grab the victim; and there was blood strewn throughout the home and the defendant was observed by several witnesses to be bleeding from cuts on the defendant's arm consistent with those made by glass. Perez v. State, 331 Ga. App. 164, 770 S.E.2d 260, 2015 Ga. App. LEXIS 117 (2015), cert. denied, No. S15C1094, 2015 Ga. LEXIS 389 (Ga. May 26, 2015).

In an armed robbery case, pretermitting whether admission of evidence of the defendant's prior armed robbery conviction amounted to clear or obvious error, the admission of that evidence did not constitute plain error that affected the defendant's substantial rights because the defendant testified and admitted that the defendant pled guilty to the prior charge; although the defendant claimed the defendant acted in self-defense, eyewitnesses testified that they saw no weapons on the victims, saw the defendant rifling the victims' pockets, and heard one of the victims pleading with the defendant not to kill the victim; and the evidence indicated that both victims were shot from behind, undermining the defendant's claim of self-defense. Nations v. State, 303 Ga. 221, 811 S.E.2d 292, 2018 Ga. LEXIS 137 (2018).

First defendant could not show plain error in the admission of the second defendant's prior conviction for burglary and possession of tools of a crime as the trial court gave a limiting instruction that the evidence was relevant only to the charges against the second defendant; and the fact that the conviction had been overturned did not preclude the conviction's admission. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132, 2019 Ga. App. LEXIS 254 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. Dec. 23, 2019), cert. denied, No. S19C1275, 2019 Ga. LEXIS 890 (Ga. Dec. 23, 2019).

Fear of admission of other crimes, wrongs, or acts evidence. — Other act evidence did not have to be excluded because the defendant's constitutional rights were not violated by the defendant having to make a choice whether or not to testify when other crimes, wrongs, or acts that were the basis for another pending case were admitted. Hendrix v. State, 356 Ga. App. 351, 847 S.E.2d 204, 2020 Ga. App. LEXIS 444 (2020).

Exceptions to prohibition of evidence of other crimes. — When the extraneous crime forms part of the res gestae, or is one of a system of mutually dependent crimes, or is evidence of guilty knowledge, or may bear upon the question of the identity of the accused or articles connected with the offense, or is evidence of prior attempts by the accused to commit the same offense upon the victim as that for which the defendant stands charged, or when the proof of the extraneous crime tends to prove malice, intent, motive, or the like, then its admission as evidence may be proper. Cawthon v. State, 119 Ga. 395, 46 S.E. 897, 1904 Ga. LEXIS 809 (1904) (decided under former Penal Code 1895, § 993); Wilson v. State, 173 Ga. 275, 160 S.E. 319, 1931 Ga. LEXIS 307 (1931) (decided under former Penal Code 1910, § 1019); Williams v. State, 51 Ga. App. 319, 180 S.E. 369, 1935 Ga. App. LEXIS 679 (1935) (decided under former Code 1933, § 38-202).

When evidence of other criminal transactions is a part of the res gestae or tends to show motive, or to show a course of conduct pointing toward and leading to the crime or to the concealment of the crime or the identity of the perpetrator thereof, such evidence is admissible as an exception to the general rule which makes evidence of other criminal transactions inadmissible under most circumstances. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63, 1981 Ga. App. LEXIS 1928 (1981) (decided under former Code 1933, § 38-202).

Evidence of another crime is admissible when it is part of a course of criminal conduct if it is a part of the res gestae. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former Code 1933, § 38-202).

Independent crimes are admissible to show motive, intent, plan, identity, bent of

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mind, or course of conduct. In order for these independent acts to be admissible it must be shown that the defendant was the perpetrator of the independent crime and that there is sufficient similarity of the former independent crime that it tends to prove the latter crime. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200, 1992 Ga. LEXIS 211 (1992) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior overturned conviction admissible. — Since the second defendant's prior conviction for burglary and possession of tools of a crime was overturned because the trial court should have suppressed the evidence obtained from a GPS device and, without that evidence, there was not enough evidence to support the second defendant's conviction, evidence of the second defendant's prior conviction was admissible in the current case to show intent, knowledge, or absence of mistake as the finding in the prior case did not implicate or call into question the second defendant's intent, absence of mistake, or knowledge of the underlying crimes. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132, 2019 Ga. App. LEXIS 254 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. Dec. 23, 2019), cert. denied, No. S19C1275, 2019 Ga. LEXIS 890 (Ga. Dec. 23, 2019).

Explanation of why officer investigated defendant. — Because evidence of defendant's prior crimes was relevant to explain why a police officer investigated defendant, the trial court did not err in admitting the evidence. Smith v. State, 274 Ga. App. 852, 619 S.E.2d 358, 2005 Ga. App. LEXIS 838 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of sheriff's statements regarding run-ins with law. — Even if the mention by sheriff's deputies of the defendant's previous run-ins with the law had impermissibly placed the defendant's character at issue during the trial, any such error would have been harmless due to the overwhelming evidence of the defendant's guilt. Furthermore, none of the trial testimony at issue remotely suggested that the defendant had ever been convicted of a past crime. Moore v. State, 310 Ga. App. 106, 712 S.E.2d 126, 2011 Ga. App. LEXIS 507 (2011) (decided under former O.C.G.A. § 24-2-2).

Admission of testimony from special agent. — Any error in admitting the testimony of a Georgia Bureau of Investigation special agent regarding the circumstances of a 2008 stabbing incident involving the defendant was harmless as the evidence pointed directly to an intentional and malicious killing committed by the defendant rather than one that was committed in self-defense because the defendant did not deny initiating the attack against the victim, another inmate; the defendant did not know if the victim was armed when the defendant decided to attack the victim; and five correctional officers testified that the defendant and the co-defendant were the aggressors, and that the pair cornered the unarmed victim before stabbing the victim a total of 17 times. Rodrigues v. State, 306 Ga. 867, 834 S.E.2d 59, 2019 Ga. LEXIS 640 (2019).

Admission of evidence of defendant's prior misdemeanor convictions was harmless error. — Trial court did not commit reversible error when the court: (1) granted the state's motion in limine prohibiting admission of evidence that another person confessed to the crime; (2) permitted a police officer to explain the officer's conduct under former O.C.G.A. § 24-3-2; and (3) allowed the state to introduce evidence of defendant's prior misdemeanor convictions under former O.C.G.A.§§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405, and 24-5-506); thus, defendant failed to show that counsel's trial strategies on these issues constituted ineffective assistance of counsel. Harris v. State, 279 Ga. 522, 615 S.E.2d 532, 2005 Ga. LEXIS 446 (2005) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest is admissible even though the testimony incidentally shows the commission of another crime. Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90, 1980 Ga. App. LEXIS 2303 (1980) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687, 1980

Ga. App. LEXIS 2553 (1980) (decided under former Code 1933, § 38-202); Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671, 1980 Ga. App. LEXIS 2659 (1980) (decided under former Code 1933, § 38-202).

When evidence is relevant for the purpose of showing the circumstances of the arrest, the evidence will not be excluded because the evidence incidentally shows the commission of another crime. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177, 1981 Ga. App. LEXIS 1946 (1981) (decided under former Code 1933, § 38-202).

Proof of other crime required. — In order to justify the admission of evidence relating to an independent crime committed by the accused, it is absolutely essential that there should be evidence establishing the fact that the independent crime was committed by the accused, and satisfactorily connecting that crime with the offense for which the accused is indicted. Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (decided under former Code 1933, § 38-202); Johnson v. State, 152 Ga. App. 624, 263 S.E.2d 509, 1979 Ga. App. LEXIS 3067 (1979) (decided under former Code 1933, § 38-202); Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685, 1979 Ga. App. LEXIS 3015 (1979) (decided under former Code 1933, § 38-202); Sweeny v. State, 152 Ga. App. 765, 264 S.E.2d 260, 1979 Ga. App. LEXIS 3078 (1979) (decided under former Code 1933, § 38-202); Rhodes v. State, 153 Ga. App. 306, 265 S.E.2d 110, 1980 Ga. App. LEXIS 1783 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714, 1980 Ga. App. LEXIS 2246 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480, 1980 Ga. App. LEXIS 2317 (1980) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452, 1980 Ga. LEXIS 1108 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696, 1980 Ga. App. LEXIS 2675 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (decided under former Code 1933, § 38-202).

Jury is to receive evidence of the commission of previous crimes only for the purposes specified, and not for the purpose of determining by this alone the guilt of the accused. Fitzgerald v. State, 52 Ga. App. 33, 182 S.E. 77, 1935 Ga. App. LEXIS 19 (1935) (decided under former Code 1933, § 38-202).

Evidence of the commission of independent crimes by the accused may be admitted even when the defendant is acquitted of the other offense. Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685, 1979 Ga. App. LEXIS 3015 (1979) (holding that the principle of collateral estoppel prevents the introduction for any purpose of evidence of crime of which a defendant has been acquitted) (decided under former Code 1933, § 38-202).

Although the modification of a defendant's first offender status by the Georgia Crime Information Center was authorized by O.C.G.A. § 42-8-65, it was not a conviction because only the trial court that imposed first offender probation was authorized to revoke that status. Thus, as the defendant was not shown to have been adjudicated guilty of the prior crimes, the state improperly impeached the defendant with evidence of the defendant's first offender record. Lee v. State, 294 Ga. App. 796, 670 S.E.2d 488, 2008 Ga. App. LEXIS 1317 (2008) (decided under former O.C.G.A. § 24-2-2).

Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. Dampier v. State, 245 Ga. 882, 268 S.E.2d 349, 1980 Ga. LEXIS 968, cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980) (decided under former Code 1933, § 38-202).

Use of form to pose prohibited question. — It is error requiring the grant of a new trial for the state to put the plaintiff's character in issue by using a form completed by the plaintiff to ask a question which would otherwise be prohibited, and then introducing into the evidence the defendant's entire past criminal record to impeach the answer to that question. Mikle v. State, 236 Ga. 748, 225 S.E.2d 275, 1976 Ga. LEXIS 1014 (1976) (decided under former Code 1933, § 38-202).

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Res gestae. — Generally, on a prosecution for a particular crime, evidence of another and distinct crime wholly independent from that for which one is on trial is inadmissible; but there are exceptions to this rule: one is, if the separate crime was committed as a part of the same transaction as that for which the accused is being tried, and forms a part of the res gestae. Bailey v. State, 214 Ga. 409, 105 S.E.2d 320, 1958 Ga. LEXIS 442 (1958) (abandonment) (decided under former Code 1933, § 38-202); Williams v. State, 223 Ga. 773, 158 S.E.2d 373, 1967 Ga. LEXIS 691 (1967) (rape) (decided under former Code 1933, § 38-202); Blanton v. State, 150 Ga. App. 559, 258 S.E.2d 174, 1979 Ga. App. LEXIS 2295 (1979) (prostitution) (decided under former Code 1933, § 38-202); Mosley v. State, 150 Ga. App. 802, 258 S.E.2d 608, 1979 Ga. App. LEXIS 2383 (1979) (armed robbery) (decided under former Code 1933, § 38-202); Bradley v. State, 154 Ga. App. 333, 268 S.E.2d 388, 1980 Ga. App. LEXIS 2151 (1980) (burglary) (decided under former Code 1933, § 38-202); Hayes v. State, 199 Ga. 251, 34 S.E.2d 97, 1945 Ga. LEXIS 306 (1945) (robbery) (decided under former Code 1933, § 38-202); Durham v. State, 243 Ga. 408, 254 S.E.2d 359, 1979 Ga. LEXIS 915 (1979) (rape and murder) (decided under former Code 1933, § 38-202); Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664, 1980 Ga. App. LEXIS 2655 (1980) (vehicular homicide) (decided under former Code 1933, § 38-202).

When transactions involving other crimes and the alleged bad character of the defendant are so connected in time and event as to be part of the same transaction as that for which defendant is being tried, those transaction are admissible as a clear exception to the general rule of inadmissibility of other transactions. Kennedy v. State, 193 Ga. App. 784, 389 S.E.2d 350, 1989 Ga. App. LEXIS 1641 (1989) (decided under former O.C.G.A. § 24-2-2).

Since the defendant produced a prison identification card voluntarily, and volunteered information about a prior conviction when a police officer asked if the defendant had a driver's license, the evidence was admissible as part of the res gestae despite its prejudicial nature. Bertholf v. State, 298 Ga. App. 612, 680 S.E.2d 652, 2009 Ga. App. LEXIS 773 (2009) (decided under former O.C.G.A. § 24-2-2).

Connection between crimes in mind of actor. — To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose the actor intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that the actor who committed the one must have done the other. Loughridge v. State, 181 Ga. 261, 182 S.E. 12, 1935 Ga. LEXIS 69 (1935) (decided under former Code 1933, § 38-202); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, 1943 Ga. LEXIS 318, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468, 1943 U.S. LEXIS 227 (1943); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798, 1958 Ga. App. LEXIS 575 (1958) (decided under former Code 1933, § 38-202).

Trial court properly admitted evidence of entering a child's bedroom during a party at another home shortly before the home invasion at the Millstone Manor residence because such evidence was relevant to establish intent as the record showed that intent was a material issue in the case and entering the bedroom in the prior home involved the same mental state as the appellant allegedly had entering the girls' bedroom at the Millstone Manor residence. Cordova v. State, 351 Ga. App. 652, 832 S.E.2d 465, 2019 Ga. App. LEXIS 461 (2019).

Logical connection between crimes. — When one is on trial charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. Wilson v. State, 173 Ga. 275, 160 S.E. 319, 1931 Ga. LEXIS 307 (1931) (decided under former Penal Code 1910, § 1019); Scott v. State, 46 Ga. App. 213, 167 S.E. 210, 1932 Ga. App. LEXIS 113 (1932) (decided under former

Penal Code 1910, § 1019); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749, 1940 Ga. App. LEXIS 590 (1940) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724, 1947 Ga. App. LEXIS 430 (1947) (decided under former Code 1933, § 38-202); Fowler v. State, 82 Ga. App. 197, 60 S.E.2d 473, 1950 Ga. App. LEXIS 1083 (1950) (decided under former Code 1933, § 38-202); Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872, 1954 Ga. App. LEXIS 613 (1954) (decided under former Code 1933, § 38-202); Spinks v. State, 92 Ga. App. 878, 90 S.E.2d 590, 1955 Ga. App. LEXIS 734 (1955) (decided under former Code 1933, § 38-202); Bailey v. State, 214 Ga. 409, 105 S.E.2d 320, 1958 Ga. LEXIS 442 (1958) (decided under former Code 1933, § 38-202); Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889, 1969 Ga. App. LEXIS 1277 (1969) (decided under former Code 1933, § 38-202); Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287, 1971 Ga. App. LEXIS 726 (1971) (decided under former Code 1933, § 38-202); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409, 1972 Ga. App. LEXIS 1430 (1972) (decided under former Code 1933, § 38-202); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65, 1980 Ga. App. LEXIS 2286 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480, 1980 Ga. App. LEXIS 2317 (1980) (decided under former Code 1933, § 38-202); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650, 1980 Ga. App. LEXIS 2646 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696, 1980 Ga. App. LEXIS 2675 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (decided under former Code 1933, § 38-202); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741, 1981 Ga. App. LEXIS 2858 (1981) (decided under former Code 1933, § 38-202).

Evidence of the commission of one crime is not admissible upon the trial of the defendant for another crime, when the sole purpose is to show that the defendant is guilty of such other crime. Honea v. State, 181 Ga. 40, 181 S.E. 416, 1935 Ga. LEXIS 17 (1935) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12, 1935 Ga. LEXIS 69 (1935) (decided under former Code 1933, § 38-202); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-202); Harrison v. State, 60 Ga. App. 610, 4 S.E.2d 602, 1939 Ga. App. LEXIS 105 (1939) (decided under former Code 1933, § 38-202).

If the evidence be so dubious that the judge does not clearly perceive the connection between the crime with which the defendant is charged and another offense, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt. Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (decided under former Code 1933, § 38-202).

Mere fact that the defendant has recently committed a crime of the same sort as that for which defendant is on trial establishes no probative connection between the two crimes. Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889, 1969 Ga. App. LEXIS 1277 (1969) (decided under former Code 1933, § 38-202).

Only separate crimes which are admissible are those that are either similar or logically connected to the crime for which defendant is being tried, and crimes which are not similar or which are not logically connected to the crime for which defendant is being tried should be excluded from evidence; proof of crimes which are similar or are closely connected to the crime charged does tend to establish the crime charged. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415, 1981 Ga. App. LEXIS 1981 (1981) (decided under former Code 1933, § 38-202).

There are exceptions to the "other crimes" rule when there is sufficient logical connection between the independent crime and the offense charged so that it can be said that proof of the former tends to prove the latter. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App.

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LEXIS 2204 (1981) (decided under former Code 1933, § 38-202); Kilgore v. State, 176 Ga. App. 121, 335 S.E.2d 465, 1985 Ga. App. LEXIS 2282 (1985) (decided under former O.C.G.A. § 24-2-2).

Logical connection between crimes. — Trial court properly admitted certain statements made by the defendant during telephone conversations while in custody at a jail because while the statements related to a prior wrong or act which would generally be irrelevant character evidence, the statements indicated the defendant's disdain for law enforcement intervention and a desire to seek revenge; thus, these statements were relevant to show motive and intent in committing the crimes. Summerlin v. State, 339 Ga. App. 148, 793 S.E.2d 477, 2016 Ga. App. LEXIS 596 (2016), cert. denied, No. S17C0595, 2017 Ga. LEXIS 407 (Ga. May 15, 2017).

Evidence that defendant possessed cocaine with intent to distribute. — Defendant's prior criminal conviction for possession of cocaine with intent to distribute was properly admitted because the defendant's current and prior crimes for possession of cocaine with intent to distribute were identical, and the intent required to prove the crimes was necessarily the same; the evidence of the prior crime was highly relevant to the issue of the defendant's unlawful possession of cocaine with the intent to distribute or sell the drugs; the evidence was important to the state's case, thereby enhancing its probative value; and any prejudice resulting from the admission of the prior conviction was mitigated by the limiting instruction the trial court gave when the evidence was introduced and in its final charge to the jury. Burgess v. State, 349 Ga. App. 635, 824 S.E.2d 99, 2019 Ga. App. LEXIS 68 (2019), cert. denied, No. S19C0984, 2019 Ga. LEXIS 739 (Ga. Nov. 4, 2019), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

Exclusion of extrinsic evidence. — Trial court did not abuse the court's discretion by excluding the extrinsic evidence of the defendant's other acts for the purposes of showing intent, motive, and knowledge because, while some of the extrinsic acts were relevant in the technical sense, the state's need to have more evidence to prove motive, intent, and knowledge was very low because those issues were obvious to a fact finder after the identity of the perpetrator, which was at issue, was determined. State v. Watson, 354 Ga. App. 263, 840 S.E.2d 641, 2020 Ga. App. LEXIS 141 (2020).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — While it is the general rule that upon the trial of a person for a criminal offense, other and distinct criminal transactions cannot be given in evidence against the defendant, yet, according to the weight of authority, evidence of other transaction may be received as tending to show motive or intent, when the transactions are so connected in time and similar in their other relations that the same motive may reasonably be imputed to all. Bates v. State, 18 Ga. App. 718, 90 S.E. 481, 1916 Ga. App. LEXIS 1221 (1916) (decided under former Penal Code 1910, § 1019); Hales v. State, 250 Ga. 112, 296 S.E.2d 577, 1982 Ga. LEXIS 1227 (1982) (decided under former O.C.G.A. § 24-2-2).

Proof of another offense is admissible on the trial of a defendant charged with the commission of a crime even though such evidence incidentally places the defendant's character in issue, when evidence of such other crime tends to show identity, motive, malice, intent, plan, scheme, bent of mind, or course of conduct. Wilson v. State, 173 Ga. 275, 160 S.E. 319, 1931 Ga. LEXIS 307 (1931) (decided under former Penal Code 1910, § 1019); Scott v. State, 46 Ga. App. 213, 167 S.E. 210, 1932 Ga. App. LEXIS 113 (1932) (decided under former Penal Code 1910, § 1019); Phillips v. State, 51 Ga. App. 675, 181 S.E. 233, 1935 Ga. App. LEXIS 440 (1935) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12, 1935 Ga. LEXIS 69 (1935) (decided under former Code 1933, § 38-202); Fitzgerald v. State, 52 Ga. App. 33, 182 S.E. 77, 1935 Ga. App. LEXIS 19 (1935) (decided under former Code 1933, § 38-202); Gray v. State, 52 Ga. App. 209, 182

S.E. 862, 1935 Ga. App. LEXIS 108 (1935) (decided under former Code 1933, § 38-202); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-202); Bennings v. State, 53 Ga. App. 218, 185 S.E. 370, 1936 Ga. App. LEXIS 37 (1936) (decided under former Code 1933, § 38-202); Wright v. State, 184 Ga. 62, 190 S.E. 663, 1937 Ga. LEXIS 482 (1937) (decided under former Code 1933, § 38-202); Hunter v. State, 188 Ga. 215, 3 S.E.2d 729, 1939 Ga. LEXIS 524 (1939) (decided under former Code 1933, § 38-202); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749, 1940 Ga. App. LEXIS 590 (1940) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (decided under former Code 1933, § 38-202); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-202); Bell v. State, 71 Ga. App. 430, 31 S.E.2d 109, 1944 Ga. App. LEXIS 386 (1944) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724, 1947 Ga. App. LEXIS 430 (1947) (decided under former Code 1933, § 38-202); Anderson v. State, 206 Ga. 527, 57 S.E.2d 563, 1950 Ga. LEXIS 365 (1950) (decided under former Code 1933, § 38-202); Mims v. State, 207 Ga. 118, 60 S.E.2d 373, 1950 Ga. LEXIS 419 (1950) (decided under former Code 1933, § 38-202); Fowler v. State, 82 Ga. App. 197, 60 S.E.2d 473, 1950 Ga. App. LEXIS 1083 (1950) (decided under former Code 1933, § 38-202); Crawford v. State, 211 Ga. 166, 84 S.E.2d 354, 1954 Ga. LEXIS 518 (1954) (decided under former Code 1933, § 38-202); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785, 1959 Ga. LEXIS 442 (1959) (decided under former Code 1933, § 38-202); Hargett v. State, 121 Ga. App. 157, 173 S.E.2d 266, 1970 Ga. App. LEXIS 1151 (1970) (decided under former Code 1933, § 38-202); Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287, 1971 Ga. App. LEXIS 726 (1971) (decided under former Code 1933, § 38-202); McNeal v. State, 228 Ga. 633, 187 S.E.2d 271, 1972 Ga. LEXIS 870 (1972) (decided under former Code 1933, § 38-202); Overton v. State, 230 Ga. 830, 199 S.E.2d 205, 1973 Ga. LEXIS 1072 (1973) (decided under former Code 1933, § 38-202); Bloodworth v. State, 233 Ga. 589, 212 S.E.2d 774, 1975 Ga. LEXIS 1381 (1975) (decided under former Code 1933, § 38-202); Davis v. State, 233 Ga. 638, 212 S.E.2d 814, 1975 Ga. LEXIS 1403 (1975) (decided under former Code 1933, § 38-202); Lofton v. State, 137 Ga. App. 323, 223 S.E.2d 727, 1976 Ga. App. LEXIS 2433, aff'd, 237 Ga. 275, 227 S.E.2d 327, 1976 Ga. LEXIS 1226 (1976); Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106, 1976 Ga. App. LEXIS 1917 (1976) (decided under former Code 1933, § 38-202); Moss v. State, 144 Ga. App. 226, 240 S.E.2d 773, 1977 Ga. App. LEXIS 2647 (1977) (decided under former Code 1933, § 38-202); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23, 1979 Ga. App. LEXIS 1999 (1979) (decided under former Code 1933, § 38-202); Simmons v. State, 152 Ga. App. 643, 263 S.E.2d 522, 1979 Ga. App. LEXIS 2990 (1979) (decided under former Code 1933, § 38-202); McClesky v. State, 245 Ga. 108, 263 S.E.2d 146, 1980 Ga. LEXIS 705, cert. denied, 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980) (decided under former Code 1933, § 38-202); Buffington v. State, 153 Ga. App. 54, 264 S.E.2d 543, 1980 Ga. App. LEXIS 1669 (1980) (decided under former Code 1933, § 38-202); Laws v. State, 153 Ga. App. 166, 264 S.E.2d 700, 1980 Ga. App. LEXIS 1725 (1980) (decided under former Code 1933, § 38-202); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, 1980 Ga. LEXIS 812 (1980) (decided under former Code 1933, § 38-202); Pittman v. State, 245 Ga. 453, 265 S.E.2d 592, 1980 Ga. LEXIS 818 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714, 1980 Ga. App. LEXIS 2246 (1980) (decided under former Code 1933, § 38-202); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-202); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65, 1980 Ga. App. LEXIS 2286 (1980) (decided under former Code 1933, § 38-202); Felts v. State, 154 Ga. App. 571, 269 S.E.2d 73, 1980 Ga. App. LEXIS 2289 (1980) (decided under former Code 1933, § 38-202); Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90, 1980 Ga.

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App. LEXIS 2303 (1980) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687, 1980 Ga. App. LEXIS 2553 (1980) (decided under former Code 1933, § 38-202); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836, 1980 Ga. App. LEXIS 2620 (1980) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452, 1980 Ga. LEXIS 1108 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696, 1980 Ga. App. LEXIS 2675 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (decided under former Code 1933, § 38-202); Wallace v. State, 246 Ga. 738, 273 S.E.2d 143, 1980 Ga. LEXIS 1279 (1980), cert. denied, 451 U.S. 988, 101 S. Ct. 2325, 68 L. Ed. 2d 847, 1981 U.S. LEXIS 2106 (1981) (decided under former Code 1933, § 38-202); Kendrick v. State, 156 Ga. App. 27, 274 S.E.2d 78, 1980 Ga. App. LEXIS 2859 (1980) (decided under former Code 1933, § 38-202); Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415, 1981 Ga. App. LEXIS 1981 (1981) (decided under former Code 1933, § 38-202); Ballweg v. State, 158 Ga. App. 576, 281 S.E.2d 319, 1981 Ga. App. LEXIS 2316 (1981) (decided under former Code 1933, § 38-202); Neal v. State, 159 Ga. App. 450, 283 S.E.2d 671, 1981 Ga. App. LEXIS 2642 (1981) (decided under former Code 1933, § 38-202); Hale v. State, 159 Ga. App. 563, 284 S.E.2d 68, 1981 Ga. App. LEXIS 2694 (1981) (decided under former Code 1933, § 38-202).

Evidence of other crimes to prove malice, intent, and motive is admissible only when the act of which the accused stands charged would be legal in the absence of those elements. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888, 1977 Ga. LEXIS 1314 (1977) (decided under former Code 1933, § 38-202).

Evidence of independent crimes will not be admitted unless its relevance to the issues at trial outweighs its prejudicial impact. Tuzman v. State, 145 Ga. App. 761, 244 S.E.2d 882, 1978 Ga. App. LEXIS 2124, cert. denied, 439 U.S. 929, 99 S. Ct. 317, 58 L. Ed. 2d 323, 1978 U.S. LEXIS 3591 (1978) (decided under former Code 1933, § 38-202).

Fact that defendant was not arrested and charged with the commission of the independent crimes does not render evidence of the commission of such crimes inadmissible for showing common motive, plan, or scheme. Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671, 1980 Ga. App. LEXIS 2659 (1980) (decided under former Code 1933, § 38-202).

When evidence of other crimes is admitted for the limited purpose of showing identity, plan, motive, scheme, bent of mind, or course of conduct, the other crimes need not be listed in the indictment as defendant is not on trial for those crimes. State v. Johnson, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (decided under former Code 1933, § 38-202).

When a prior victim testified as to the similarities between the prior victim's encounter with defendant and the victim's, the prior victim's evidence was properly admitted to show defendant's bent of mind, intent, and course of conduct; any inconsistencies in the prior victim's testimony affected only the weight and credibility. Williams v. State, 264 Ga. App. 115, 589 S.E.2d 676, 2003 Ga. App. LEXIS 1398 (2003), cert. denied, No. S04C0554, 2004 Ga. LEXIS 211 (Ga. Mar. 1, 2004) (decided under former O.C.G.A. § 24-2-2 and former Ga. Unif. Super. Ct. R. 31.3(B)).

Trial court did not err in finding that similar transaction evidence was relevant and admissible because some of the offenses committed during the coconspirators' crime spree were very similar to the crimes for which the defendant was indicted and, therefore, were relevant and admissible to demonstrate the co-conspirators' modus operandi, identity, bent of mind, and motive; even if some of the separate offenses were insufficiently similar to the indicted offenses, the evidence showed that each of the offenses was an essential part of a continuing criminal enterprise in which the defendant and the coconspirators acted in concert and with a common purpose. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413, 2011 Ga. App.

LEXIS 537 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of the similar transaction involving an attack by the defendant on an inmate because the state introduced the evidence of the attack on the inmate for the purpose of showing the defendant's course of conduct and bent of mind, which was a legitimate and proper purpose. Johnson v. State, 292 Ga. 22, 733 S.E.2d 736, 2012 Ga. LEXIS 846 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of the defendant's prior convictions after determining that the convictions were relevant to show intent, knowledge, plan, and motive. Morris v. State, 340 Ga. App. 295, 797 S.E.2d 207, 2017 Ga. App. LEXIS 62 (2017).

Defendant's prior conviction for theft was properly admitted as the conviction was being offered to show motive and, thus, the state was not required to show an overall similarity between the prior offense and the violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. Whaley v. State, 343 Ga. App. 701, 808 S.E.2d 88, 2017 Ga. App. LEXIS 555 (2017).

Introduction of certified copy of indictment proper. — In proving a prior offense for the purpose of proving identity, bent of mind, course of conduct, etc., it is proper to introduce a certified copy of the indictment and the plea or verdict of guilty. Scott v. State, 162 Ga. App. 541, 292 S.E.2d 125, 1982 Ga. App. LEXIS 2215 (1982) (decided under former O.C.G.A. § 24-2-2).

Standard for admitting evidence of prior crimes is well-settled: the state must show that: (1) it is introducing evidence of an independent offense or act for an appropriate purpose; (2) there is sufficient evidence to establish that an accused committed the independent offense or act; and (3) there is sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415, 2004 Ga. App. LEXIS 830 (2004) (decided under former O.C.G.A. § 24-2-2).

Implicit finding that probative value not outweighed by prejudicial effect. — Notwithstanding the defendant's waiver of the enumeration of error that the trial court erred by admitting the prior bad acts without undertaking the balancing test, it presented no basis for reversal because the appellate court's review of the record showed that, although the trial court did not make specific findings regarding whether the probative value of the prior crimes was outweighed by its prejudicial impact, the court explicitly referenced the balancing test and noted that the evidence had to satisfy the balancing test rule; thus, by admitting the evidence, the trial court implicitly found that the evidence was admissible pursuant to the balancing test rule. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743, 2017 Ga. App. LEXIS 25 (2017), cert. denied, No. S17C1084, 2017 Ga. LEXIS 581 (Ga. June 30, 2017).

Similar transaction evidence admissible. Similar transaction evidence was properly admitted to show defendant's state of mind, knowledge, or intent because, in both crimes, defendant worked with an accomplice to force the victims to cooperate by threatening to shoot the victims, and both crimes were committed in a brazen manner during the daytime without any attempt to hide defendant's identity. Pace v. State, 272 Ga. App. 16, 611 S.E.2d 694, 2005 Ga. App. LEXIS 205 (2005), cert. denied, No. S05C1122, 2005 Ga. LEXIS 425 (Ga. June 6, 2005) (decided under former O.C.G.A. § 24-2-2).

In a theft by taking case, because intent was put in issue by the defendant, evidence of the other acts that two witnesses paid the defendant money but never received completed cabinets nor a refund of their money was relevant and admissible under O.C.G.A. § 24-4-404(b); furthermore, the probative value of the similar acts was not outweighed by their prejudicial effect pursuant to O.C.G.A. § 24-4-403. Graham v. State, 337 Ga. App. 664, 788 S.E.2d 555, 2016 Ga. App. LEXIS 384 (2016).

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Trial court did not abuse the court's discretion in allowing evidence of an argument with a former wife over the defendant's treatment of the victim on the afternoon before the murder as the defendant's behavior a few hours before inflicting the victim's fatal injuries plainly pertained to the chain of events in the case and was linked by time and circumstance with the charged crimes, making the information necessary to complete the story for the jury. Keller v. State, 308 Ga. 492, 842 S.E.2d 22, 2020 Ga. LEXIS 289 (2020).

Trial counsel was not ineffective because counsel did object to evidence that, just two weeks before the current incident, the appellant had been involved in a different high-speed chase; and the appellant did not articulate what argument, if any, trial counsel should have made with respect to the evidence of the other acts. Even if trial counsel did perform deficiently in failing to object, the evidence against the appellant was strong and, thus, the appellant did not show that the other-acts evidence prejudiced the appellant such that the outcome of the appellant's trial would have been different if trial counsel had made a successful objection. Calhoun v. State, 308 Ga. 146, 839 S.E.2d 612, 2020 Ga. LEXIS 138 (2020).

Motive evidence provided by two other women whom the defendant contacted through the dating website was important to the state's case because the motive evidence helped explain why the defendant acted as the defendant did. Hartman v. State, 358 Ga. App. 663, 856 S.E.2d 39, 2021 Ga. App. LEXIS 111 (2021).

Trial court erred in granting the defendant's motion in limine to exclude any evidence of another robbery because, although the trial court assumed the evidence could be relevant to identity or motive, the trial court did not appear to have considered the admissibility of the evidence to show modus operandi, plan, or preparation; the trial court seemed to have ignored the prosecutorial need for the evidence, given the defendant's own concession at the hearing that the evidence was the only link between him and the 2016 robbery; and the trial court failed to properly apply the Rule 403 balancing test. State v. Anderson, 365 Ga. App. 75, 877 S.E.2d 639, 2022 Ga. App. LEXIS 390 (2022).

Scheme defined. — Plan, scheme, device, design, etc., means a peculiar or distinctive method of committing a crime which, if employed at another time by an accused, would tend to show the accused was the one who employed it this time. Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287, 1971 Ga. App. LEXIS 726 (1971) (decided under former Code 1933, § 38-202); Hammitt v. State, 183 Ga. App. 382, 359 S.E.2d 4, 1987 Ga. App. LEXIS 2702 (1987), cert. denied, 183 Ga. App. 905.

Impeachment of defendant's specific testimony by contradictory evidence. — District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. Williams v. State, 257 Ga. 761, 363 S.E.2d 535, 1988 Ga. LEXIS 9 (1988) (decided under former O.C.G.A. § 24-2-2).

In order for evidence of independent crime to be admissible as a circumstance of an arrest, it must be relevant to the circumstances of the arrest, which circumstances must, in turn, be relevant to the crime for which the defendant is on trial. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177, 1981 Ga. App. LEXIS 1946 (1981) (decided under former Code 1933, § 38-202).

Conduct of defendant before, during the time of, and after commission of a crime may be considered by the jury in establishing defendant's intention and defendant's participation in order to determine whether or not such intention and conduct were sufficient corroboration of the testimony of an accomplice to sustain a conviction. This may be done by circumstantial as well as by direct evidence. Zuber v. State, 248 Ga. 314, 282 S.E.2d 900, 1981 Ga. LEXIS 1005 (1981) (decided under former Code 1933, § 38-202).

Conduct by family members. — Trial court did not abuse the court's discretion in curtailing defendant's cross-examina-

tion of the victim as to the victim's spouse's criminal activities since defendant argued that the victim might have been a participant in the criminal conduct and that, therefore, the victim's credibility would have to be tested against the victim's criminal conduct. Bell v. State, 265 Ga. App. 407, 593 S.E.2d 935, 2004 Ga. App. LEXIS 132 (2004) (decided under former O.C.G.A. § 24-2-2).

Admission of family violence conviction. — Trial court's admission of evidence of the defendant's prior conviction for family violence battery was not erroneous because the evidence was relevant to show motive, specifically that the defendant used violence to assert control when the defendant's authority was questioned. Chambers v. State, 351 Ga. App. 771, 833 S.E.2d 155, 2019 Ga. App. LEXIS 491 (2019).

Continuous course of conduct. — In a criminal prosecution, evidence of another crime is admissible when both crimes are part of a continuous course of conduct, closely connected in time, place, and manner of commission. Putman v. State, 251 Ga. 605, 308 S.E.2d 145, 1983 Ga. LEXIS 901 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546, 1984 U.S. LEXIS 254 (1984) (decided under former O.C.G.A. § 24-2-2).

Past physical and verbal abuse admissible. — Evidence of the defendant's past physical and verbal abuse of the victim was admissible as proof of the relationship between the defendant and the victim and to show the defendant's motive and intent. Faircloth v. State, 293 Ga. 134, 744 S.E.2d 52, 2013 Ga. LEXIS 497 (2013).

Two conditions imposed on admission of evidence of independent crimes. — Before evidence of independent crimes is admissible two conditions must be satisfied: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime; second, there must be sufficient similarity or connection between the independent crime and the offense charged that proof of the former tends to prove the latter. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415, 1981 Ga. App. LEXIS 1981 (1981) (decided under former Code 1933, § 38-202); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741, 1981 Ga. App. LEXIS 2858 (1981) (decided under former Code 1933, § 38-202); Milner v. State, 180 Ga. App. 97, 348 S.E.2d 509, 1986 Ga. App. LEXIS 2678 (1986) (decided under former O.C.G.A. § 24-2-2).

Length of time intervening between prior difficulty and present offense is only material as affecting the credibility and weight to be given such evidence. Barnes v. State, 157 Ga. App. 582, 277 S.E.2d 916, 1981 Ga. App. LEXIS 1924 (1981) (decided under former Code 1933, § 38-202).

Objection to admission of similar transaction evidence must be at trial. — Trial court properly denied defendant's motion for a new trial as defendant waived defendant's contentions that one of the similar transactions offered to show bent of mind and course of conduct was too remote in time, and that the similar transaction evidence was unduly prejudicial, as defendant failed to object on these grounds at trial. Murphy v. State, 263 Ga. App. 62, 587 S.E.2d 223, 2003 Ga. App. LEXIS 1098 (2003), cert. denied, No. S04C0138, 2004 Ga. LEXIS 98 (Ga. Jan. 20, 2004) (decided under former O.C.G.A. § 24-2-2).

Use of alias. — District attorney's opening statement to jury referring to defendant by defendant's alias "The Grass Man" was relevant since testimony of the witnesses established that defendant often used the alias. Campbell v. State, 160 Ga. App. 561, 287 S.E.2d 591, 1981 Ga. App. LEXIS 3097 (1981) (decided under former Code 1933, § 38-202).

Prior peace warrant of victim against defendant. — Under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), evidence of prior difficulties between the accused and the victim is admissible to illustrate the accused's motive, intent, or bent of mind toward the victim; therefore, a peace warrant that victim had taken out against defendant nine months before the victim's death was clearly relevant to show defendant's motive and "bent of mind" towards the victim, and the admission of the warrant into evidence did not violate defendant's due process rights. Williams v.

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Kemp, 846 F.2d 1276, 1988 U.S. App. LEXIS 6460 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, 1989 U.S. LEXIS 1647 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965, 1990 U.S. LEXIS 1953 (1990) (decided under former O.C.G.A. § 24-2-2).

Mistrial was not necessary to preserve defendant's right to a fair trial after trial court immediately ruled out improperly admitted evidence and instructed the jury to disregard the evidence and, thus, the trial court did not abuse the court's discretion in denying defendant's motion for a mistrial after defendant claimed that the state improperly placed defendant's character into evidence when the state attempted to introduce evidence of a third similar shoplifting incident in which defendant was involved but the state's evidence failed to establish the third similar incident. Bradford v. State, 261 Ga. App. 621, 583 S.E.2d 484, 2003 Ga. App. LEXIS 710 (2003) (decided under former O.C.G.A. § 24-2-2).

Although the defendant contended that the statements from the deceased child's mother and an acquaintance placed the defendant's prior felony before the jury, the defendant overstated the case, as the record reflected that the state instructed the mother not to reference the defendant's criminal history and the acquaintance's testimony was a surprise; the witnesses' statements were nonresponsive; the statements simply referenced the defendant's prior incarceration, and not a prior felony; and the trial court provided a curative instruction, which the jury was presumed to have followed; thus, the defendant's character was not put at issue, and the trial court did not abuse the court's discretion when the court denied the defendant's motions for a mistrial. Wade v. State, 304 Ga. 5, 815 S.E.2d 875, 2018 Ga. LEXIS 445 (2018).

Counsel not ineffective in failing to seek severance. — In the defendant's trial for two murders, the defendant's trial counsel was not ineffective in failing to move to sever the counts involving the two victims; trial counsel testified that counsel did not move for a severance because counsel believed that the state could have introduced "other acts" evidence from one case into the other under O.C.G.A. § 24-4-404(b) or as intrinsic evidence, and counsel wanted to speed the trials up because, at the time, the state's witnesses were being uncooperative. DeLoach v. State, 308 Ga. 283, 840 S.E.2d 396, 2020 Ga. LEXIS 179 (2020).

Evidence of prior incarceration. — Trial court did not abuse the court's discretion in admitting improper character evidence of the appellant regarding the appellant's previous incarceration because the appellant's brief statement about being in jail with the individual who assisted in the crime was relevant and admissible to show that the men knew each other prior to the crimes at issue. Easley v. State, 352 Ga. App. 1, 833 S.E.2d 591, 2019 Ga. App. LEXIS 519 (2019).

Similarity between former transactions and charged crime not found. — When, in presenting similar crimes evidence to the jury, the state merely introduced certified copies of the guilty pleas, that procedure was reversible error because the jury was not presented with any evidence to establish the similarity or connection between the former transactions and the charged crime. Little v. State, 202 Ga. App. 7, 413 S.E.2d 496, 1991 Ga. App. LEXIS 1662 (1991) (decided under former O.C.G.A. § 24-2-2).

Evidence of incident occurring when defendant was a juvenile. — Trial court did not err when the court denied the defendant's motion for new trial on the basis that the state proffered similar transaction evidence of an incident that occurred when the defendant was a juvenile because the trial court did offer to give a curative instruction to the jury, but trial counsel refused the curative instruction citing "strategy" as counsel's reasons; the trial court admonished the witness not to make any references to the juvenile court proceeding. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551, 2011 Ga. LEXIS 429 (2011) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence not proper. — State failed to prove that the defendant's prior at-

tempted robbery was so similar to the charged offense that the charged offense must have been the defendant's handiwork as robbery of a woman alone at night after the woman had parked the car was not in the nature of a signature so as to be proof of the perpetrator's identity. Amey v. State, 331 Ga. App. 244, 770 S.E.2d 321, 2015 Ga. App. LEXIS 137 (2015), cert. denied, No. S15C1089, 2015 Ga. LEXIS 395 (Ga. May 26, 2015).

Evidence of other conduct or crimes was admissible in the following cases. — See Fitzgerald v. State, 51 Ga. App. 636, 181 S.E. 186, 1935 Ga. App. LEXIS 428 (1935) (possession of whiskey) (decided under former Code 1933, § 38-202); Honea v. State, 181 Ga. 40, 181 S.E. 416, 1935 Ga. LEXIS 17 (1935) (conspiracy to commit robbery) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12, 1935 Ga. LEXIS 69 (1935) (conspiracy to commit robbery and murder) (decided under former Code 1933, § 38-202); Crow v. State, 52 Ga. App. 192, 182 S.E. 685, 1935 Ga. App. LEXIS 95 (1935) (transporting liquor) (decided under former Code 1933, § 38-202); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (robbery) (decided under former Code 1933, § 38-202); Sisk v. State, 182 Ga. 448, 185 S.E. 777, 1936 Ga. LEXIS 384 (1936) (murder) (decided under former Code 1933, § 38-202); Ballenger v. State, 60 Ga. App. 344, 4 S.E.2d 58, 1939 Ga. App. LEXIS 580 (1939) (maintaining a disorderly house) (decided under former Code 1933, § 38-202); Heller v. State, 60 Ga. App. 552, 4 S.E.2d 413, 1939 Ga. App. LEXIS 77 (1939) (possession of burglary tools) (decided under former Code 1933, § 38-202); Springer v. State, 60 Ga. App. 641, 4 S.E.2d 679, 1939 Ga. App. LEXIS 125 (1939) (illegal sale of whiskey) (decided under former Code 1933, § 38-202); Guiffrida v. State, 61 Ga. App. 595, 7 S.E.2d 34, 1940 Ga. App. LEXIS 179 (1940) (abortion) (decided under former Code 1933, § 38-202); Hale v. State, 62 Ga. App. 315, 7 S.E.2d 787, 1940 Ga. App. LEXIS 649 (1940) (illegal sale of whiskey) (decided under former Code 1933, § 38-202); Williams v. State, 62 Ga. App. 679, 9 S.E.2d 697, 1940 Ga. App. LEXIS 402 (1940) (operating a lottery) (decided under former Code 1933, § 38-202); Thompson v. State, 191 Ga. 222, 11 S.E.2d 795, 1940 Ga. LEXIS 624 (1940) (homicide) (decided under former Code 1933, § 38-202); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (murder) (decided under former Code 1933, § 38-202); Simmons v. State, 196 Ga. 395, 26 S.E.2d 785, 1943 Ga. LEXIS 366 (1943) (robbery) (decided under former Code 1933, § 38-202); Fuller v. State, 197 Ga. 714, 30 S.E.2d 608, 1944 Ga. LEXIS 332 (1944) (murder) (decided under former Code 1933, § 38-202); Christian v. State, 71 Ga. App. 350, 30 S.E.2d 832, 1944 Ga. App. LEXIS 364 (1944) (violation of lottery laws) (decided under former Code 1933, § 38-202); Bell v. State, 71 Ga. App. 430, 31 S.E.2d 109, 1944 Ga. App. LEXIS 386 (1944) (homicide) (decided under former Code 1933, § 38-202); Loughridge v. State, 201 Ga. 513, 40 S.E.2d 544, 1946 Ga. LEXIS 495 (1946) (homicide) (decided under former Code 1933, § 38-202); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611, 1954 Ga. App. LEXIS 833 (1954) (larceny) (decided under former Code 1933, § 38-202); Bowman v. State, 91 Ga. App. 52, 85 S.E.2d 66, 1954 Ga. App. LEXIS 858 (1954) (seduction and fornication) (decided under former Code 1933, § 38-202); Pierce v. State, 212 Ga. 88, 90 S.E.2d 417, 1955 Ga. LEXIS 556 (1955) (murder) (decided under former Code 1933, § 38-202); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785, 1959 Ga. LEXIS 442 (1959) (homicide) (decided under former Code 1933, § 38-202); Huckaby v. State, 127 Ga. App. 439, 194 S.E.2d 119, 1972 Ga. App. LEXIS 909 (1972) (obscene telephone calls) (decided under former Code 1933, § 38-202); Garrett v. State, 147 Ga. App. 666, 250 S.E.2d 1, 1978 Ga. App. LEXIS 2913 (1978), aff'd, 243 Ga. 322, 253 S.E.2d 741, 1979 Ga. LEXIS 898 (1979) (theft by conversion) (decided under former Code 1933, § 38-202); Hance v. State, 245 Ga. 856, 268

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S.E.2d 339, 1980 Ga. LEXIS 966 (1980), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611, 1980 U.S. LEXIS 4419 (1980), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (murder) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687, 1980 Ga. App. LEXIS 2553 (1980) (drug violation) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452, 1980 Ga. LEXIS 1108 (1980) (vehicular homicide) (decided under former Code 1933, § 38-202); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650, 1980 Ga. App. LEXIS 2646 (1980) (bank robbery) (decided under former Code 1933, § 38-202); Wilson v. State, 155 Ga. App. 560, 271 S.E.2d 694, 1980 Ga. App. LEXIS 2673 (1980) (theft by deception) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696, 1980 Ga. App. LEXIS 2675 (1980) (burglary) (decided under former Code 1933, § 38-202); Kendrick v. State, 156 Ga. App. 27, 274 S.E.2d 78, 1980 Ga. App. LEXIS 2859 (1980) (theft by receiving stolen property) (decided under former Code 1933, § 38-202); Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755, 1980 Ga. App. LEXIS 3219 (1980) (embezzlement) (decided under former Code 1933, § 38-202); Sherrod v. State, 157 Ga. App. 351, 277 S.E.2d 335, 1981 Ga. App. LEXIS 1816 (1981) (battery) (decided under former Code 1933, § 38-202); Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703, 1981 Ga. App. LEXIS 2014 (1981), overruled in part, State v. Adamczyk, 162 Ga. App. 288, 290 S.E.2d 149, 1982 Ga. App. LEXIS 2140 (1982) (indecent exposure) (decided under former Code 1933, § 38-202); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239, 1982 Ga. App. LEXIS 2916 (1982) (homicide with a knife over misconduct of a woman) (decided under former O.C.G.A. § 24-2-2); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10, 1982 Ga. LEXIS 1230 (1982) (multiple murders, kidnappings, armed robbery and burglary in three counties) (decided under former O.C.G.A. § 24-2-2); Hendrix v. State, 164 Ga. App. 831, 298 S.E.2d 317, 1982 Ga. App. LEXIS 3348 (1982) (evidence of same facts already properly before jury) (decided under former O.C.G.A. § 24-2-2); Hunter v. State, 177 Ga. App. 326, 339 S.E.2d 381, 1985 Ga. App. LEXIS 2578 (1985) (aggravated battery) (decided under former O.C.G.A. § 24-2-2); Nelson v. State, 181 Ga. App. 481, 352 S.E.2d 804, 1987 Ga. App. LEXIS 1469 (1987) (theft of disadvantaged victim, eleven years earlier under similar circumstances) (decided under former O.C.G.A. § 24-2-2); Haywood v. State, 256 Ga. 694, 353 S.E.2d 184, 1987 Ga. LEXIS 618 (1987) (evidence showing propensity to use gun when intoxicated) (decided under former O.C.G.A. § 24-2-2); Bernyk v. State, 182 Ga. App. 329, 355 S.E.2d 753, 1987 Ga. App. LEXIS 1696 (1987) (armed robbery) (decided under former O.C.G.A. § 24-2-2); Methvin v. State, 189 Ga. App. 906, 377 S.E.2d 735, 1989 Ga. App. LEXIS 58 (1989) (burglary) (decided under former O.C.G.A. § 24-2-2); Burney v. State, 201 Ga. App. 64, 410 S.E.2d 172, 1991 Ga. App. LEXIS 1181 (1991) (burglary) (decided under former O.C.G.A. § 24-2-2); Farley v. State, 265 Ga. 622, 458 S.E.2d 643, 1995 Ga. LEXIS 500 (1995) (felony murder) (decided under former O.C.G.A. § 24-2-2); Herring v. State, 224 Ga. App. 809, 481 S.E.2d 842 (prior domestic violence) (decided under former O.C.G.A. § 24-2-2); Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695, 2004 Ga. App. LEXIS 731 (2004) (burglary and possession of tools) (decided under former O.C.G.A. § 24-2-2).

Since the prior incidents and the incident for which the defendant was being prosecuted all involved the defendant or an accomplice being in employee-only areas when the stores were open and employees were present, the similarities were adequate to satisfy the state's burden of showing a sufficient connection between similar offenses and the instant offense. Spinks v. State, 322 Ga. App. 387, 745 S.E.2d 653, 2013 Ga. App. LEXIS 527 (2013).

Evidence of prior difficulties between the defendant and the victim was admissible to show an ongoing scheme and given that the evidence was not so complex that the jury was unable to distinguish the evidence. Madison v. State, 329

Ga. App. 856, 766 S.E.2d 206, 2014 Ga. App. LEXIS 794 (2014).

Admission of prior acts evidence was not an abuse of discretion as the similarity between the charged offense and an altercation two days earlier in which the defendant poked the victim with a knife made the former act highly probative of the defendant's intent. Powell v. State, 332 Ga. App. 437, 773 S.E.2d 399, 2015 Ga. App. LEXIS 319 (2015).

In the defendant's murder trial, other acts evidence, including the defendant's act of following the defendant's spouse and slashing the spouse's tire on two occasions, was admissible as relevant to the defendant's motive to take revenge on the victim, with whom the spouse was having an affair, and to provoke confrontation; the evidence also countered the defendant's theory of self-defense. Anthony v. State, 298 Ga. 827, 785 S.E.2d 277, 2016 Ga. LEXIS 397 (2016).

Testimony by the sister of the defendant's ex-wife regarding prior acts of domestic violence committed by the defendant was properly admitted for purposes of showing the defendant's motive to control family members with violence, the intent to harm intimate partners, and to show the absence of mistake or accident. Smart v. State, 299 Ga. 414, 788 S.E.2d 442, 2016 Ga. LEXIS 458 (2016).

Other acts evidence, showing that the defendant engaged in voyeuristic activity involving the defendant's minor sister-in-law, was relevant because it made it more probable that the defendant took the nude pictures of the defendant's step-daughter with the intent to arouse the defendant's sexual desire and was indicative of the defendant's state of mind. Gerbert v. State, 339 Ga. App. 164, 793 S.E.2d 131, 2016 Ga. App. LEXIS 599 (2016).

Other acts evidence was properly admitted against the appellant because while the tire cutting and surveillance incidents showed only that the appellant was hurt by the wife's decision to divorce the appellant and the appellant was gathering evidence for the pending divorce action, it was also readily understood as demonstrating the appellant's desire to take revenge and to provoke confrontation in response to the wife's affair with the victim. Anthony v. State, 298 Ga. 827, 785 S.E.2d 277, 2016 Ga. LEXIS 397 (2016).

Cross-examination of the defendant's mother and sister were for the purpose of impeaching their testimony about the defendant's whereabouts at the time of the crimes on trial and demonstrating their motives for offering alibi testimony, a fear of violent reprisal from the defendant, and O.C.G.A. § 24-4-404(b) did not prevent such examination. Davis v. State, 302 Ga. 576, 805 S.E.2d 859, 2017 Ga. LEXIS 956 (2017).

Trial court did not err in admitting evidence of two other acts because the probative value of the other acts was great given the state's need for evidence to combat the defendant's attacks on the victim's credibility and negate the defense of consent, and the extrinsic acts, which involved the defendant's attempt at nonconsensual sexual gratification with women the defendant did not know, were not of such a heinous nature that the acts were likely to incite the jury to an irrational decision. Cross v. State, 354 Ga. App. 355, 839 S.E.2d 265, 2020 Ga. App. LEXIS 82 (2020), cert. denied, No. S20C1227, 2020 Ga. LEXIS 855 (Ga. Nov. 16, 2020).

It was highly probable that the admission of the other-act evidence showing that the defendant stabbed another homeless man with a fork, even if erroneous, did not contribute to the jury's guilty verdicts because the evidence of guilt was strong, the prior incident was not the sort that posed a significant risk of inflaming the jury's passion, and the prosecutor's comments about the prior incident were focused on intent. Howell v. State, 307 Ga. 865, 838 S.E.2d 839, 2020 Ga. LEXIS 99 (2020).

Trial court did not abuse the court's discretion when the court admitted the defendant's prior Florida convictions because the defendant put intent at issue and, contrary to the defendant's contention that the prior crimes and the instant crimes were not sufficiently similar, all involved defendant acquiring or attempting to acquire high-end vehicles through fraud or deceit. Clarke v. State, 356 Ga. App. 580, 848 S.E.2d 192, 2020 Ga. App. LEXIS 492 (2020).

Evidence of other conduct or crimes was inadmissible in the following cases. — See Cawthon v. State,

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119 Ga. 395, 46 S.E. 897, 1904 Ga. LEXIS 809 (1904) (adultery as background for murder) (decided under former Penal Code 1895, § 993); Alsobrook v. State, 126 Ga. 100, 54 S.E. 805, 1906 Ga. LEXIS 336 (1906) (adultery as background for murder) (decided under former Penal Code 1895, § 993); Moose v. State, 145 Ga. 361, 89 S.E. 335, 1916 Ga. LEXIS 320 (1916) (threats to another in assault case) (decided under former Penal Code 1910, § 1019); Young v. State, 149 Ga. 17, 98 S.E. 603, 1919 Ga. LEXIS 91 (1919) (adultery as background for murder) (decided under former Penal Code 1910, § 1019); Williams v. State, 51 Ga. App. 319, 180 S.E. 369, 1935 Ga. App. LEXIS 679 (1935) (killing a hog) (decided under former Code 1933, § 38-202); Hillery v. State, 51 Ga. App. 373, 180 S.E. 499, 1935 Ga. App. LEXIS 700 (1935) (possession of stolen goods in burglary case) (decided under former Code 1933, § 38-202); Ballenger v. State, 60 Ga. App. 344, 4 S.E.2d 58, 1939 Ga. App. LEXIS 580 (1939) (maintaining a disorderly house) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (murder) (decided under former Code 1933, § 38-202); Waters v. State, 80 Ga. App. 559, 56 S.E.2d 924, 1949 Ga. App. LEXIS 878 (1949) (murder by automobile) (decided under former Code 1933, § 38-202); Anderson v. State, 206 Ga. 527, 57 S.E.2d 563, 1950 Ga. LEXIS 365 (1950) (operating a disorderly house in a murder case) (decided under former Code 1933, § 38-202); Walker v. State, 86 Ga. App. 875, 72 S.E.2d 774, 1952 Ga. App. LEXIS 1088 (1952) (theft) (decided under former Code 1933, § 38-202); Howard v. State, 211 Ga. 186, 84 S.E.2d 455, 1954 Ga. LEXIS 527 (1954) (embezzlement) (decided under former Code 1933, § 38-202); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798, 1958 Ga. App. LEXIS 575 (1958) (assault in attempted murder case) (decided under former Code 1933, § 38-202); Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83, 1976 Ga. App. LEXIS 1902 (1976) (victim as homosexual in sodomy case) (decided under former Code 1933, § 38-202); Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547, 1979 Ga. App. LEXIS 2616 (1979) (forgery) (decided under former Code 1933, § 38-202); Johnson v. State, 154 Ga. App. 793, 270 S.E.2d 214, 1980 Ga. App. LEXIS 2393, rev'd on other grounds, 246 Ga. 654, 272 S.E.2d 321, 1980 Ga. LEXIS 1240 (1980) (sale of contraband) (decided under former Code 1933, § 38-202).

Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

No ineffective counsel shown since state's motion to introduce was granted. — Appellant failed to show that trial counsel performed deficiently by informing the jury that appellant had a lifelong drug and alcohol problem and had more than 20 criminal charges because the trial court had granted the state's motion to introduce other acts evidence under O.C.G.A. § 24-4-404(b), thus, it could not be said that any attempt trial counsel may have made to short-circuit its impact was deficient. Dickson v. State, 339 Ga. App. 500, 793 S.E.2d 663, 2016 Ga. App. LEXIS 654 (2016).

Evidence of improper juror influence through Facebook account. — Trial court did not err in admitting evidence that the defendant conspired and attempted to improperly influence a juror in the defendant's trial because the jury could have concluded that the defendant, a podmate of the individual who told the individual's mother to contact a juror in

the defendant's case, was part of the conspiracy to influence the juror through the use of a fake Facebook account and the evidence was relevant to the defendant's consciousness of guilt. West v. State, 305 Ga. 467, 826 S.E.2d 64, 2019 Ga. LEXIS 157 (2019).

2. Character

Good character may of itself generate a reasonable doubt in the minds of the jury as to the defendant's guilt, and for this reason the defendant is allowed when the defendant sees fit to offer defendant's good character in issue. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92, 1935 Ga. App. LEXIS 128 (1935), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, § 38-202).

In criminal trials, the state cannot introduce evidence of the character of the accused unless the accused has personally first put it in issue. Richardson v. State, 41 Ga. App. 226, 152 S.E. 599, 1930 Ga. App. LEXIS 510 (1930) (decided under former Penal Code 1910, § 1019); Clarke v. State, 52 Ga. App. 254, 183 S.E. 92, 1935 Ga. App. LEXIS 128 (1935), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, § 38-202); Love v. State, 70 Ga. App. 529, 28 S.E.2d 781 (1944) (decided under former Code 1933, § 38-202); Bacon v. State, 209 Ga. 261, 71 S.E.2d 615, 1952 Ga. LEXIS 465 (1952), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, § 38-202); Haire v. State, 209 Ga. 378, 72 S.E.2d 707, 1952 Ga. LEXIS 493 (1952) (decided under former Code 1933, § 38-202); Borders v. State, 114 Ga. App. 90, 150 S.E.2d 306, 1966 Ga. App. LEXIS 660 (1966) (decided under former Code 1933, § 38-202); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185, 1968 Ga. App. LEXIS 1479 (1968) (decided under former Code 1933, § 38-202); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45, 1969 Ga. App. LEXIS 725 (1969) (decided under former Code 1933, § 38-202); Bowen v. State, 123 Ga. App. 670, 182 S.E.2d 124 (1971) (decided under former Code 1933, § 38-202); Dudley v. State, 228 Ga. 551, 186 S.E.2d 875, 1972 Ga. LEXIS 841 (1972) (decided under former Code 1933, § 38-202); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409, 1972 Ga. App. LEXIS 1430 (1972) (decided under former Code 1933, § 38-202); Askew v. State, 135 Ga. App. 56, 217 S.E.2d 385, 1975 Ga. App. LEXIS 1558 (1975) (decided under former Code 1933, § 38-202); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275, 1976 Ga. LEXIS 1014 (1976) (decided under former Code 1933, § 38-202); Brown v. State, 237 Ga. 467, 228 S.E.2d 853, 1976 Ga. LEXIS 1268 (1976) (decided under former Code 1933, § 38-202); Posey v. State, 152 Ga. App. 216, 262 S.E.2d 541, 1979 Ga. App. LEXIS 2874 (1979) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452, 1980 Ga. LEXIS 1108 (1980) (decided under former Code 1933, § 38-202).

General character of defendant and defendant's conduct in other transactions was irrelevant under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) unless the defendant chose to put defendant's character in issue. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-202).

Opportunity of state to disprove good character. — Whenever defendant puts defendant's good character in issue as fact state has privilege of disproving this fact, by cross-examination of the witness by whom the accused attempts to make the proof. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-202).

When nature of the case does not involve defendant's character, and the case does not render necessary and proper the investigation thereof, it is error to allow, over objection of the defendant, prejudicial and irrelevant matter to go before the jury in a trial which tends to place defendant's character and conduct before the jury. Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684, 1981 Ga. App. LEXIS 2531 (1981) (decided under former Code 1933, § 38-202).

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After testimony put defendant's character in issue, implying defendant's commission of the offense and such testimony was not necessary or relevant to the circumstances of defendant's arrest, that testimony should not be admitted. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177, 1981 Ga. App. LEXIS 1946 (1981) (decided under former Code 1933, § 38-202).

A passing reference to a defendant's record does not place defendant's character in evidence. Johnson v. State, 256 Ga. 604, 351 S.E.2d 623, 1987 Ga. LEXIS 547 (1987) (decided under former O.C.G.A. § 24-2-2).

In a trial for armed robbery, aggravated assault, kidnapping, and possession of a firearm during the commission of certain crimes, the trial court properly denied defendant's motion for a mistrial even though the state placed defendant's character in issue when a police officer testified that defendant was "picked up on charges" when police arrested defendant in Maryland pursuant to a fugitive warrant because the testimony was admissible and relevant to the circumstances surrounding defendant's arrest, even if it did incidentally show that defendant committed another crime. Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33, 2005 Ga. App. LEXIS 241 (2005) (decided under former O.C.G.A. § 24-2-2).

When an officer testified that the officer had known the defendant for a long time and "could have charged" the defendant in a couple of cases, this passing reference to prior conduct did not suffice to put the defendant's character in evidence so as to violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); furthermore, a curative instruction remedied any prejudicial impact from the statement. Height v. State, 281 Ga. 727, 642 S.E.2d 812, 2007 Ga. LEXIS 233 (2007) (decided under former O.C.G.A. § 24-2-2).

When an investigator, asked how the investigator knew defendant, replied, "I've made contact with [the defendant] in the streets before and I believe through past cases," this did not warrant a mistrial. A passing reference to a defendant's criminal record did not suffice to put the defendant's character in evidence so as to violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849, 2008 Ga. App. LEXIS 646 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which was based on the admission of a recorded telephone conversation between the defendant and the defendant's mother, who stated "because it's on your record," in response to why the defendant could not be disappointed if the defendant was denied bond; the comment was fleeting and was not a direct comment about the defendant's criminal history, and the mother did not comment on the content of the defendant's criminal record or even say, with certainty, that one did or did not exist. Hamrick v. State, 304 Ga. App. 378, 696 S.E.2d 403, 2010 Ga. App. LEXIS 533 (2010), cert. denied, No. S10C1666, 2010 Ga. LEXIS 782 (Ga. Oct. 18, 2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by denying a motion for a mistrial because, although a reference by a defense witness on cross-examination to the defendant's photograph having been pulled from the website of the Georgia State Board of Pardons and Paroles was improper, the curative instruction which the trial court gave was sufficient to remedy any prejudice arising from the answer. Moreover, the evidence of guilt in the case was overwhelming, such that the comment likely did not affect the outcome of the trial. Russell v. State, 308 Ga. App. 328, 707 S.E.2d 543, 2011 Ga. App. LEXIS 185 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant's character not "put in issue." — It is only when a defendant has "put his character in issue," as that term is defined in the context of former O.C.G.A. §§ 24-2-2 and 24-9-20(b), that the court is required to give a charge on good character and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of acci-

dent and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. Williams v. State, 187 Ga. App. 355, 370 S.E.2d 210, 1988 Ga. App. LEXIS 683 (1988) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion in limine to exclude evidence that police, in searching defendant's apartment, found not only the murder weapon defendant used to shoot and kill defendant's girlfriend, but also two other handguns; the evidence of the two other handguns was relevant to the accuracy of a statement defendant gave to police that upon searching defendant's apartment, the police would find the two guns hidden in a shoe box and the fact that defendant owned the guns was not, in and of itself, evidence of bad character. Brinson v. State, 276 Ga. 671, 581 S.E.2d 548, 2003 Ga. LEXIS 537 (2003) (decided under former O.C.G.A. § 24-2-2).

State did not improperly place a defendant's character in evidence by informing the jury that defendant was charged with possession of a firearm by a convicted felon when defendant was charged with possession of a firearm by a convicted felon, not because defendant personally was a convicted felon, but because defendant aided and abetted defendant's cousin, a convicted felon, in receiving and possessing a firearm. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, 2003 Ga. LEXIS 489, rev'd on other grounds, 276 Ga. 839, 584 S.E.2d 253, 2003 Ga. LEXIS 625 (2003) (decided under former O.C.G.A. § 24-2-2).

Testimony by police officers did not improperly place the defendant's character at issue; statements regarding the charges against the defendant at the time of previous arrests were merely passing references and described the circumstances of the arrests; a statement about the defendant having an open warrant fell short of placing the defendant's character at issue. Williams v. State, 285 Ga. App. 190, 645 S.E.2d 676, 2007 Ga. App. LEXIS 472 (2007) (decided under former O.C.G.A. § 24-2-2).

Permitting an officer to testify that the officer had been looking for the defendant because the officer had a warrant for the defendant's arrest did not impermissibly put the defendant's character into issue; the testimony was admissible as relevant to the circumstances leading the police to the residence where the defendant was found. Smith v. State, 285 Ga. App. 399, 646 S.E.2d 499, 2007 Ga. App. LEXIS 533 (2007) (decided under former O.C.G.A. § 24-2-2).

Because a mere mention that the defendant had been in jail did not place the defendant's character in issue, and despite this fact the defendant waived any claim of error regarding the placement of character in issue, it did not amount to reversible error; moreover, the challenged testimony, given by the defendant's mother, amounted to a non-responsive answer, which the state did not directly solicit and it did not appear from the record that the state anticipated the response. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105, 2007 Ga. App. LEXIS 646 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-2-2).

When a witness twice referred to a codefendant's incarceration, these nonresponsive answers did not improperly place the defendant's own character at issue. Moreover, any error was harmless because the evidence of the defendant's guilt was overwhelming. Walker v. State, 282 Ga. 703, 653 S.E.2d 468, 2007 Ga. LEXIS 850 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant, because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that the jurors were not to consider the warrant for any purpose other than to explain the officers' presence at the defendant's home. Thrasher v. State, 289 Ga. App. 399, 657 S.E.2d 316, 2008 Ga. App. LEXIS 97 (2008) (decided under former O.C.G.A. § 24-2-2).

Appellant alleged that the trial court erred by denying appellant's motion for a

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mistrial because a witness, while testifying about the abduction and murder of the victim, improperly injected the appellant's character in issue by saying, in front of the jury, "these guys are killers." While the state agreed that the reference to "killers" in this comment should not have been made, any error was harmless as the statement did not place the appellants' character in issue because the statement did not concern other transactions. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507, 2008 Ga. App. LEXIS 1358 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-2-2).

Testimony that an investigator ran a criminal history check on the defendant and prepared photographic lineups at two police stations did not put the defendant's character into issue under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). The testimony did not indicate that the defendant had been convicted of any crime and did not otherwise specify the nature of the defendant's prior dealings with police; moreover, the other evidence against the defendant was substantial and damning, and the action taken by the trial court assured, without drawing attention to the improper evidence, that there would be no other references to the defendant's criminal history. Young v. State, 297 Ga. App. 248, 676 S.E.2d 854, 2009 Ga. App. LEXIS 411 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by denying the defendant's motion for mistrial with respect to a nonresponsive answer by an accomplice when the accomplice was asked on direct examination whether the accomplice had a conversation with defendant about a pistol in the defendant's possession on the day of the shooting because a nonresponsive answer that impacted negatively on the defendant's character did not improperly place the defendant's character in issue; moreover, the defendant declined the trial court's offer to give a curative instruction with regard to the statement. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224, 2010 Ga. LEXIS 387 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by denying the defendant's motion for mistrial due to the prosecutor's questioning an accomplice as to whether the accomplice had spoken with the defendant on the previous day because the possibility that the defendant had spoken with the accomplice did not necessarily imply that the defendant too was in custody; even if it did, a passing reference to the defendant's incarceration did not place the defendant's character in evidence. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224, 2010 Ga. LEXIS 387 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial counsel did not place the defendant's character in issue by conceding the defendant's guilt of aggravated assault because the concession related to the facts alleged and crimes charged in the case, not to other transactions reflective of the defendant's character; given that numerous witnesses testified that the defendant had a bat on the night in question and struck the victim in the head with the bat while only one witness testified that the defendant took the victim's wallet out of the victim's pocket, trial counsel's strategy of contesting only the armed robbery count was reasonable and not ineffective. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686, 2010 Ga. App. LEXIS 536 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion for a mistrial after an investigating officer testified on crossexamination that the defendant gave the officer a statement right after the defendant talked with the defendant's parole officer because the testimony followed defense counsel's question regarding the content, not the timing of the defendant's statement; a passing reference to a defendant's record does not place his or her character in evidence, and a nonresponsive answer that impacts negatively on a defendant's character does not improperly place his or her character in issue. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141, 2010 Ga. LEXIS 815 (2010) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish a claim of ineffective assistance of counsel due to

counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue. Billings v. State, 308 Ga. App. 248, 707 S.E.2d 177, 2011 Ga. App. LEXIS 171 (2011) (decided under former O.C.G.A. § 24-2-2).

Character not placed in issue by prison uniform. — In a prosecution for felony murder, armed robbery, and burglary, the fact that the jury was shown a videotape of the defendant's statement to police depicting the defendant wearing a prison uniform did not place the defendant's character in evidence. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700, 2008 Ga. LEXIS 846 (2008) (decided under former O.C.G.A. § 24-2-2).

Use of booking photographs. — As the booking photograph in no way suggested that the defendant was guilty of any previous crimes, the trial court did not abuse the court's discretion in admitting the photographs. Clark v. State, 285 Ga. App. 182, 645 S.E.2d 671, 2007 Ga. App. LEXIS 475 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court erred by admitting the defendant's mug shot from a prior arrest because the mug shot used in the photo array could not have been related to the crime for which the defendant was being tried, but it would have to be related to a prior crime; however, the error was harmless based on the overwhelming evidence of the defendant's guilt. Sharpe v. State, 288 Ga. 565, 707 S.E.2d 338, 2011 Ga. LEXIS 276 (2011) (decided under former O.C.G.A. § 24-2-2).

Agent's reference to the defendant's mug shot from a previous arrest was harmless because there was overwhelming evidence of the defendant's guilt. Butler v. State, 290 Ga. 425, 721 S.E.2d 889, 2012 Ga. LEXIS 86 (2012) (decided under former O.C.G.A. § 24-2-2).

Photographic identification. — In a prosecution for forgery, defendant's photographic identification card issued by the Georgia Department of Corrections was admissible as relevant to issues of the identity of the perpetrator and the credibility of witnesses; the card did not refer to any charge or conviction nor indicate that defendant was a parolee. Biggins v. State, 229 Ga. App. 297, 494 S.E.2d 45 (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion to exclude evidence and admitting the correctional facility identification card found on defendant's person at the time of arrest for stealing a car as the card was not used to show defendant's criminal character, but, instead, was used to prove that defendant gave a police officer investigating the crime a false name, which was a different crime. McNeil v. State, 257 Ga. App. 147, 570 S.E.2d 433, 2002 Ga. App. LEXIS 1075 (2002) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting investigating officer's testimony that the investigating officer obtained from police in another county a prior photograph of defendant for use in a photographic lineup the investigating officer was creating as the investigating officer's testimony, without more, did not indicate that defendant was guilty of any prior crimes, and, thus, did not improperly place defendant's character in issue. Browne v. State, 261 Ga. App. 648, 583 S.E.2d 496, 2003 Ga. App. LEXIS 733 (2003) (decided under former O.C.G.A. § 24-2-2).

Defendant waived any error in the admission of a photograph of defendant with a gun as defendant did not argue at trial that the photo was improper character evidence; further, gun ownership did not impute bad character. Johnson v. State, 274 Ga. App. 641, 618 S.E.2d 716, 2005 Ga. App. LEXIS 824 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of fingerprint card. — Admission into evidence of the defendant's fingerprint card taken in connection with a previous crime does not place the defendant's character into evidence when any incriminating evidence was removed from the face of the card. Williams v. State, 184 Ga. App. 124, 361 S.E.2d 15,

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1987 Ga. App. LEXIS 2160 (1987) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against defendant. Jinks v. State, 229 Ga. App. 18, 493 S.E.2d 214 (decided under former O.C.G.A. § 24-2-2).

Evidence of prison identification card. — Defendant's claim that defendant's character was improperly placed into evidence when an officer testified that the officer found defendant's prison identification card in defendant's pocket was waived as defendant failed to make a further objection or renew defendant's motion for a mistrial after a curative instruction was given. McCullough v. State, 268 Ga. App. 445, 602 S.E.2d 181, 2004 Ga. App. LEXIS 942 (2004) (decided under former O.C.G.A. § 24-2-2).

Admission of videotape. — Trial court did not err in denying defendant's motion in limine that sought to bar introduction of defendant's videotaped statement to police, as well as defendant's later motion for mistrial after the videotape was played for the jury; although defendant claimed that the videotape was entirely exculpatory and was only introduced by the state to place defendant's character in evidence because defendant referenced in the videotape a murder, separate from the instant crimes, with which defendant had previously been charged, the videotape was not entirely exculpatory and defendant's references in the videotape were relevant to other issues besides defendant's character, such as motive, intent, and course of conduct, and, thus, was material and admissible. Cummings v. State, 261 Ga. App. 281, 582 S.E.2d 231, 2003 Ga. App. LEXIS 611 (2003), cert. denied, No. S03C1353, 2003 Ga. LEXIS 811 (Ga. Sept. 22, 2003), cert. denied, 543 U.S. 824, 125 S. Ct. 40, 160 L. Ed. 2d 35, 2004 U.S. LEXIS 5717 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting improper character evidence, consisting of video and photographs of the defendant stealing laptops, because the evidence showed the theft of the laptops the defendant was accused of receiving; the videotape was relevant to show that the laptops at issue were stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45, 2011 Ga. App. LEXIS 585 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of motive. — Evidence that victim's taking of an arrest warrant would have immediately returned defendant to jail was relevant to prove that defendant had a motive to kill the victim and relevant evidence is not rendered inadmissible simply because it incidentally puts the defendant's character in issue. Terrell v. State, 271 Ga. 783, 523 S.E.2d 294 (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant's motive for shooting the victim was the victim's friendship with a person who had apparently bought drugs from defendant, but had refused to pay the amount of money defendant demanded, was admissible, even if it injected defendant's character into evidence. Sharif v. State, 272 Ga. App. 660, 613 S.E.2d 176, 2005 Ga. App. LEXIS 356 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant was on probation at the time of the crimes was relevant to show defendant's motive for fleeing from the officer, even though the evidence might have reflected negatively on defendant's character. Mills v. State, 273 Ga. App. 699, 615 S.E.2d 824, 2005 Ga. App. LEXIS 603 (2005) (decided under former O.C.G.A. § 24-2-2).

Substantial evidence showed that defendant was using crack cocaine before the crimes and that defendant planned to take the victim's wallet to purchase more; proof of motive was not inadmissible simply because it incidentally put defendant's character into evidence. Young v. State, 280 Ga. 65, 623 S.E.2d 491, 2005 Ga. LEXIS 860 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish that defendant received ineffective assistance of counsel because, even assuming that the transcript was accurate and that the involvement of drug money was placed before the jury, the question elicited testimony which constituted relevant evidence of defendant's motive, and thus defense

counsel was not ineffective in failing to object, since any objection would have been fruitless. Jones v. State, 280 Ga. 205, 625 S.E.2d 1, 2005 Ga. LEXIS 858 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial counsel did not "open the door" to bad character evidence by stating that the evidence would show that the victim previously stole the defendant's cash and marijuana because evidence concerning the victim's transaction with the defendant and the defendant's subsequent suspicion that the victim stole the defendant's marijuana and money was admissible as evidence of prior difficulties between the two and was relevant to show the defendant's motives. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686, 2010 Ga. App. LEXIS 536 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not violate former O.C.G.A. § 24-2-2 in admitting evidence of the defendant's extramarital relationship with another woman as it showed that the defendant had a motive to conceal the defendant's extramarital affair with the victim not only from the defendant's wife, but from the other woman. Washington v. State, 294 Ga. 560, 755 S.E.2d 160, 2014 Ga. LEXIS 120 (2014) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting into evidence a former roommate's testimony about the defendant's conversation about a proposed insurance scheme as the evidence was relevant to show motive. Mattei v. State, 307 Ga. 300, 835 S.E.2d 623, 2019 Ga. LEXIS 734 (2019).

Trial court did not abuse the court's discretion in admitting other acts evidence showing the defendant's gang membership because that evidence helped establish a motive for the defendant to encourage the accomplice to shoot the victim. Worthen v. State, 306 Ga. 600, 832 S.E.2d 335, 2019 Ga. LEXIS 513 (2019).

Phone call admitted as evidence of motive. — Trial court did not err by admitting a recording of a phone call defendant's wife made after being left alone in the police interview room because the call revealed a motive for why the defendant would want to injure the defendant's wife and the call showed that the stabbing was intentional. Wilson v. State, 351 Ga. App. 50, 830 S.E.2d 407, 2019 Ga. App. LEXIS 387 (2019), cert. denied, No. S19C1501, 2020 Ga. LEXIS 62 (Ga. Jan. 27, 2020).

Evidence of drug use. — Because evidence of the defendant's prior drug use and history of crimes committed against family members fueled by that drug use were properly admitted as relevant to the crimes charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. Jones v. State, 283 Ga. App. 812, 642 S.E.2d 887, 2007 Ga. App. LEXIS 208 (2007) (decided under former O.C.G.A. § 24-2-2).

Because evidence of the defendant's prior drug use was introduced to show evidence of motive, it did not violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); therefore, counsel was not ineffective for failing to raise a meritless objection. Simons v. State, 311 Ga. App. 819, 717 S.E.2d 319, 2011 Ga. App. LEXIS 867 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in allowing the state to introduce evidence that the defendant used cocaine and marijuana before the robbery because an accomplice's testimony that the accomplice and the defendant used drugs on the day of the crime was relevant evidence of the defendant's state of mind and admissible as part of the res gestae; whether the effects due to the drugs' use may have worn off by the time of the crime was a question for the jury to decide. Hawkins v. State, 316 Ga. App. 415, 729 S.E.2d 549, 2012 Ga. App. LEXIS 578 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's Klu Klux Klan affiliation was admissible since the evidence explained defendant's motive for murder and defendant's bent of mind. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (decided under former O.C.G.A. § 24-2-2).

Evidence of Gothic beliefs or Satanism. — Trial court erred in admitting photographs of the defendant with dyed black hair and dark make-up, a document bearing the words of a "curse" to be recited while burning the letter over a black candle, and seven different inscriptions

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bearing themes of anguish, enslavement, atheism, and violence because nothing in the challenged evidence explicitly referenced Satanism or "gothic" beliefs and there was no testimony linking the inscriptions or other evidence to any such ideology. The trial court abused the court's discretion in admitting the challenged evidence, which bore no specific connection to the crime and operated to impugn the defendant's character. Boring v. State, 289 Ga. 429, 711 S.E.2d 634, 2011 Ga. LEXIS 430 (2011) (decided under former O.C.G.A. § 24-2-2).

Admission of defendant's violence-prone Facebook posts error. — Trial court erred in allowing the state to introduce evidence in its case in chief of threatening posts the defendant had made on Facebook as evidence of the defendant's allegedly violent character and behavior in conformity therewith because O.C.G.A. § 24-4-405 required such proof be made by testimony as to reputation or in the form of an opinion; however, the error was harmless. Timmons v. State, 302 Ga. 464, 807 S.E.2d 363, 2017 Ga. LEXIS 928 (2017).

Evidence incidentally reflecting on character not barred. — Former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) did not bar evidence simply because the evidence might incidentally reflect on the defendant's character. Felker v. State, 252 Ga. 351, 314 S.E.2d 621, 1984 Ga. LEXIS 691, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158, 1984 U.S. LEXIS 364 (1984) (decided under former O.C.G.A. § 24-2-2).

In allowing testimony relating to defendant's obtaining possession of a gun used in committing offenses, the trial court refused to allow characterization of defendant's conduct as criminal, denial of a motion to exclude the testimony was proper since the limitation injected defendant's character only minimally. Baker v. State, 225 Ga. App. 848, 485 S.E.2d 548 (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion for a mistrial based on admission of a police officer's testimony that defendant, on the night prior to being arrested for theft by receiving stolen property, fled every time the officer turned into a particular parking lot and that the stolen property, a rental car, was parked nearby; even though the evidence might have incidentally put defendant's character in issue, the evidence was relevant and probative on the issue of defendant's consciousness of guilt. Richardson v. State, 275 Ga. App. 320, 620 S.E.2d 522, 2005 Ga. App. LEXIS 956 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in allowing evidence of the previous conflict between the defendant and the condominium association because the testimony was relevant to whether the defendant made telephone calls with the intent of harassing the victim in violation of O.C.G.A. § 16-11-39.1(a) and only incidentally reflected on the defendant's character. Bozzuto v. State, 276 Ga. App. 614, 624 S.E.2d 166, 2005 Ga. App. LEXIS 1209 (2005), cert. dismissed, No. S06C0696, 2006 Ga. LEXIS 288 (Ga. May 8, 2006), cert. denied, No. S06C0696, 2006 Ga. LEXIS 548 (Ga. July 14, 2006), overruled in part, Edvalson v. State, 339 Ga. App. 348, 793 S.E.2d 545, 2016 Ga. App. LEXIS 626 (2016) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for armed robbery, the victim's testimony that the defendant looked at the victim with a "mean, just horrible cold-hearted face" was relevant to show the defendant's demeanor during the commission of the crime, even if the testimony incidentally placed the defendant's character in issue. Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438, 2009 Ga. App. LEXIS 8 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion for a mistrial based on an allegation that the defendant's character was impermissibly placed into evidence because the challenged testimony was no more than a fleeting comment, and, thus, the trial court was authorized to find that its effect was not prejudicial enough to warrant a mistrial; because defense counsel declined the trial court's

offer to give curative instructions to the jury, the defendant would not be heard to complain. Bowen v. State, 304 Ga. App. 819, 697 S.E.2d 898, 2010 Ga. App. LEXIS 615 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in failing to grant a mistrial after a witness testified that the witness was afraid of the defendant and the defendant's friends because although the testimony put the defendant's character in evidence, the testimony was admissible since the testimony was relevant to the witness's credibility and was being used to show that the witness was testifying by reason of duress or fear; in light of the fact that four other witnesses independently testified that the witnesses also observed the defendant shoot the victim and picked the defendant out of a photographic lineup, even if the witness's testimony was improper, any error was harmless. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845, 2010 Ga. LEXIS 607 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion in limine to redact references in the defendant's statement to previous drug transactions because the statement was relevant to the issue of the defendant's intent; any potential error caused by the inclusion of the defendant's references to previous drug transactions amounted to harmless error in light of the overwhelming evidence against the defendant, including the defendant's own statement admitting to drug dealing. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730, 2011 Ga. App. LEXIS 911 (2011) (decided under former O.C.G.A. § 24-2-2).

Testimony that the defendant had another child was admissible even though the testimony might incidentally place the defendant's character at issue because the testimony was relevant to explain why the 12-year-old victim, who had initially fabricated a story about the father of the child, later said that the victim had a sexual relationship with the defendant; and because, given the overwhelming evidence demonstrating that the defendant was the father of the defendant's 12-year-old niece's child, it was unlikely that the testimony negatively impacted the outcome of the defendant's case, and the failure to demonstrate harm from an alleged error precluded reversal. Andrews v. State, 331 Ga. App. 353, 771 S.E.2d 59, 2015 Ga. App. LEXIS 147 (2015).

Evidence of good character may not serve to create such doubt, even in the face of apparently conclusive evidence, as to lead jurors to believe the other evidence false or witnesses mistaken. Edwards v. State, 255 Ga. 149, 335 S.E.2d 869, 1985 Ga. LEXIS 972 (1985) (decided under former O.C.G.A. § 24-2-2).

Testimony as to defendant's residence. — Defendant's character not injected into evidence after a police officer testified that the officer knew where defendant resided. Chaney v. State, 169 Ga. App. 616, 314 S.E.2d 457, 1984 Ga. App. LEXIS 2788 (1984) (decided under former O.C.G.A. § 24-2-2).

State's mention of defendant's aliases. — State does not impermissibly place the defendant's character in issue by referring, in a limited manner, to the defendant's uncontested correct aliases and nickname. Veal v. State, 167 Ga. App. 175, 306 S.E.2d 667, 1983 Ga. App. LEXIS 3304 (1983), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Good character is valid defense. — Courts of this state have consistently recognized the validity of a good character defense, and have held that good character should be considered by the court and jury. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595, 1983 Ga. App. LEXIS 3280 (1983) (decided under former O.C.G.A. § 24-2-2).

Specific acts to prove character. — Former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) limits proof of character to evidence of reputation. Proof of conduct in other transactions by evidence of specific instances of such conduct is not authorized but amounts to self-serving declarations of nonculpability to prove a trait of character. Baine v. State, 181 Ga. App. 856, 354 S.E.2d 177, 1987 Ga. App. LEXIS 2584 (1987) (decided under former O.C.G.A. § 24-2-2); Barrett v. State, 192 Ga. App.

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705, 385 S.E.2d 785, 1989 Ga. App. LEXIS 1110 (1989) (decided under former O.C.G.A. § 24-2-2).

Character testimony need not be based exclusively on community relationships. — Appellate court could not conclude that the trial court erred in restricting the character testimony of one of the defendant's witnesses, which testimony was obtained through business relationships rather than through the community in which the defendant lived, and further, even if the trial court did commit error, the defendant showed no harm in the restriction as the trial court did not completely restrict the witness's testimony, and because of the cumulative testimony of the other character witnesses concerning the defendant's good character. Burchette v. State, 260 Ga. App. 739, 580 S.E.2d 609, 2003 Ga. App. LEXIS 405 (2003), cert. denied, No. S03C1195, 2003 Ga. LEXIS 772 (Ga. Sept. 8, 2003), aff'd, 278 Ga. 1, 596 S.E.2d 162, 2004 Ga. LEXIS 332 (2004) (decided under former O.C.G.A. § 24-2-2).

Inadvertant reference did not warrant mistrial. — Given the trial court's prompt and pointed curative instruction after an inadvertent placement of the defendant's character into evidence, the trial court did not abuse the court's discretion in denying the defendant a mistrial. Hunter v. State, 281 Ga. 526, 640 S.E.2d 271, 2007 Ga. LEXIS 44 (2007) (decided under former O.C.G.A. § 24-2-2).

When a stalking victim was asked if the defendant had ever pulled a gun on the victim, the victim's reply that the victim had seen the defendant pull a gun on someone else was stricken as nonresponsive, and the trial court advised the jury to disregard that response. Even assuming this testimony improperly injected evidence of the defendant's bad character, the defendant was not entitled to a mistrial, particularly in light of the defendant's testimony that admitted each act listed in the indictment. Seibert v. State, 294 Ga. App. 202, 670 S.E.2d 109, 2008 Ga. App. LEXIS 1137 (2008) (decided under former O.C.G.A. § 24-2-2).

When the nature of the presentence hearing involves the "general character" of the defendant, and when the state has notified the defendant that such evidence will be admitted, evidence of general bad character may be admitted. Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-202); Cochran v. State, 144 Ga. App. 820, 242 S.E.2d 735, 1978 Ga. App. LEXIS 1798 (1978) (decided under former Code 1933, § 38-202).

Statements as to defendant's drinking habits. — Testimony that a defendant drank alcohol did not place defendant's character in issue under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); further, testimony that the defendant had been drinking on the night of the crimes of child molestation of the defendant's daughter concerned the res gestae of the incident, which the state was entitled to present even if the defendant's character was incidentally placed in issue. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155, 2010 Ga. App. LEXIS 546 (2010), cert. dismissed, No. S10C2046, 2011 Ga. LEXIS 85 (Ga. Jan. 24, 2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's alcoholism not relevant. — Defendant's convictions of aggravated battery and simple battery were affirmed as the trial court properly refused to admit evidence of the victim's alcoholism prior to the victim's involvement with defendant since defendant failed to show any nexus between the victim's alcoholism and the conclusion that the victim had falsely accused defendant of battery. Harris v. State, 263 Ga. App. 329, 587 S.E.2d 819, 2003 Ga. App. LEXIS 1202 (2003) (decided under former O.C.G.A. § 24-2-2).

Voluntary intoxication charge was not "red flag" as to character. — Defendant's claim that the state used a voluntary intoxication charge as a "red flag" to the jury that defendant was drunk and therefore was "an unsavory character," that the victim's parents now might question their decision "to invite this intoxicated man into their home," and that defendant had "major psychological problems" was rejected; there was evidence from which an inference or deduction

might be made that defendant was drunk on the afternoon in question. Byers v. State, 276 Ga. App. 295, 623 S.E.2d 157, 2005 Ga. App. LEXIS 1231 (2005) (decided under former O.C.G.A. § 24-2-2).

Bent of mind evidence. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. Oree v. State, 280 Ga. 588, 630 S.E.2d 390, 2006 Ga. LEXIS 349 (2006) (decided under former O.C.G.A. § 24-2-2).

Although trial counsel should not have acquiesced in and later failed to object to a jury charge on a "bent of mind" exception, reading the charge as a whole, including the correct portions of the instructions regarding the proper purpose for admitting the prior difficulty evidence, there was no fair risk that the jury was confused and misled as to the proper limited use of prior difficulty transaction evidence to the prejudice of the defendant. Butler v. State, 354 Ga. App. 473, 841 S.E.2d 162, 2020 Ga. App. LEXIS 203 (2020).

Character evidence admissible. — On the trial of a case arising under a municipal ordinance prohibiting street walking, evidence of the general character of the woman arrested was admissible. Braddy v. City of Milledgeville, 74 Ga. 516, 1885 Ga. LEXIS 346 (1885) (decided under former Code 1882, § 3757).

On the trial of one for murder when the testimony tended to show that the homicide was committed in consequence of an effort to have some sort of sexual relation with the victim, and the defendant introduced a witness to establish the defendant's good character, it was competent, on cross-examination, to ask such witness if the witness had not heard of certain lascivious acts of the defendant with other females. Frank v. State, 141 Ga. 243, 80 S.E. 1016, 1914 Ga. LEXIS 183 (1914); 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 582 (1915) (decided under former Penal Code 1910, § 1019).

Trial court did not abuse the court's discretion in finding that the defendant's prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant's position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. Curry v. State, 330 Ga. App. 610, 768 S.E.2d 791, 2015 Ga. App. LEXIS 26 (2015), cert. dismissed, No. S16C0519, 2016 Ga. LEXIS 278 (Ga. Apr. 4, 2016).

Trial court did not err in finding that the defense opened the door to the admission of character evidence because, although counsel's question to the witness might not have been specifically aimed at eliciting character evidence, it was, as admitted by counsel, part of counsel's trial strategy to allow the witness to give lengthy and nonresponsive answers to questioning; and the trial court exercised the court's discretion and concluded that counsel's conscious decision not to object or redirect the nonresponsive witness once the witness made a reference to the defendant's character created an inference that counsel intended to inject character evidence into the trial and thus triggered the state's right to explore and impeach that testimony. Harris v. State, 330 Ga. App. 267, 765 S.E.2d 369, 2014 Ga. App. LEXIS 824 (2014), cert. denied, No. S15C0723, 2015 Ga. LEXIS 286 (Ga. Apr. 20, 2015) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in finding that the defense intentionally placed the defendant's general character in issue and triggered the state's right to cross-examine a character witness about the defendant's criminal history as although defense counsel may not have specifically aimed at eliciting

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character testimony, the door was opened when defense counsel did not object or move to strike the testimony that the defendant was a man of integrity as nonresponsive, and, in fact, presented 11 character witnesses. Montgomery v. State, 350 Ga. App. 244, 828 S.E.2d 620, 2019 Ga. App. LEXIS 278 (2019).

When defendant put defendant's character in issue by attempting to explain defendant's actions as resulting from devotion to defendant's church, admission of evidence of prior convictions was proper. Language v. State, 169 Ga. App. 649, 314 S.E.2d 484, 1984 Ga. App. LEXIS 1664 (1984) (decided under former O.C.G.A. § 24-2-2).

Testimony about the characteristics of spousal abuse and a statement that defendant fit the profile of a spouse abuser was properly admitted in defendant's trial for felony murder and aggravated assault of defendant's spouse after defendant claimed the defense of an accident, thereby putting defendant's character into evidence; the court found such testimony was relevant to rebut defendant's claimed defense. Jones v. State, 276 Ga. 253, 577 S.E.2d 560, 2003 Ga. LEXIS 168 (2003) (decided under former O.C.G.A. § 24-2-2).

Although the general character of a party and the party's conduct in other transactions were usually irrelevant, the trial court did not err in concluding that defendant's counsel rendered effective assistance and was not ineffective for not objecting to the codefendant's testimony that defendant was not employed and sold drugs for a living, as such testimony, although incidentally involving defendant's character, went to the very central issue in the case of whether defendant was dealing drugs, and, thus, defendant's counsel could not be faulted for not making an objection that would have been meritless because such testimony was admissible. Pitts v. State, 260 Ga. App. 553, 580 S.E.2d 618, 2003 Ga. App. LEXIS 419 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when the court held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-2-2).

State's introduction of evidence of the defendant's two prior arrests was not improper since the only conceivable purpose of defense counsel's questions to a case agent was to elicit testimony concerning the defendant's character, defense counsel opened the door to the state's rebuttal character evidence on the same specific subject. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348, 2009 Ga. App. LEXIS 566 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of abuse of ex-spouse properly admitted. — In the defendant's trial for the murder of the defendant's spouse, even assuming that the trial court erred in permitting the defendant's ex-spouse to testify pursuant to O.C.G.A. § 24-4-404(b), the evidence of the defendant's abuse of the defendant's ex-spouse was harmless because similar evidence regarding the victim was already admitted. Leili v. State, 307 Ga. 339, 834 S.E.2d 847, 2019 Ga. LEXIS 795 (2019).

Admission of defendant's videotaped statement in which defendant implicated oneself in the commission of other crimes did not improperly place defendant's character in issue. Griffin v. State, 243 Ga. App. 282, 531 S.E.2d 175, 2000 Ga. App. LEXIS 334 (2000), cert. denied, No. S00C1259, 2000 Ga. LEXIS 660 (Ga. Sept. 8, 2000) (decided under former O.C.G.A. § 24-2-2).

Evidence properly admitted as res gestae and did not amount to bad character evidence. — Introduction of evidence regarding crimes for which the

defendant was not charged, specifically two checkbooks that were recovered from the defendant's residence at the time of the arrest, and testimony of the defendant's involvement in two uncharged robberies, did not amount to bad character evidence, but was part of the res gestae; moreover, pretermitting whether the trial court properly admitted the aforementioned evidence, any error arising from that admission was harmless. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633, 2007 Ga. App. LEXIS 444 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion when the court allowed a passenger in the defendant's car to testify that the defendant "always ran red lights," as such was not used for improper character evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), but rather, as part of the res gestae of the moments described by the passenger, whereupon a police officer had to swerve away from the defendant's vehicle and the officer eventually died from injuries sustained in a subsequent crash; further, any error in the admission thereof was harmless due to the overwhelming amount of evidence of the defendant's guilt. Potts v. State, 296 Ga. App. 242, 674 S.E.2d 109, 2009 Ga. App. LEXIS 188 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by ruling that the state was not required to redact from a recording allegedly irrelevant and prejudicial statements the defendant made during the course of the offense; evidence of statements made by the defendant during the commission of the offense are admissible as part of the res gestae of the crime even if the evidence puts the defendant's character in evidence. Ware v. State, 308 Ga. App. 24, 707 S.E.2d 111, 2011 Ga. App. LEXIS 29 (2011), cert. denied, No. S11C0941, 2011 Ga. LEXIS 441 (Ga. May 31, 2011) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not deficient for failing to object to the victim's testimony regarding the defendant's excessive alcohol consumption, mental health problems, and possession of a handgun because the evidence was part of the res gestae of the numerous incidents of prior difficulties between the victim and the defendant; the evidence was relevant and admissible, even if the evidence incidentally placed the defendant's character in issue. Billington v. State, 313 Ga. App. 674, 722 S.E.2d 395, 2012 Ga. App. LEXIS 53 (2012) (decided under former O.C.G.A. § 24-2-2).

Photograph of defendant holding rifle admissible. — Defendant's conviction for malice murder was upheld because the trial court did not abuse the court's discretion by concluding that the probative value of the photograph's depiction of the defendant holding a rifle was not substantially outweighed by the danger of unfair prejudice as it was relevant to show that the defendant, at some point, possessed the type of gun used in the crimes at issue. Perkins v. State, 313 Ga. 885, 873 S.E.2d 185, 2022 Ga. LEXIS 154 (2022).

Photograph of defendant in possession of gun not bad character evidence. — Trial court did not abuse the court's discretion in admitting a photograph showing the defendant in possession of a gun because the photograph was relevant to show that the defendant, at some point, possessed the type of gun used in the crimes at issue; and the probative value of the evidence was not substantially outweighed by its prejudice, as even evidence that a defendant owned and frequently carried a pistol did not impute to the defendant generally bad character. Lyons v. State, 309 Ga. 15, 843 S.E.2d 825, 2020 Ga. LEXIS 361 (2020).

Evidence properly admitted to establish defendant's identity and appearance, and did not amount to bad character evidence. — Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's identity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. Buice v. State, 289 Ga. App.

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415, 657 S.E.2d 326, 2008 Ga. App. LEXIS 108 (2008) (decided under former O.C.G.A. § 24-2-2).

Bad character evidence improperly admitted. — Trial court erred in permitting a witness to testify that the witness saw the defendant with a pistol because the witness testified that the young defendant pulled out the gun while in a group of people at a shopping mall, and such testimony imputed bad character to the defendant. The trial court admitted the bad character evidence after defense counsel inquired into how the police had procured the witness's statement, but that inquiry had no bearing on the defendant's character and thus did not open the door to permit the introduction of character evidence. Lee v. State, 308 Ga. App. 711, 708 S.E.2d 633, 2011 Ga. App. LEXIS 277 (2011) (decided under former O.C.G.A. § 24-2-2).

Harmless error in instruction on other acts. — Even though the trial court erred by instructing the jury on evidence of other acts admitted because the state did not present any evidence of alleged other crimes committed by the defendant, the error was harmless because the oral instructions told the jury it could consider evidence of other alleged crimes only if it found more likely than not that the defendant committed such other crimes and it could not have made such a finding, there was no indication that the jury was confused, the instruction had little to do with the case's central question which was whether the shooting was a justifiable act of self-defense, and the evidence against defendant was strong. Jones v. State, No. S23A0084, 2023 Ga. LEXIS 102 (Ga. May 16, 2023).

Harmless error in jury instruction on prior act evidence. — Even assuming that the trial court clearly erred by instructing the jury that the prior act evidence could be considered for those purposes and for the purpose of opportunity, the defendant failed to show that the challenged instructions likely affected the outcome of the trial given the strong evidence against the defendant. Priester v. State, No. S23A0109, 2023 Ga. LEXIS 75 (Ga. Apr. 18, 2023).

Limiting instruction proper. — Limiting instruction on similar transaction evidence was properly given as the instruction was substantially the same as an approved pattern and did not direct the jury that the jury could consider similar transaction evidence to show any element of the offense charged in the indictment. Miller v. State, 281 Ga. App. 354, 636 S.E.2d 60, 2006 Ga. App. LEXIS 1100 (2006), cert. denied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-2-2).

Claim waived. — Appeals court rejected the defendant's contention that the trial court erroneously admitted character evidence consisting of the defendant's statement made to a special agent regarding past cocaine use and distribution, when at trial, counsel raised a delayed objection arguing that such was inculpatory, and the objection was not only untimely but also failed to state the specific grounds raised on appeal; moreover, because the defendant later admitted to making the statement, any error in admitting the special agent's testimony was harmless. Henley v. State, 281 Ga. App. 242, 635 S.E.2d 856, 2006 Ga. App. LEXIS 1065 (2006) (decided under former O.C.G.A. § 24-2-2).

Despite the defendant's claim that the trial court erred by denying a mistrial based on an improper character reference in violation of former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), because counsel failed to do anything more than move for a mistrial following the challenged statement and specifically request a curative instruction, no error resulted from the denial of the motion. Johnson v. State, 285 Ga. App. 590, 646 S.E.2d 760, 2007 Ga. App. LEXIS 590 (2007) (decided under former O.C.G.A. § 24-2-2).

Because the defendant did not contend at trial that testimony was improper character evidence or violated the defendant's Sixth Amendment right of confrontation, those bases for objections were not preserved for review on appeal. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834, 2012 Ga. LEXIS 13 (2012) (decided under former O.C.G.A. § 24-2-2).

Counsel was not ineffective in failing to object to statements that might

have impugned defendant's character, and hence the defendant was properly denied a new trial on those grounds. Page v. State, 287 Ga. App. 182, 651 S.E.2d 131, 2007 Ga. App. LEXIS 903 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158, 2011 Ga. App. LEXIS 172 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because even assuming that trial counsel performed deficiently by failing to object to character evidence, the defendant failed to show a reasonable probability that the outcome of the trial would have been different; the evidence of the crime charged was overwhelming. Lowe v. State, 310 Ga. App. 242, 712 S.E.2d 633, 2011 Ga. App. LEXIS 535 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to challenge the admission of bad character evidence against a codefendant because the defendant failed to call trial counsel as a witness during the motion for new trial hearing, and the record supported the trial court's finding that counsel made a conscious, strategic decision not to oppose the admission of evidence of the codefendant's cocaine conviction. Smith v. State, 316 Ga. App. 175, 728 S.E.2d 808, 2012 Ga. App. LEXIS 512 (2012), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible to impeach witness. — Trial court did not abuse the court's discretion in admitting bad character evidence because the testimony of the defendant's witness called into question the truthfulness of the state's witnesses; therefore, evidence of an incident where the defendant allegedly possessed a knife in the witness's presence was admissible for purposes of impeaching the witness. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691, 2012 Ga. App. LEXIS 344 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-2-2).

3. Specific Crimes

a. Assault, Battery, and Homicide Crimes

Use of improper standard for admissibility not harmless error. — Trial court erred in applying an obsolete legal standard to allow the state to introduce other-acts evidence and the error was not harmless because, aside from that evidence, the defendant's convictions rested on the testimony of a nine-year-old child, the defendant's initial willingness to lie to police about the defendant's whereabouts and knowledge of the shooting, and testimony from the gun owner and the owner's brother, who was indicted for the murder and had a motive to lie. Rouzan v. State, 308 Ga. 894, 843 S.E.2d 814, 2020 Ga. LEXIS 357 (2020).

Proper admission of similar transaction evidence. — In a prosecution for aggravated assault, under O.C.G.A. § 16-5-21, and possession of a knife during the commission of a crime, under O.C.G.A. § 16-11-106(b)(1), evidence that defendant stabbed another in an incident eight years previously was admissible to show whether defendant intended to threaten or harm the victim when defendant brandished a knife, and the evidence was not more prejudicial than probative, given the prior incident's relevance to a necessary element of the current crimes. Ledford v.

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State, 275 Ga. App. 107, 620 S.E.2d 187, 2005 Ga. App. LEXIS 894 (2005) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for malice murder and drug-related offenses, the trial court did not abuse the court's discretion in admitting as similar transaction evidence testimony regarding the defendant's previous arrest on a charge of possession of cocaine with intent to distribute and a prior shooting incident because a drug sting was similar to the cocaine trafficking in that both involved relatively recent arrangements for appellant to sell cocaine, and the shooting incident was probative of defendant's inclination towards unprovoked gun violence; the similar transactions were offered to prove, inter alia, intent and state of mind, the trial court admitted the evidence for those limited purposes only, and the trial court instructed the jury accordingly. Moore v. State, 288 Ga. 187, 702 S.E.2d 176, 2010 Ga. LEXIS 853 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11, 2017 Ga. App. LEXIS 176 (2017).

Trial court did not abuse the court's discretion in ruling that evidence of the 1993 murder was admissible as the evidence was similar transaction evidence as the state expressly sought to introduce evidence of the 1993 murder for an appropriate purpose, there was no question that the defendant committed the murder, and, in both instances, the defendant used a gun to shoot someone in the presence of one's peers, the defendant did so with little provocation, and the defendant had engaged in drug transactions with the victim. Norman v. State, 303 Ga. 635, 814 S.E.2d 401, 2018 Ga. LEXIS 286 (2018).

In the defendant's appeal from a conviction for trafficking in cocaine, the admission of prior acts was not erroneous because the 12-, 11-, and 5-year intervals between the defendant's other acts and the crimes charged in this case were not too remote to erode the probative value of the prior convictions and the prosecutorial need for the evidence was heightened by the State's need to demonstrate that defendant actively participated in the crime. Sloans v. State, 360 Ga. App. 256, 861 S.E.2d 130, 2021 Ga. App. LEXIS 336 (2021).

Trial court did not err in admitting other-act evidence because all of the prior drug convictions were either identical or similar to the charged offenses and thus highly probative to show defendant's intent with respect to the charged offenses. Hargrove v. State, 361 Ga. App. 106, 863 S.E.2d 364, 2021 Ga. App. LEXIS 439 (2021).

Admission of similar transaction proper. — Because the state adequately showed the connection between the murder of one victim, and the murder charged in the instant proceeding, specifically embedded in the defendant's proffered motive that the killing of the victim in the instant proceeding was committed to prevent evidence from being introduced against the defendant in the first killing, the similar transaction evidence was properly allowed; hence, the similar transaction did not amount to improper character evidence. Young v. State, 281 Ga. 750, 642 S.E.2d 806, 2007 Ga. LEXIS 247 (2007) (decided under former O.C.G.A. § 24-2-2).

In a trial for felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the trial court properly allowed the state to introduce as similar transaction evidence an aggravated assault the defendant committed four years earlier; both the old assault charge and crimes for which the defendant was on trial involved violent assaults committed by the defendant with the help of young, unarmed accomplices, involved

the defendant's use of a firearm and demand for valuables, and targeted business people within the same five-mile area during morning work hours. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663, 2007 Ga. LEXIS 399 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of the 1999 incident in which the defendant was standing on the defendant's ex-girlfriend's porch with the ex-girlfriend, the ex-girlfriend's daughter, and other children when the defendant pulled out a handgun, pointed the handgun at the people on the porch, and pulled the trigger, although the gun did not fire, because, in both the current and prior incident, the defendant pulled out a handgun and aimed the handgun at a person with whom the defendant had a dispute, in a residential area, ignoring the presence of innocent bystanders, including a child. Brown v. State, 295 Ga. 804, 764 S.E.2d 376, 2014 Ga. LEXIS 751 (2014).

When the defendant was convicted of malice murder for setting the victim on fire and burning the victim's apartment building with a Molotov cocktail, the state was properly allowed to introduce similar transaction evidence that the defendant attempted to burn down the house of the defendant's sister using a Molotov cocktail because the evidence was introduced for the proper purpose of showing the defendant's intent, bent of mind, course of conduct, and identity; there were clear similarities between the current and previous crimes, including that the victims were women with whom the defendant had a close relationship; and the choice of a unique weapon, a Molotov cocktail, was the same. Scruggs v. State, 295 Ga. 840, 764 S.E.2d 413, 2014 Ga. LEXIS 767 (2014).

Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting evidence of the defendant's prior convictions for financial identity fraud, forgery, and stealing public documents because intent was in issue and the prior criminal acts and the crime at issue involved a similar mental state or intent, namely, to obtain an advantage through misrepresentation or use of someone else's identifying information. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802, 2016 Ga. App. LEXIS 352 (2016).

Trial court did not err in admitting evidence of the defendant's involvement in a prior murder as both offenses involved strangers, the murders were not planned well in advance, and the motives for both were related to a relatively minor dispute. Blackledge v. State, 299 Ga. 385, 788 S.E.2d 353, 2016 Ga. LEXIS 462 (2016).

Trial court did not abuse the court's discretion in admitting evidence the defendant previously committed an act of family violence battery and simple battery against the defendant's estranged wife and the wife's sister because that evidence was relevant to shed light on why the defendant reacted as the defendant did when the victim did not acquiesce to sexual advances, hitting the victim when the victim would not let the defendant force the defendant's penis into the victim's mouth. Harris v. State, 338 Ga. App. 778, 792 S.E.2d 409, 2016 Ga. App. LEXIS 546 (2016).

While the trial court erred when the court admitted the defendant's 24-year-old prior conviction for aggravated assault, because the defendant's intent when the defendant committed the prior assault had nothing to do with the defendant shooting the victim and the case had no purpose other than to show the defendant's propensity toward violence, the error was harmless given the substantial evidence of the defendant's guilt. Parks v. State, 300 Ga. 303, 794 S.E.2d 623, 2016 Ga. LEXIS 776 (2016).

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103, 2017 Ga. App. LEXIS 390 (2017).

In the defendant's trial for the shooting death of a drug dealer, evidence showing the defendant's involvement in a prior similar incident was admissible under

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O.C.G.A. § 24-4-404(b), despite the defendant's acquittal of charges in that case; Moore v. State, 254 Ga. 674, 333 S.E.2d 605 (1985), applying collateral estoppel principles, was disapproved. State v. Atkins, 304 Ga. 413, 819 S.E.2d 28, 2018 Ga. LEXIS 600 (2018).

Trial court did not abuse the court's discretion when the court concluded that the evidence of two prior acts was relevant because the 2002 attack showed that the defendant, when affronted by a romantic partner, would call on male friends to help subdue the partner, as well as the 2003 vase-throwing incident with the defendant biting the victim, were both strikingly similar to the assault upon the defendant's boyfriend, which resulted in the boyfriend's death. Morgan v. State, 354 Ga. App. 754, 841 S.E.2d 430, 2020 Ga. App. LEXIS 216 (2020).

In a malice murder case, the evidence of the defendant's prior acts against the defendant's ex-wife was admissible for the purpose of establishing the defendant's intent and motive as to the shooting of the ex-wife because the prior acts were similar to the charged crimes, as both sets of acts involved threats and violence against a romantic partner; and the defendant's history of committing jealousy-fueled violent acts against a romantic partner had significant probative value in establishing that the defendant's conduct in the current case was intentional and not accidental. Harrison v. State, 310 Ga. 862, 855 S.E.2d 546, 2021 Ga. LEXIS 81 (2021).

Trial court did not abuse its discretion admitting other acts of child molestation evidence as the other alleged acts of molestation in Kentucky were relevant for purposes of showing intent or motive and there was no showing that the trial court improperly found that the probative value of the evidence outweighed the danger of unfair prejudice. Kuprian v. State, 359 Ga. App. 692, 859 S.E.2d 843, 2021 Ga. App. LEXIS 270 (2021).

Trial court did not err in admitting evidence of the defendant's alleged beating of another person because it was highly probable that the admission of such evidence did not contribute to the jury's verdict since the remaining evidence that the defendant beat the victim to death was strong. Williams v. State, 313 Ga. 443, 870 S.E.2d 397, 2022 Ga. LEXIS 57 (2022).

Evidence of prior acts admissible although defendant acquitted of bad acts. — In the defendant's trial for the shooting death of a drug dealer, the trial court properly ruled that a prior similar incident was so similar that evidence showing the defendant's involvement in the prior incident was admissible under O.C.G.A. § 24-4-404(b), despite the defendant's acquittal of charges in that case; however, the trial court erred in excluding evidence of that victim's murder out of "an abundance of caution," which was not a ground for excluding evidence under O.C.G.A. § 24-4-403. State v. Atkins, 304 Ga. 413, 819 S.E.2d 28, 2018 Ga. LEXIS 600 (2018).

Evidence of prior difficulties between victim and defendant. — In a felony murder case, the trial court did not plainly err when the court admitted evidence of prior difficulties between the defendant and the victim because a witness's testimony about the prior incident was admitted to show the defendant's motive, especially in light of the limiting instruction given by the court. Payne v. State, 313 Ga. 218, 869 S.E.2d 395, 2022 Ga. LEXIS 20 (2022).

Trial court did not err by admitting evidence of the alleged use, sale, or purchase of illegal substances by defendant during the murder trial as intrinsic evidence because it was necessary to complete the story of the crime and to explain why defendant and the victim were engaged in an ongoing feud that led to the shootings. Without evidence of the initial drug transaction and the victim's theft of marijuana or money from defendant afterwards, there would be no explanation for the dispute between defendant and the victim and for the subsequent threats and confrontations that took place, about which defendant's friends and family members testified extensively. Jackson v. State, 2023 Ga. LEXIS 22.

Admission of old voluntary manslaughter conviction. — Trial court did not abuse the court's discretion by admit-

ting evidence that defendant had pled guilty to voluntary manslaughter in 1997 because it was relevant to the issue of intent, which the state was required to prove for the malice murder charge. The trial court did not err by finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the state had a high need for the evidence to counter the defense that defendant had been coerced into participating in the crimes, there were significant similarities between the crimes, and the defendant admitted to shooting the prior victim. Frazier v. State, 309 Ga. 219, 845 S.E.2d 579, 2020 Ga. LEXIS 460 (2020).

Admission of prior incident for defendant found guilty but mentally ill of aggravated assault. — When the defendant was found guilty but mentally ill on three counts of aggravated assault at the trailer park, the trial court did not err in admitting evidence of the 2008 incident at the trailer park, in which the defendant allegedly attempted to stop a domestic abuse situation by firing three shots outside of a neighbor's trailer over the span of several minutes, because the evidence was admissible as the defendant placed the defendant's intent at issue by pleading not guilty by reason of insanity. Bonner v. State, 351 Ga. App. 439, 830 S.E.2d 514, 2019 Ga. App. LEXIS 406 (2019), cert. denied, No. S19C1646, 2020 Ga. LEXIS 145 (Ga. Feb. 28, 2020).

Evidence improperly admitted to show intent. — In a malice murder and aggravated assault case, the trial court abused the court's discretion by admitting the defendant's 2006 convictions for aggravated assault for the purpose of showing intent because, by asserting self-defense, the defendant did not deny the intent to inflict injury, but claimed authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another; and because the prior aggravated assaults were clearly more prejudicial than probative as the fact that the defendant had committed an assault on another person nine years earlier had nothing to do with the defendant's reason for shooting the victim, and really had no purpose other than to show the defendant's propensity toward violence. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

Appellant's convictions for felony murder, aggravated assault, and knife-possession offenses were reversed because the Georgia Supreme Court could not say that the trial court's erroneous admission of the voluminous evidence that the appellant had previously committed multiple serious violent acts did not contribute to the guilty verdicts that the jury returned. Strong v. State, 309 Ga. 295, 845 S.E.2d 653, 2020 Ga. LEXIS 467 (2020).

In an assault and battery case, the trial court properly admitted other acts evidence regarding an incident between the defendant and the defendant's mother to show intent, as the defendant placed intent at issue by pleading not guilty and taking no affirmative steps to relieve the state of its burden to prove intent. Moody v. State, 361 Ga. App. 737, 865 S.E.2d 544, 2021 Ga. App. LEXIS 542 (2021).

In an assault and battery case, the trial court improperly admitted other-acts evidence regarding an incident between the defendant and the defendant's mother to show identity and motive because the two crimes were not sufficiently uncommon so as to constitute a signature crime and evidence to show that the defendant slapped older women when asked to leave a location was the classic propensity argument improperly used to prove the character of a person in order to show action in conformity therewith. Moody v. State, 361 Ga. App. 737, 865 S.E.2d 544, 2021 Ga. App. LEXIS 542 (2021).

Admission of family fight over insurance. — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial after the prosecutor elicited the defendant's prior admissions that the defendant had the defendant's spouse killed in order to show that the defendant's children were involved in litigation over an insurance policy based on a legitimate desire to insure that the defendant was not rewarded for taking their mother from them because the defendant introduced the family fight over insurance proceeds, which were payable on the death of the defendant's spouse, in an effort to under-

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cut the credibility of the defendant's children, who testified that the defendant admitted killing the victim. Cantera v. State, 304 Ga. App. 289, 696 S.E.2d 354, 2010 Ga. App. LEXIS 515 (2010), aff'd, 289 Ga. 583, 713 S.E.2d 826, 2011 Ga. LEXIS 504 (2011), overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS 793 (2015) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for felony murder, malice murder, aggravated assault, and possession of a firearm by a convicted felon, the trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's involvement in a prior shooting as a similar transaction based on the similarities that the defendant used a handgun, committed the offenses with little or no provocation, fled the scene, and attempted to cause serious injury or death in the same immediate location; the crimes need not be exactly alike for the crimes to be sufficiently similar. Evans v. State, 288 Ga. 571, 707 S.E.2d 353, 2011 Ga. LEXIS 92 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior domestic violence admissible to prove intent. In the defendant's trial for the murder of the defendant's girlfriend's 17-month-old daughter, the trial court did not err in admitting other-acts evidence under O.C.G.A. § 24-4-404(b) that showed the defendant's violent behavior toward the defendant's former spouses and their children because these violent acts proved intent and lack of mistake or accident. Intent was in issue because the defendant denied harming the victim. Naples v. State, 308 Ga. 43, 838 S.E.2d 780, 2020 Ga. LEXIS 96 (2020).

Other acts evidence was relevant to the state's goal of showing that defendant's motive for striking the victim was not self-defense because it showed defendant's willingness to use physical violence against female victims whom defendant knew in an attempt to intimidate them or bend them to defendant's will when they did not accede to defendant's demands or were otherwise acting against defendant's wishes. Freeman v. State, 365 Ga. App. 332, 878 S.E.2d 578, 2022 Ga. App. LEXIS 440 (2022).

Evidence of gang activity and prior murders admitted after defendant opened door. — In the appellant's murder trial, the state did not introduce two witnesses' police-interview statements regarding the appellant's gang activities and prior murders for any of the purposes listed in O.C.G.A. § 24-4-404(b), but rather to rebut the appellant's defense theory seeking to cast doubt on those witnesses' identification of the appellant as the shooter; therefore, the statements were not required to be excluded under § 24-4-404(b) and no pretrial notice was required. Strother v. State, 305 Ga. 838, 828 S.E.2d 327, 2019 Ga. LEXIS 341 (2019).

No notice required when prior crimes, wrongs or acts were between accused and victim. — Trial court correctly denied a motion in limine to exclude evidence of prior difficulties between the defendant and the victim because O.C.G.A. § 24-4-404(b) expressly provided that notice was not to be required when the evidence of prior crimes, wrongs, or acts was offered to prove prior difficulties between the accused and the alleged victim. St. Germain v. State, 358 Ga. App. 163, 853 S.E.2d 394, 2021 Ga. App. LEXIS 10 (2021).

Similar transaction notice was sufficient. — Similar transaction evidence was properly admitted because: (1) defendant's claim that the similar transaction notice was insufficient because the notice did not include a copy of the prior indictment was waived; (2) while the notice did not state the county involved and did not include the indictment, the failure of the state to attach copies of the indictment and to fully comply with former Ga. Unif. Super. Ct. R. 31.3(B) did not require automatic reversal or exclusion of the similar transaction evidence, but was subject to testing for harm; and (3) the state served the indictment, verdict, and police report from the earlier attack on trial counsel more than a year before the trial took place. Moreover, any error in failing to attach the indictment to the notice was

harmless because the indictment was otherwise provided in discovery long before trial. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729, 2006 Ga. App. LEXIS 1217 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (Ga. Jan. 22, 2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Because the state provided notice to the defendant prior to trial that the state would use evidence of a prior incident at the trailer park to show intent, identity, absence of mistake or accident, and consciousness of guilt, the defendant's argument that the defendant did not receive proper notice was without merit. Bonner v. State, 351 Ga. App. 439, 830 S.E.2d 514, 2019 Ga. App. LEXIS 406 (2019), cert. denied, No. S19C1646, 2020 Ga. LEXIS 145 (Ga. Feb. 28, 2020).

Evidence of prior difficulties between victim and defendant ought to be received carefully, and if there is no probative connection between the two, or the prejudice arising from the evidence far outweighs what probative value the evidence may have, the evidence ought not be admitted; but if there is any relevance, or in cases of doubt, the jury ought to hear the evidence and determine for itself the weight and credibility the evidence will be given. Barnes v. State, 157 Ga. App. 582, 277 S.E.2d 916, 1981 Ga. App. LEXIS 1924 (1981) (decided under former Code 1933, § 38-202).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties the deceased wife and defendant had, as evidence of defendant's prior acts toward the victim, the deceased wife, was admissible. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119, 2003 Ga. LEXIS 549 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in permitting a witness to testify about the decedent victim's statement concerning defendant's prior acts of abuse as testimony about prior difficulties between the defendant and a victim was admissible at trial to show the nature of their relationship and to demonstrate motive, intent, or bent of mind of the defendant in committing the act. Banegas v. State, 283 Ga. App. 346, 641 S.E.2d 593, 2007 Ga. App. LEXIS 56 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence plainly was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. Whitley v. State, 307 Ga. App. 553, 707 S.E.2d 375, 2011 Ga. App. LEXIS 9 (2011) (decided under former O.C.G.A. § 24-2-2).

There was no reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b), in the trial court's decision to give a prior difficulties charge to the jury because evidence was presented regarding prior difficulties between the defendant and the victim, and thus, the inclusion of a prior difficulties charge did not constitute an impermissible comment on the evidence; the defendant testified that the defendant and the victim "had problems" on more than one occasion, that the victim had called the police because of those problems "a few times," and that the defendant's mother had helped the defendant move out of the victim's house once before, telling the victim not to let the defendant move back in. Jones v. State, 289 Ga. 145, 710 S.E.2d 127, 2011 Ga. LEXIS 304 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting into evidence the defendant's 2009 convictions for terroristic threats because the evidence helped to explain why the April 22 altercation between the defendant and the victim and the victim's brother occurred and how the altercation established a motive for the defendant's shooting of the victim on April 24. McKelvey v. State, 311 Ga. 34, 855 S.E.2d 598, 2021 Ga. LEXIS 72 (2021).

Evidence of drug use. — Trial court did not err in admitting into evidence

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defendant's unredacted taped statement to police in a case in which defendant was ultimately convicted of malice murder; even though the statement contained evidence that defendant was under the influence of drugs at the time the crime was committed, such evidence was deemed part of the res gestae and was admissible as such even though the statement incidentally placed defendant's character in evidence. Cunningham v. State, 279 Ga. 694, 620 S.E.2d 374, 2005 Ga. LEXIS 639 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of felony record in charge of possession of firearm by convicted felon. — Even if the trial court erred by admitting evidence of defendant's 2009 convictions as other acts the error was harmless because the convictions served as the predicate felonies for the charge of possession of a firearm by a convicted felon and defendant admitted to being a convicted felon in an interview with the detective which was played for the jury. Ash v. State, 312 Ga. 771, 865 S.E.2d 150, 2021 Ga. LEXIS 680 (2021).

Prior use of a firearm. — Trial court did not err in admitting evidence of defendant's conviction several years earlier for voluntary manslaughter as evidence of the prior conviction was admissible as substantive evidence of defendant's guilt on the current charge against defendant of possession of a firearm by a convicted felon. Laster v. State, 276 Ga. 645, 581 S.E.2d 522, 2003 Ga. LEXIS 540 (2003) (decided under former O.C.G.A. § 24-2-2).

Evidence of armed robbery defendant allegedly committed nine days before murder was properly admitted against defendant as, although circumstantial, was quite strong as intrinsic evidence from armed robbery placed murder weapon in defendant's hands just nine days before murder and cell-tower records and surveillance-video footage confirmed defendant had been with victim earlier on night of murder. Roberts v. State, 315 Ga. 229, 880 S.E.2d 501, 2022 Ga. LEXIS 292 (2022).

Writing book entitled The Philosophy of Murder. — Trial court did not abuse the court's discretion in admitting evidence that the defendant had written a book in 2005, titled " The Philosophy of Murder" because the prosecutor notified the court and defense counsel that the state intended to introduce evidence of the novel at trial; it was highly probable that the evidence did not contribute to the verdicts given the defendant's explanation of the plot and the very short time devoted to that line of questioning; several witnesses recounted the defendant's admissions that the defendant killed the defendant's mother; and other witnesses gave expert testimony explaining either how the fire was intentionally set or how repeated and intense blunt force was necessary to cause the victim's injuries. Cavis-ton v. State, 315 Ga. 279, 882 S.E.2d 221, 2022 Ga. LEXIS 320 (2022).

Prior threat to kill another. — Witnesses testimony that defendant had recently come to the witnesses' residences in an intoxicated state and threatened the witnesses by pointing a loaded, cocked shotgun at the witnesses was admissible to show a common course of conduct and state of mind of the defendant in a time frame substantially close to the date on which the murder occurred. Hooks v. State, 253 Ga. 141, 317 S.E.2d 531, 1984 Ga. LEXIS 844 (1984) (decided under former O.C.G.A. § 24-2-2).

In a murder case, the trial court did not err when the court limited the defendant's cross-examination of a co-conspirator because evidence that the co-conspirator had told a detective that the co-conspirator was going to kill the man who caused the co-conspirator to be arrested based on a prior criminal act was inadmissible as the desire to seek violent retribution against another person on another occasion was not logically relevant and necessary to establish motive; and there was no evidence that the victim in the current case was killed as retribution for anything. Carpenter v. State, 305 Ga. 725, 827 S.E.2d 250, 2019 Ga. LEXIS 229, cert. denied, 140 S. Ct. 476, 205 L. Ed. 2d 282, 2019 U.S. LEXIS 6640 (2019).

Admission of evidence of subsequent shooting involving defendant harmless error. — Assuming without deciding that the admission of the other

acts evidence that the defendant was involved in a second shooting approximately a month after the murders was erroneous, any error was harmless as the evidence of the defendant's guilt was strong because the defendant was identified as the shooter by the surviving victim; the defendant was discovered with the murder weapon while driving a vehicle that had been spotted leaving the murder scene by a second witness; the defendant's mother resembled the description of the woman driving the car on the night in question; and the defendant's mother's cell phone, which the defendant was known to share with the defendant's mother, was in the vicinity of the shooting on the night in question. Douglas v. State, 303 Ga. 178, 811 S.E.2d 337, 2018 Ga. LEXIS 128 (2018).

Because the first defendant's connection to a separate shooting was tenuous and the evidence presented at trial as to the first defendant's guilt for the murders was strong, including recorded jail phone calls with the first defendant's sister where the first defendant admitted to playing a "big part" in the crimes and gave a motive for the robbery and said that he felt guilty about his participation, it was highly probable that the admission of the evidence concerning the later shooting was harmless. Fitts v. State, 312 Ga. 134, 859 S.E.2d 79, 2021 Ga. LEXIS 291 (2021).

Admission of evidence of defendant's prior involuntary manslaughter conviction was harmless error. — Assuming (without deciding) that the trial court was correct in concluding that the similar transaction evidence of the 2002 incident in which the defendant pled guilty to involuntary manslaughter after being involved in a drug deal and shooting that resulted in the death of an innocent female bystander should not have been admitted at trial, the admission of that evidence was harmless, in that it was highly probable that the assumed error did not contribute to the verdict as there was overwhelming evidence of the defendant's guilt of the crimes charged in the current case; thus, it was not an abuse of discretion for the trial court to decline to grant a mistrial when the evidence was harmless. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365, 2016 Ga. LEXIS 236 (2016).

Admission of other acts evidence in murder trial constituted harmless error. — When the defendant was convicted of, inter alia, malice murder, although other acts evidence might have been improperly admitted, any error was harmless because, considering the quantity and strength of the evidence against the defendant, it was highly probable that any error did not contribute to the verdict as the defendant was heard by multiple people threatening the lives of the victims the night of the murders; the defendant made numerous incriminating statements after the murders — some of which concerned information only the killer could have known; and the defendant's jailhouse confession was both detailed and consistent with the defendant's statements to other parties before the murders. Fletcher v. State, 303 Ga. 43, 810 S.E.2d 101, 2018 Ga. LEXIS 67 (2018).

Any error in the admission of evidence regarding the defendant's violent acts against an ex-girlfriend were harmless because the evidence against the defendant was overwhelming, including the medical examiner's testimony that the victim's injuries were the result of blunt force trauma and strangulation, the victim was found in the apartment the victim shared with the defendant with the door locked and no sign of forced entry, and DNA supported the state's position that the defendant inflicted the victim's injuries. Moore v. State, 307 Ga. 290, 835 S.E.2d 610, 2019 Ga. LEXIS 731 (2019).

Trial court abused the court's discretion admitting 2005 shooting evidence of the appellant's firing a handgun, but that error was harmless in light of the array of other strong evidence demonstrating the appellant's guilt and considering it was an evidentiary error and not of constitutional dimensions; given the overall strength of the other evidence of the appellant's guilt, the Georgia Supreme Court held that it was highly probable that erroneously admitted evidence of the 2005 shooting did not contribute to the jury's verdict. Jackson v. State, 306 Ga. 69, 829 S.E.2d 142, 2019 Ga. LEXIS 392 (2019).

Assuming without deciding that the trial court abused the court's discretion in

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admitting evidence that the defendant abused an ex-wife more than 20 years before the victim's death, such error was harmless and did not require reversal as it was highly improbable the outcome would not have been different given that the forensic evidence indicated that the defendant shot the victim, attempted to cover up the crime, and then fabricated a story to the police that the victim committed suicide. Davenport v. State, 309 Ga. 385, 846 S.E.2d 83, 2020 Ga. LEXIS 479 (2020).

In a case in which the defendant was convicted of malice murder and possession of a firearm during the commission of a felony, although the trial court erred in admitting the evidence of the prior shooting as there were limited similarities and minimal prosecutorial need for the evidence, and the prior act was not at all relevant for the purpose of showing motive, the error was harmless as it was highly probable that the error in admitting the evidence about the shooting did not contribute to the verdict given the strong independent evidence of the defendant's guilt and the trial court's thorough instructions. Thomas v. State, 314 Ga. 681, 878 S.E.2d 493, 2022 Ga. LEXIS 255 (2022).

Any error admitting or failing to strike the co-defendant's trial testimony was harmless because other evidence corroborated the co-defendant's testimony, including the victim's car being found behind an abandoned house; that the iron found near the victim's body had the co-defendant's blood on it; and the medical examiner's testimony supported the co-defendant's description of the attack on the victim. Brock v. State, No. S23A0124, 2023 Ga. LEXIS 74 (Ga. Apr. 18, 2023).

Any error in the admission of prior acts evidence was harmless in light of the overwhelming evidence of guilt. Walker v. State, 306 Ga. 44, 829 S.E.2d 121, 2019 Ga. LEXIS 384 (2019).

Even if it was error to admit evidence of the defendant's prior aggravated assault conviction, the error was harmless because significant evidence supported the defendant's participation in the criminal enterprise that led to the shooting and, thus, it was highly probable that any error in admitting the other-acts evidence did not contribute to the verdicts. Sams v. State, 314 Ga. 306, 875 S.E.2d 757, 2022 Ga. LEXIS 182 (2022).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — With regard to a defendant's conviction for the malice murder of the defendant's husband, the trial court did not err in admitting evidence of a similar transaction as to the defendant poisoning a boyfriend with antifreeze via being fed green Jell-O because the defendant was intimate with both victims; both men went to the hospital complaining of flu-like symptoms soon before each man died; both men died from the unique cause of antifreeze poisoning; the defendant was the last person to see either man alive; both men died soon after the defendant served them Jell-O; and the defendant, who had financial problems before the deaths of both men, collected substantial money in connection with each man's death. Turner v. State, 281 Ga. 647, 641 S.E.2d 527, 2007 Ga. LEXIS 162 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting a prior shooting as similar transaction evidence because the trial court admitted the evidence for the limited, proper purpose of establishing the defendant's bent of mind and course of conduct and instructed the jury on several occasions to consider it for this purpose alone; both the prior shooting and the crime for which the defendant was convicted involved nighttime shootings occurring less than two weeks apart, wherein a man emerged from a gold car in the parking lot of an apartment complex and opened fire with little apparent provocation. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217, 2011 Ga. LEXIS 261 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence was sufficient to support defendant's conviction for malice murder because the defendant hit the victim with a baseball bat during the course of an argument over a drug transaction, and an incident that occurred when the defendant was a juvenile was properly admit-

ted to show course of conduct and bent of mind. Jackson v. State, 291 Ga. 54, 727 S.E.2d 454, 2012 Ga. LEXIS 442 (2012) (decided under former O.C.G.A. § 24-2-2).

Guilty plea to earlier offense properly admitted. — In the malice murder and armed robbery case, the trial court did not err under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in admitting into evidence the defendant's guilty plea to an earlier robbery; the crimes were close in time, two years apart, each involved the morning robbery of a lone male at a convenience store, and in both robberies, the robbery was accomplished with a weapon other than a firearm, a borrowed vehicle was used, money was taken from the register, and the employee was forcibly moved around the store. Daniels v. State, 281 Ga. 226, 637 S.E.2d 403, 2006 Ga. LEXIS 926 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence: in both incidents, which occurred seven months apart, the defendant had a verbal disagreement with young unarmed males, demanded that they leave the premises, and when they refused to comply, retrieved a particular make of weapon and fired it at or near the victims, then calmly walked inside. Johnson v. State, 289 Ga. App. 435, 657 S.E.2d 333, 2008 Ga. App. LEXIS 115 (2008) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for felony murder, armed robbery, and burglary, it was not error to admit evidence of an armed robbery that the defendant and the codefendant committed two weeks before the charged crimes as the trial court's conclusion that the two crimes were sufficiently similar was not clearly erroneous. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700, 2008 Ga. LEXIS 846 (2008) (decided under former O.C.G.A. § 24-2-2).

In a malice murder prosecution when the victim was violently stabbed and severely beaten, evidence that an officer saw the defendant violently attack an acquaintance as the result of a minor disagreement was properly submitted as a similar transaction to show the defendant's bent of mind and course of conduct. Dixon v. State, 285 Ga. 312, 677 S.E.2d 76, 2009 Ga. LEXIS 154 (2009), overruled in part, Whitehead v. State, 287 Ga. 242, 695 S.E.2d 255, 2010 Ga. LEXIS 412 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court acted within the court's discretion in finding that a sufficient similarity existed between a prior transaction and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because in both instances the defendant became enraged and reacted impulsively and aggressively in response to a perceived challenge from a woman, and the prior transaction tended to disprove the defendant's claim of self-defense. Jones v. State, 316 Ga. App. 442, 729 S.E.2d 578, 2012 Ga. App. LEXIS 586 (2012), cert. denied, No. S12C1744, 2013 Ga. LEXIS 218 (Ga. Mar. 4, 2013) (decided under former O.C.G.A. § 24-2-2).

Admission of unrelated criminal incidents involving the defendant's former girlfriend was not erroneous because there was unquestionably similarity between the incidents, including that the incidents all involved the defendant reacting violently with a weapon and inflicting physical injury when the defendant believed the defendant's authority was challenged by a female with whom the defendant once had a romantic relationship. Faniel v. State, 291 Ga. 559, 731 S.E.2d 750, 2012 Ga. LEXIS 700 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence improperly admitted to show course of conduct. — In a home invasion, although course of conduct was no longer a viable exception to the admissibility of other acts, and the trial court erred in admitting the defendant's 1989 convictions for that purpose, the defendant's current convictions did not need to be reversed because the trial court's error in admitting the defendant's prior convictions was harmless, given the overwhelming evidence of the defendant's guilt, including that the defendant and an accomplice planned and committed the home invasion together, and that, when found by a deputy the day after the offense near the woods around the victim's residence, the defendant gave the deputy a false name, and then ran from the deputy

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to dispose of the gun used in the home invasion. Paschal v. State, 335 Ga. App. 411, 780 S.E.2d 681, 2015 Ga. App. LEXIS 780 (2015), cert. denied, No. S16C0579, 2016 Ga. LEXIS 287 (Ga. Apr. 4, 2016).

Evidence improperly admitted to show plan. — Defendant was granted a new trial because the evidence of a subsequent armed robbery was not admissible to show motive since that later act was not connected to the murders, and the only similarities it shared with the murders were the all-too-common elements of guns and an assortment of co-conspirators. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899, 2017 Ga. LEXIS 950 (2017).

In a malice murder and aggravated assault case, the defendant's 2006 convictions for aggravated assault were improperly admitted because the convictions did not tend to establish a larger goal, the convictions were not so connected with the crime charged that the murder could not be fully shown without proving the prior assaults, and the convictions were not relevant to the ultimate issue of whether the defendant acted in self-defense; furthermore, the evidence primarily established the defendant's propensity toward violence. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

Incident occurring eight years ago admitted. — Trial court properly allowed similar transaction evidence in the defendant's trial for malice murder, O.C.G.A. § 16-5-1(b), to show course of conduct; the defendant, who was working as a security officer at a government building was charged with attacking a coworker without provocation. The state was permitted to present evidence of a similar transaction from eight years earlier in which the defendant, wearing the uniform of a security guard, ran down the stairs of a train station to the platform, grabbed a man awaiting the arrival of a train, beat and kicked the victim, threw the victim on the train tracks, and when the victim climbed back on the platform, the defendant resumed beating and kicking the victim until transit police arrived. Hicks v. State, 285 Ga. 386, 677 S.E.2d 111, 2009 Ga. LEXIS 178 (2009) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest admissible. — Because the police found weapons in defendant's car, after obtaining consent to search, when the police arrested defendant for stalking, the evidence was properly admitted in defendant's subsequent trial for burglary and aggravated assault to show the circumstances connected with the stalking arrest. Blackwell v. State, 274 Ga. App. 579, 618 S.E.2d 190, 2005 Ga. App. LEXIS 803 (2005) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Admission of evidence that defendant committed a prior crime was proper pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) when the defendant was on trial for having pursued defendant's former girlfriend in defendant's car, threatening to kill her because they broke up, and shooting at her, and there was evidence from a prior crime that the defendant had taken the same type of action against another former girlfriend; the court found that such evidence was properly admitted in order to prove identity, course of conduct, intent, and motive because there was obvious similarity between the crimes and the methods in which the crimes were carried out. Morris v. State, 263 Ga. App. 115, 587 S.E.2d 272, 2003 Ga. App. LEXIS 1137 (2003) (decided under former O.C.G.A. § 24-2-2).

When the defendant was accused of the malice murder of the mother of defendant's child, the trial court did not err in admitting testimony about an earlier statement where the defendant said that the defendant would have shot the victim and the victim's male companion had the defendant's gun not jammed; such evidence was proper to show motive, intent, and bent of mind. Lowery v. State, 282 Ga. 68, 646 S.E.2d 67, 2007 Ga. LEXIS 400, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355, 2007 U.S. LEXIS 11917 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible to prove intent and absence of accident or mistake. — Extrinsic acts evidence from two

women who dated the defendant, one before and one after the victim's death, was admissible to prove intent and absence of accident or mistake. McWilliams v. State, 304 Ga. 502, 820 S.E.2d 33, 2018 Ga. LEXIS 655 (2018).

Similar transaction evidence admissible. — When the defendant pointed a gun at the victim twice after the victim flicked a cigarette that landed on the defendant's car seat, the trial court properly admitted similar transaction evidence that two days before the incident, the defendant pointed a gun at the chest of a teenager who was wearing a T-shirt with a message that the defendant did not like. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337, 2007 Ga. App. LEXIS 765 (2007) (decided under former O.C.G.A. § 24-2-2).

In a trial for arson, burglary, and malice murder, the trial court properly admitted similar transaction evidence of a fire at the defendant's former home to show motive and course of conduct; before each incident, the defendant acted in a suspicious manner with regard to the fire, both fires occurred at homes to which the defendant had access, and the defendant had incurred substantial debt before each fire and reaped a financial benefit as a result of each fire. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718, 2007 Ga. LEXIS 718 (2007) (decided under former O.C.G.A. § 24-2-2).

In a malice murder case, a voluntary manslaughter conviction was properly admitted as similar transaction evidence since in both cases defendant knew the victim and obtained the weapon from the victim, both incidents arose from arguments with the victim and resulted in the victim being struck or shot in the head, neither victim was able to defend against the attack, and in both cases the defendant attempted to conceal evidence. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528, 2008 Ga. LEXIS 352 (2008) (decided under former O.C.G.A. § 24-2-2).

In a murder and aggravated assault prosecution, the trial court properly admitted similar transaction evidence for the limited purposes of showing motive, state of mind, bent of mind, course of conduct, and plan or scheme, as the similar transaction and the crimes for which the defendant was on trial occurred in very close proximity, in time and location, and each involved the defendant using a handgun to shoot an unsuspecting victim without provocation. Abdullah v. State, 284 Ga. 399, 667 S.E.2d 584, 2008 Ga. LEXIS 815 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence from the defendant's ex-wife and ex-girlfriends because the evidence was sufficient to establish the required similarity between the charged crime and the assaults the defendant inflicted on the ex-wife and ex-girlfriends; both the prior transactions and the murder at issue involved violent assaults by the defendant against women with whom the defendant was intimately involved, and the evidence established the defendant's pattern of choking the defendant's lovers, beating the lovers, and threatening the lovers with a knife. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580, 2012 Ga. LEXIS 333 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence relating to a North Carolina traffic stop and seizure of currency was properly admissible as the stop, also involving both defendants, a car registered in Massachusetts, with dark tinted windows, a single key in the ignition, religious insignias throughout, and a hidden compartment with shrink-wrapped items, was sufficiently similar that proof of that incident tended to prove the current incident. Betancourt v. State, 322 Ga. App. 201, 744 S.E.2d 419, 2013 Ga. App. LEXIS 479 (2013), aff'd on other grounds, 294 Ga. 903, 757 S.E.2d 109, 2014 Ga. LEXIS 250 (2014).

In the defendant's trial for the murder of the defendant's former girlfriend, the defendant's 15-year-old conviction for an attack on another girlfriend was admissible to show identity under O.C.G.A. § 24-4-404(b): in both cases, the victim was dragged off a walkway into nearby bushes and choked, and both victims had dated the defendant and had recently ended the relationship. McKinney v.

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State, 307 Ga. 129, 834 S.E.2d 741, 2019 Ga. LEXIS 702 (2019).

Evidence of similar or connected sexual offenses against children. — Trial counsel was not ineffective for failing to object to testimony that the defendant could have molested the victim's brother because the evidence included more than just the allegations made in the initial outcry; thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been more favorable to the defendant had the testimony been excluded. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429, 2012 Ga. App. LEXIS 500 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting evidence regarding the defendant's prior acts of child molestation because the evidence was relevant to show the defendant's intent, identity, and propensity to commit the crimes; and both of the prior incidents that the state sought to admit were relevant to show the defendant's lustful disposition with respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Maner v. State, 358 Ga. App. 21, 852 S.E.2d 867, 2020 Ga. App. LEXIS 684 (2020).

Sexual activities not admissible in murder case. — In an action related to the death of defendant's son after being left in a hot car, the trial court clearly abused the court's discretion in admitting the sexual-activities evidence to show the defendant's intent, absence of mistake or accident, and knowledge as the evidence was not relevant to show intent because the intent required for the alleged crimes against the child was different than the defendant's intent when the defendant sent sexual messages and engaged in sexual conduct. Harris v. State, 314 Ga. 238, 875 S.E.2d 659, 2022 Ga. LEXIS 169 (2022).

Evidence of six prior incidents of assaulting young African-American sex workers admissible. — In defendant's prosecution for the strangulation death of the victim at the victim's home, six similar transactions between 1991 and 2005 were admissible: in each case, the victims were young African-American women who either were sex workers or had substance abuse problems, or both, and the victims were sexually or physically abused, often by choking. The sheer number of the incidents did not preclude their admissibility. Dillard v. State, 297 Ga. 756, 778 S.E.2d 184, 2015 Ga. LEXIS 690 (2015) (decided under former law).

Evidence of a subsequent successful conspiracy by defendant to murder her husband had a logical connection to the crime for which she was being tried, a separate conspiracy to murder him. Such evidence tends to show intent and state of mind, and certainly tends to establish conspiracy to murder the same victim. Buffington v. State, 171 Ga. App. 919, 321 S.E.2d 418, 1984 Ga. App. LEXIS 3015 (1984) (decided under former O.C.G.A. § 24-2-2).

Domestic abuse evidence admitted. — In the defendant's trial for the murder of a former girlfriend's 13-month-old daughter, evidence that the defendant had abused the child's mother was not introduced for one of the purposes listed in O.C.G.A. § 24-4-404(b), but rather to show the mother's bias under O.C.G.A. § 24-6-622, which allowed evidence of a witness's feelings towards the parties and the witness's relationship to the parties. Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019).

Impeachment of defendant's specific testimony by contradictory evidence. — While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions is prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. Williams v. State, 257 Ga. 761, 363 S.E.2d 535, 1988 Ga. LEXIS 9 (1988) (decided under former O.C.G.A. § 24-2-2).

Defense counsel's failure to object to evidence that a burglar alarm went off at the house where defendant was arrested shortly before the defendant was arrested

was not ineffective assistance of counsel because even if this evidence improperly placed defendant's character into evidence, contrary to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), there was no reasonable probability that defendant would have been acquitted, given the strength of other evidence against the defendant. Patterson v. State, 274 Ga. App. 341, 618 S.E.2d 81, 2005 Ga. App. LEXIS 753 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior obstruction of police officers admissible. — After defendant struck and pushed an officer, and fought with another officer who attempted to arrest defendant the trial court did not abuse the court's discretion in admitting evidence of a similar transaction because, in both incidents, defendant refused to comply with law enforcement officers' instructions, cursed at the officers, and physically resisted by struggling with the officers; the similar transaction evidence showed a course of conduct in resisting law enforcement officers in the performance of their duties and was relevant to rebut defendant's claim of justification. Harris v. State, 276 Ga. App. 234, 622 S.E.2d 905, 2005 Ga. App. LEXIS 1217 (2005) (decided under former O.C.G.A. § 24-2-2).

Victim's prior convictions not admissible. — Counsel was not ineffective for failing to present evidence that the first victim had a criminal history and was a gang member as the defendant did not come forward with any evidence that the first victim was ever in a gang; the defendant did not show that any of the first victim's prior convictions would have been admissible; and the first victim's prior convictions would not have been admissible to show the defendant's state of mind or the reasonableness of the defendant's conduct as the defendant was not aware of those convictions at the time of the shootings. Wofford v. State, 305 Ga. 694, 827 S.E.2d 652, 2019 Ga. LEXIS 278 (2019).

Evidence admissible on assault and battery claim. — With regard to a former employee's assault and battery claim, a trial court erred in excluding evidence of a dentist's prior threats to kill the dentist's spouse and children and of the dentist pushing a 13-year-old patient after the patient had allegedly been rude to the dentist; the evidence was admissible given that the dentist was alleged to have assaulted the employee and threatened to kill the employee. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285, 2008 Ga. App. LEXIS 766 (2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's prior assault on victim. — In a prosecution against a defendant for aggravated assault upon defendant's spouse, evidence that defendant had earlier committed an assault upon the spouse was admissible to demonstrate defendant's intent or bent of mind. Roberson v. State, 180 Ga. App. 406, 349 S.E.2d 39, 1986 Ga. App. LEXIS 2179 (1986) (decided under former O.C.G.A. § 24-2-2).

In a prosecution against a defendant for aggravated assault on defendant's girlfriend, evidence that the defendant had previously attacked her with a machete was admissible. Smith v. State, 232 Ga. App. 290, 501 S.E.2d 523, 1998 Ga. App. LEXIS 578 (1998) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion to suppress certain testimony about prior difficulties that had occurred between defendant and the murder victim as such evidence was relevant to the relationship between the victim and defendant, and was admissible to show defendant's motive, intent, and bent of mind in murdering the victim. Moody v. State, 277 Ga. 676, 594 S.E.2d 350, 2004 Ga. LEXIS 267 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting a witness's testimony about the defendant's beating of the murder victim at a store and the surveillance video of the incident because the video shed light on the nature of the parties' relationship and on the defendant's potential motive in shooting the victim eight days later. Flowers v. State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Evidence of victim's gang membership properly excluded. — Trial court did not commit plain error by excluding evidence that the first victim was a mem-

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ber of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134, 2018 Ga. LEXIS 71 (2018).

Evidence not related to issues excluded. — In a voluntary manslaughter case, a photograph portraying the victim's use of obscene hand gestures, a photograph portraying the victim's display of what appeared to be two partially consumed bottles of beer, and photographs portraying the victim's obscene consumption of a cake baked in the likeness of a nude woman were properly excluded because the photographs were not relevant to the issues being tried and not relevant to defendant's claim of self-defense. Guy v. State, 204 Ga. App. 228, 418 S.E.2d 778, 1992 Ga. App. LEXIS 775 (1992), cert. denied, No. S92C1083, 1992 Ga. LEXIS 632 (Ga. July 2, 1992) (decided under former O.C.G.A. § 24-2-2).

Evidence not relevant. — In a malice murder and aggravated assault case, because the defendant never claimed, nor was there any evidence to suggest, that the shooting was the result of an accident or mistake, whether the defendant's actions were the result of an accident or mistake was irrelevant, and it was error for the trial court to admit the 2006 guilty pleas to aggravated assault. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

Evidence of a prior violent act. — Trial court did not err in admitting evidence of defendant's conviction for manslaughter since the plaintiff contended that the defendant made a violent, malicious, and unwarranted attack on the plaintiff, as it went to the issue of defendant's bent of mind, habit, and course of conduct. Dimarco's, Inc. v. Neidlinger, 207 Ga. App. 526, 428 S.E.2d 431, 1993 Ga. App. LEXIS 258 (1993) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for battery, evidence of the victim's prior acts of violence and convictions for battery was properly excluded as the defendant failed to make a prima facie showing of justification. There was no evidence that the victim attacked the defendant, and the testimony of the victim's former romantic companion indicated that the defendant could not have seen the victim's alleged attack on the companion. Frasier v. State, 295 Ga. App. 596, 672 S.E.2d 668, 2009 Ga. App. LEXIS 49 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court's determination that the state met the requirements for admission of similar transaction evidence was not an abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant's bent of mind in using violence against a member of the defendant's family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789, 2011 Ga. LEXIS 302 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting evidence of the defendant's prior difficulty in which the defendant squeezed and threw the defendant's baby because the prior difficulty evidence was properly admitted to show the defendant's bent of mind towards and course of conduct with the baby; even if similarity were an issue, both the prior difficulty and the crimes for which the defendant was being tried involved inappropriate squeezing of the baby. Stokes v. State, 289 Ga. 702, 715 S.E.2d 81, 2011 Ga. LEXIS 670 (2011) (decided under former O.C.G.A. § 24-2-2).

State had a significant need for the other-act evidence pertaining to the defendant's attack on a former girlfriend because most of the evidence indicating that defendant beat the victim was circumstantial, the only eyewitness was a young child, and the defendant maintained during police interviews that the defendant never attacked the victim and that the victim was injured by accidental falls. To satisfy its burden of proof and to rebut the defendant's explanation for how the victim was injured, the state needed evi-

dence that the victim's death was not accidental and that the defendant harmed the victim with malicious intent, as the defendant had done to a previous girlfriend. Jones v. State, 311 Ga. 455, 858 S.E.2d 462, 2021 Ga. LEXIS 270 (2021).

Trial court did not abuse its discretion by admitting evidence that defendant had physically assaulted the victim before his death because it was admissible as to defendant's intent and the prior acts were highly probative given that defendant's squeezing the victim around the rib cage was the same type of act alleged to have caused his death and the acts occurred within two years of the victim's death. Hounkpatin v. State, 313 Ga. 789, 873 S.E.2d 201, 2022 Ga. LEXIS 153 (2022).

Generic motive that defendant regularly enagaged in violent acts rejected. — Evidence of the two prior incidents was not relevant to prove the defendant's motive in committing the felony murder and two firearm crimes, and the trial court abused the court's discretion by admitting that evidence because the state failed to prove that the defendant's actions in the prior incidents were motivated by a desire to get revenge for the break-in at the defendant's house; and the motive that the state really ascribed to the defendant based on those incidents was the generic motive that the defendant regularly engaged in violent acts against others, which was not a proper purpose. Finney v. State, 311 Ga. 1, 855 S.E.2d 578, 2021 Ga. LEXIS 82 (2021).

Admission of photographs posted on Facebook. — Even if the trial court erred in admitting the three photographs posted to Facebook showing the defendant with handguns in the defendant's felony murder trial, the error was harmless because the State presented strong independent evidence of the defendant's guilt as a party to the felony murder, including a photo depicting the defendant holding the handgun used in the murder and that the defendant's phone was used to order the pizza the victim attempted to deliver. Lofton v. State, 309 Ga. 349, 846 S.E.2d 57, 2020 Ga. LEXIS 474 (2020).

Admission of previous murder improperly admitted. — In a murder case, under the new evidence code, the trial court erred in admitting the other acts evidence that the defendant and an accomplice murdered a Mississippi state trooper in 1983 because evidence of the Mississippi murder was not admissible to prove identity or motive as the crimes were not so similar as to mark the murders as the handiwork of the defendant; the dissimilarities were stark and militated against the supposition that the murders were committed by the same person; the evidence of the Mississippi murder during a prison escape was unrelated and unnecessary to prove why the defendant murdered a security guard in the course of a theft seven years earlier; and admission of the evidence was not harmless. Brooks v. State, 298 Ga. 722, 783 S.E.2d 895, 2016 Ga. LEXIS 193 (2016).

Admission of prior aggravated assault conviction error. — In a malice murder and aggravated assault case, the admission of the defendant's 2006 convictions for aggravated assault did not constitute harmless error as the evidence underlying the defendant's guilt was not overwhelming, and there was ample conflicting evidence concerning whether the defendant acted in self-defense. Brown v. State, 303 Ga. 158, 810 S.E.2d 145, 2018 Ga. LEXIS 136 (2018).

Evidence of other conduct or crimes was admissible. — Defendant's aggravated assault conviction was upheld on appeal, as the victim's identification of the defendant as the perpetrator was sufficient evidence to uphold the conviction, and evidence of a subsequent altercation between the two, like evidence of a prior difficulty, was probative evidence that the victim immediately identified the defendant to police on the day of the incident. Bond v. State, 283 Ga. App. 620, 642 S.E.2d 223, 2007 Ga. App. LEXIS 133 (2007) (decided under former O.C.G.A. § 24-2-2).

In an aggravated assault case, since there was evidence that the victim's injuries were consistent with the use of a sharp instrument, similar transaction evidence of attacks with a box cutter and with a knife during altercations was not admitted for an improper purpose. The evidence was admissible to show the de-

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fendant's bent of mind and course of conduct. Miller v. State, 292 Ga. App. 641, 666 S.E.2d 35, 2008 Ga. App. LEXIS 719 (2008), cert. denied, No. S08C1941, 2008 Ga. LEXIS 903 (Ga. Oct. 27, 2008) (decided under former O.C.G.A. § 24-2-2).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour), and the marks and scratches witnesses saw on the victim's body as the testimony qualified as prior difficulties or similar transaction evidence. Smith v. State, 284 Ga. 304, 667 S.E.2d 65, 2008 Ga. LEXIS 753 (2008) (decided under former O.C.G.A. § 24-2-2).

Defendant was convicted of voluntary manslaughter for fatally stabbing the defendant's spouse. A witness's testimony at a former Ga. Unif. Super. Ct. R. 31.3(B) hearing that the defendant had threatened the witness with a knife was sufficient to establish the commission of the prior act, and as the prior act was sufficiently connected to the charged crime, the testimony was properly admitted at trial. McKenzie v. State, 294 Ga. App. 376, 670 S.E.2d 158, 2008 Ga. App. LEXIS 1201 (2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of the defendant's prior participation in crimes in which the co-defendant shot a man in order to steal the man's car was admissible to show that the defendant had knowledge of, and shared, the co-defendant's criminal intent in the instant case. Brannon v. State, 298 Ga. 601, 783 S.E.2d 642, 2016 Ga. LEXIS 207 (2016).

Evidence of an earlier altercation between the defendant and a former girlfriend was admissible in the aggravated assault of the victim, the former girlfriend's brother, because the state of mind required for the charged offense of aggravated assault against the victim was the same as the state of mind required for the uncharged act against the former girlfriend, which could have constituted an aggravated assault; the other act was probative of the issue of the defendant's intent, which defense counsel argued to the jury was the biggest issue in the case; and the evidence was sufficient to show that the prior bad act occurred and that the defendant was the person who accosted and threatened the former girlfriend with the knife. Wilson v. State, 336 Ga. App. 60, 783 S.E.2d 662, 2016 Ga. App. LEXIS 115 (2016).

Contention that the trial court abused the court's discretion when the court admitted evidence concerning the defendant's prior assaults on other women required further consideration in light of the supreme court's clarification of the law, including that the defendant's not guilty plea put the prosecution's burden of proving every element of the crime, including intent, evidence of other acts that tends to make the requisite intent more or less probable to any extent is relevant. Olds v. State, 299 Ga. 65, 786 S.E.2d 633, 2016 Ga. LEXIS 393 (2016).

Testimony regarding similar transactions that occurred years earlier was properly admitted as it was relevant to show the defendant's lustful disposition with respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498, 2017 Ga. App. LEXIS 150 (2017).

Trial court did not err by allowing the state to introduce evidence the defendant previously pointed a gun at a former girlfriend because that evidence was relevant to intent and identity. Vass v. State, 347 Ga. App. 535, 820 S.E.2d 181, 2018 Ga. App. LEXIS 558 (2018).

Trial court did not err in admitting other-acts testimony of the defendant's stepchildren and daughter because the defendant's intent to commit aggravated assault against the victim, the predicate felony for felony murder, was an issue after the defendant told police that the defendant had never harmed the victim but suggested the victim's injuries resulted from accidental falls, and the defendant pled not guilty, and the testimony showed the defendant's same intent to commit aggravated assault against the wife and other family members. Thomp-

son v. State, 308 Ga. 854, 843 S.E.2d 794, 2020 Ga. LEXIS 369 (2020).

Trial court did not abuse its discretion by admitting the testimony of defendant's former girlfriend because it was relevant to establish intent, as both incidents involved an intent to harass and falsely accuse a former girlfriend as a means of retaliation after she broke up with him, and it was relevant to establish motive, as it demonstrated the lengths defendant would go to when a girlfriend broke up with him, including using the legal system, harassing letters, and false accusations as a means to control, harass, intimidate, and exact revenge. Whitson v. State, 359 Ga. App. 757, 860 S.E.2d 70, 2021 Ga. App. LEXIS 279 (2021).

Trial court did not abuse its discretion by admitting evidence of other acts committed against the victim because the intrinsic acts defendant committed against the victim demonstrated defendant's motive to escalate harassment after the victim broke up with defendant and filed for protective orders, including defendant's use of legal and social means as retaliation, all of which culminated in defendant falsely accusing the victim of armed robbery. Whitson v. State, 359 Ga. App. 757, 860 S.E.2d 70, 2021 Ga. App. LEXIS 279 (2021).

Trial court did not err in admitting evidence that the defendant previously had sexual intercourse with a child and took partially nude photographs of the child, as it was highly probative of motive. State v. Palacio-Gregorio, 361 Ga. App. 339, 862 S.E.2d 605, 2021 Ga. App. LEXIS 452 (2021).

Trial court did not err by allowing the state to introduce extrinsic evidence of defendant's two prior traffic violations and two videos defendant posted on defendant's social media account because the evidence was relevant to show defendant's intent to engage in a chase and to show defendant's knowledge of traffic regulations. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Evidence of other conduct or crimes of a witness was inadmissable. — Trial court did not err in excluding evidence that a witness and a friend had been involved in a separate crime because absent any competent evidence showing that a witness and a friend had actually committed a prior crime, the defendant failed to meet the burden of showing that evidence of the prior crime was admissible. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201, 2012 Ga. App. LEXIS 382 (2012) (decided under former O.C.G.A. § 24-2-2).

Error in admitting similar transaction evidence required reversal. — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920, 2008 Ga. App. LEXIS 400 (2008) (decided under former O.C.G.A. § 24-2-2).

Other sexual offense relevant for sentencing. — Trial court properly refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the court found the defendant's conviction for sexual exploitation of children was a relevant similar transaction and the phrase relevant similar transaction under § 17-10-6.2(c)(1)(C) included a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence was considered. Evans v. State, 334 Ga. App. 104, 778 S.E.2d 360, 2015 Ga. App. LEXIS 580 (2015), aff'd, 300 Ga. 271, 794 S.E.2d 40, 2016 Ga. LEXIS 773 (2016).

Admission of similar transaction evidence proper in kidnapping case. — Defendant's convictions for kidnapping, attempted kidnapping, and criminal trespass were erroneously reversed as the fact that the state did not file criminal charges against the defendant based directly on three prior pool incidents with young children did not mean that those incidents were non-criminal or not indicative of the defendant's state of mind. State v. Ashley,

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299 Ga. 450, 788 S.E.2d 796, 2016 Ga. LEXIS 468 (2016).

Linking in time and circumstances with charged crime. — Any evidence regarding the taking of the victim's purse was linked in time and circumstances with the charged crime and was properly admitted with respect to non-time-barred charges against the defendant. Tyner v. State, 305 Ga. 326, 825 S.E.2d 129, 2019 Ga. LEXIS 145 (2019).

Notice not required for uncharged wrong. — When the defendant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the testimony of two witnesses who stated that the defendant threatened to kill the victim's brother if the victim's brother disciplined the defendant's granddaughter was admissible as intrinsic evidence, bearing directly on the charged conduct, and was not subject to the notice requirements for an uncharged wrong. Wimberly v. State, 302 Ga. 321, 806 S.E.2d 599, 2017 Ga. LEXIS 886 (2017).

Highly probable that error in admitting evidence did not contribute to verdict. — In a malice murder case, even assuming that the trial court abused the court's discretion in permitting the defendant's ex-wife to testify regarding the defendant's alleged prior bad acts of restraining the ex-wife, punching or breaking things in the ex-wife's vicinity to scare the ex-wife, engaging in surveillance and tracking, and manipulating the ex-wife, it was highly probable that the error did not contribute to the verdict because there was already extensive evidence concerning similar behavior with respect to the victim, as well as the volatility of the defendant's marriage to the victim. Leili v. State, 307 Ga. 339, 834 S.E.2d 847, 2019 Ga. LEXIS 795 (2019).

b. Robbery, Burglary, and Theft Crimes

Admission of similar transaction evidence proper. — In a prosecution involving a murder and robbery at a convenience store, the trial court properly admitted similar transaction evidence of an attempted robbery of a fast-food restaurant. In each case, the defendant recruited another person from the same house for assistance, wore a mask, carried a .9mm pistol, and committed the crimes early in the morning. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537, 2007 Ga. LEXIS 776 (2007) (decided under former O.C.G.A. § 24-2-2).

In an armed robbery case, the trial court properly admitted evidence of a prior armed robbery. The similar transaction was offered to prove course of conduct, state of mind, and the defendant's intent; a certified copy of the defendant's conviction was offered; and the prior robbery took place the day before the robbery at issue and like the present robbery involved a victim being robbed of money at gunpoint while at work. Deloatch v. State, 296 Ga. App. 65, 673 S.E.2d 576, 2009 Ga. App. LEXIS 123 (2009) (decided under former O.C.G.A. § 24-2-2).

Defendant was charged with robbing a store clerk at knife-point. Evidence presented at a former Ga. Unif. Super. Ct. R. 31.3(B) hearing that, on the day after this robbery, the defendant robbed a second clerk at knife-point, was properly admitted as similar transaction evidence; the fact that the trial on the second robbery was pending afforded no basis to exclude the evidence. Hill v. State, 298 Ga. App. 677, 680 S.E.2d 702, 2009 Ga. App. LEXIS 745 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984, was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742, 2010 Ga. App. LEXIS 600 (2010), overruled in part, Reed v. State, 291 Ga. 10, 727 S.E.2d 112, 2012 Ga. LEXIS 364 (2012) (decided under former O.C.G.A. § 24-2-2).

Given the similarities between the theft of a car and the theft of a second vehicle

only hours after the car was stolen, evidence of either theft would be admissible as a similar transaction of the other to show bent of mind, intent, and course of conduct; both crimes occurred in the same city and on the same date, both involved the theft of foreign-made, mid-size sedans, and the state presented evidence from which the jury could infer that, like the car, the keys had been left in the second vehicle at the time the car was stolen, and the keys from both cars were missing when the cars were recovered. Ferguson v. State, 307 Ga. App. 232, 704 S.E.2d 470, 2010 Ga. App. LEXIS 1128 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in permitting testimony and argument about a prior robbery at a video store because evidence relating to the first crime was not wholly unrelated to the charged crimes, nor was the evidence so remote in time as to make the evidence inadmissible; an officer's business card containing information relating to the earlier robbery of the video store was admissible because the evidence was relevant to the identity of the accused and was an article connected with the charged offense and recovered during the search of the codefendant's apartment, and although it was improper to permit testimony and argument that went beyond identifying the business card as an article taken in the prior robbery, the error did not require reversal since there was overwhelming evidence of the codefendant's guilt. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246, 2010 Ga. App. LEXIS 1121 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by permitting witnesses to mention in their testimony, and the prosecutor to mention during the prosecutor's opening statement and closing argument, a prior robbery of a video store because the evidence and statements did not constitute evidence of or statements concerning similar transactions which the state sought to use against the defendant; the state did not suggest, nor could it be reasonably inferred from the evidence, that the defendant was implicated in any way in the prior robbery, and adherence to Ga. Unif. Super. Ct. R. 31.1 and former 31.3 was not required because that evidence and those statements did not place the defendant's character in issue. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246, 2010 Ga. App. LEXIS 1121 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889, 2011 Ga. App. LEXIS 38 (2011), cert. dismissed, No. S14C0343, 2014 Ga. LEXIS 142 (Ga. Feb. 24, 2014) (decided under former O.C.G.A. § 24-2-2).

Trial court's decision to admit evidence of the defendant's prior handgun theft was not an abuse of the court's discretion because in both the earlier theft and the murder for which the defendant was convicted, the defendant stole 9 millimeter handguns from individuals with whom the defendant had a close relationship and access, and then the defendant lied to police in order to avoid arrest and prosecution. Hunt v. State, 288 Ga. 794, 708 S.E.2d 357, 2011 Ga. LEXIS 260 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two

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days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889, 2011 Ga. App. LEXIS 38 (2011), cert. dismissed, No. S14C0343, 2014 Ga. LEXIS 142 (Ga. Feb. 24, 2014) (decided under former O.C.G.A. § 24-2-2).

Testimony of 12 former child victims was properly admitted because the similar past transactions were sufficiently similar and showed the defendant's unique bent of mind; the similar transaction evidence included testimony about the defendant's sexual experiences with other underage victims, which were the same as those involved in the charged offenses. Ewell v. State, 318 Ga. App. 812, 734 S.E.2d 792, 2012 Ga. App. LEXIS 1005 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by allowing the state to introduce the evidence of a similar robbery to show the defendant's intent and modus operandi or course of conduct, which were legitimate purposes at the time of trial, because the state presented sufficient evidence that the defendant committed the other robbery, which involved robbing a restaurant night manager at closing time while concealing the face with clothing. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815, 2013 Ga. App. LEXIS 823 (2013).

In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense's theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested in that the defendant had admitted to being present but denied participating in the armed robbery. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899, 2015 Ga. App. LEXIS 219 (2015).

Trial court did not err in admitting other acts evidence as the other burglaries were factually similar to the charged offense as all three targeted convenience stores and entry was made by breaking the glass front door, the other acts occurred one day after the charged offense, and evidence recovered from the other burglaries connected those acts to the charged offense. York v. State, 334 Ga. App. 581, 780 S.E.2d 352, 2015 Ga. App. LEXIS 684 (2015).

Trial court did not err in finding that the similar transaction, in which the defendant jumped into a car, robbed a victim and drove off in their vehicle, was admissible to show the defendant's intent in robbing the victim in the instant case. McCoy v. State, 332 Ga. App. 626, 774 S.E.2d 179, 2015 Ga. App. LEXIS 370 (2015).

Trial court did not abuse the court's discretion in admitting prior act evidence in the form of testimony from two witnesses that the witnesses each purchased prescription pain pills from the defendant on numerous occasions as the testimony was relevant to the issue of the defendant's intent and the state was entitled to reject the defendant's offer to stipulate to the commission of the crime of possession of a controlled substance with intent to distribute. Hood v. State, 299 Ga. 95, 786 S.E.2d 648, 2016 Ga. LEXIS 389 (2016).

Trial court did not err in admitting evidence of the defendant's identity as a participant in a prior robbery as the incidents occurred within one month of each other, both involved the armed robbery of a purse of a Hispanic woman walking alone, the perpetrators wore dark clothing, used a small handgun, and used a white SUV, and the stolen purses were later found discarded on a roadway, allowing the trial court to find that the modus operandi for each robbery was sufficiently similar. Martin v. State, 340 Ga. App. 773, 798 S.E.2d 326, 2017 Ga. App. LEXIS 139 (2017).

Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes; the defendant's prior conviction for a similar burglary was also properly admitted and supported the conviction. Nations v. State, 345 Ga. App. 92, 812 S.E.2d 346, 2018 Ga. App. LEXIS 176 (2018).

Evidence of the defendant's prior guilty plea to six separate residential burglaries was admissible to show intent, absence of mistake, and motive, in a case that was sufficiently similar and any danger of unfair prejudice was mitigated by the trial court's limiting instruction. Harvey v. State, 344 Ga. App. 761, 811 S.E.2d 479, 2018 Ga. App. LEXIS 133 (2018), cert. denied, No. S18C0930, 2018 Ga. LEXIS 628 (Ga. Aug. 27, 2018).

Trial court did not err in admitting other acts evidence of the defendant's involvement in two armed robberies that led to the entry of guilty pleas to reduced charges of two counts of theft by taking because the evidence of the defendant's guilt aside from the other acts evidence was strong. Edwards v. State, 308 Ga. 176, 839 S.E.2d 599, 2020 Ga. LEXIS 126 (2020).

Trial court did not abuse the court's discretion by failing to exclude evidence of the defendant's prior convictions for forgery and theft by deception because, given the clear questions raised about the defendant's intent, the claim to the police that the defendant and the victim were involved in a drug-dealing scheme, and the fact that all the incidents involved efforts by the defendant to obtain funds through deceit, any unfair prejudice did not substantially outweigh the probative value of the other acts evidence. Austin v. State, 356 Ga. App. 839, 849 S.E.2d 689, 2020 Ga. App. LEXIS 539 (2020).

Trial court did not err in admitting the defendant's prior robbery convictions as other acts evidence because, while there was physical evidence implicating the defendant, there was no direct evidence identifying the defendant as the robber. Tariq-Madyun v. State, 361 Ga. App. 219, 863 S.E.2d 703, 2021 Ga. App. LEXIS 461 (2021).

Trial court did not err in admitting other transaction evidence regarding a burglary from 1990 because it was relevant to show defendant's intent, which was the central question for the jury. Hall v. State, 361 Ga. App. 568, 865 S.E.2d 183, 2021 Ga. App. LEXIS 515 (2021).

Similar transaction evidence was properly admitted under former O.C.G.A. § 24-2-2 to show that the defendant had committed a prior armed robbery of a retail establishment when the defendant was unable to support oneself and needed money. Johnson v. State, 277 Ga. App. 41, 625 S.E.2d 411, 2005 Ga. App. LEXIS 1252 (2005), cert. denied, No. S06C0778, 2006 Ga. LEXIS 386 (Ga. May 18, 2006) (decided under former O.C.G.A. § 24-2-2).

When defendant was accused of robbing an auto parts store, similar transaction evidence was properly admitted; the evidence showed defendant's participation in nine other armed robberies of retail establishments in the same metropolitan area over a seven-month period, including six robberies at five other auto parts stores. Wyche v. State, 291 Ga. App. 165, 661 S.E.2d 226, 2008 Ga. App. LEXIS 442 (2008), cert. denied, No. S08C1413, 2008 Ga. LEXIS 914 (Ga. Oct. 27, 2008), overruled in part, Harris v. State, 322 Ga. App. 87, 744 S.E.2d 82, 2013 Ga. App. LEXIS 458 (2013) (decided under former O.C.G.A. § 24-2-2).

Evidence of later crime inadmissible. — Because the state did not establish that the features of the charged crimes and the later crimes marked those crimes as the unique "signature" of the same perpetrator, the trial court abused the court's discretion by admitting evidence of those other acts to show a distinctive plan and identity. There was no reason to believe that the person who alone directly stole a sedan from a woman, assaulted a child, and kidnapped another child was the same person who by entirely unknown means, and possibly working with other persons, stole an SUV miles away more than two months earlier.

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Heard v. State, 309 Ga. 76, 844 S.E.2d 791, 2020 Ga. LEXIS 455 (2020).

Reversible error occurred by admitting character evidence. — Trial court committed reversible error by admitting character evidence and holding that the evidence was intrinsic to the alleged crimes of robbery as the defendant did not testify as to character and the character trait was not an essential element of a charge, claim, or defense; the text introduced a specific bad act, possible fraud, which was not allowed and the fact that the defendant may have attempted to defraud an apartment complex a week earlier did not arise out of the same transaction. Holt v. State, 352 Ga. App. 504, 835 S.E.2d 336, 2019 Ga. App. LEXIS 593 (2019).

Error in admitting evidence of the defendant's prior arrest for armed robbery was not harmless as the evidence against the defendant was not overwhelming because none of the people in the bank during the robbery identified the defendant as one of the robbers; and the only witness connecting the defendant to the robbery was an accomplice, whose testimony, standing alone, would not support the defendant's conviction as corroboration of the accomplice's testimony was required. Blackwell v. State, 351 Ga. App. 302, 830 S.E.2d 782, 2019 Ga. App. LEXIS 429 (2019).

In an action for burglary and theft by taking, the trial court erred in improperly admitting evidence of the defendant's two prior burglary convictions because they constituted impermissible character evidence, the probative value was minimal given that intent was not in dispute, and they were unduly prejudicial. Hewell v. State, 360 Ga. App. 81, 860 S.E.2d 608, 2021 Ga. App. LEXIS 309 (2021).

Prior arrest for armed robbery improperly admitted. — When the defendant was convicted of, inter alia, armed robbery, the trial court erred in allowing the state to present character evidence in the form of the defendant's prior arrest for armed robbery as the defendant's references to mentoring children did not open the door to rebuttal evidence from the state because neither the defendant's counsel nor the state questioned the defendant about the references or attempted to tie the defendant's mentoring to any character trait; and even if the references to being a mentor did open the door to rebuttal testimony, the evidence of the defendant's prior arrest for armed robbery was not tailored to rebut evidence of any pertinent character trait offered by the defendant's testimony. Blackwell v. State, 351 Ga. App. 302, 830 S.E.2d 782, 2019 Ga. App. LEXIS 429 (2019).

When the defendant was convicted of, inter alia, armed robbery, the trial court erred in allowing the state to present character evidence in the form of the defendant's prior arrest for armed robbery because defense counsel's cross-examination of an accomplice did not amount to an offer of evidence of a pertinent character trait as it was an attempt to establish that the accomplice was afraid of someone other than the defendant. Blackwell v. State, 351 Ga. App. 302, 830 S.E.2d 782, 2019 Ga. App. LEXIS 429 (2019).

Evidence of plan to commit separate robbery the same day was intrinsic to charged robbery. — In the defendant's robbery trial, evidence that the group had planned to execute another robbery the same day was intrinsic under O.C.G.A. § 24-4-404; it established the members of the group, confirmed the group's goal, and explained how the conspiracy had transformed into the robbery of the victims when they showed up flashing cash around. Because the evidence was intrinsic, it was not subject to the notice requirements of Rule 404(b). The evidence was not unduly prejudicial. Brown v. State, 350 Ga. App. 104, 828 S.E.2d 110, 2019 Ga. App. LEXIS 250 (2019).

Appeal by state permitted from pretrial exclusions. — In a robbery case, the state's direct appeal under O.C.G.A. § 5-7-1(a)(5) from an order excluding evidence of a similar robbery under O.C.G.A. § 24-4-404(b) was accepted because, although the trial court was not required to treat the state's pretrial notice of other crimes evidence as a motion under § 5-7-1(a)(5), the state complied with the provi-

sions of the statute. An order excluding intrinsic evidence was not appealable because the pretrial notice did not cover intrinsic evidence. State v. Battle, 344 Ga. App. 565, 812 S.E.2d 1, 2018 Ga. App. LEXIS 68 (2018).

Incident occurring eight years ago admitted. — Similar transaction evidence of an eight-year-old incident in which the defendant robbed two victims at gunpoint was not too remote in time or dissimilar to the armed robbery and aggravated assault charges the defendant was on trial for, and was thus properly admitted to show course of conduct, bent of mind, motive, and identity. Wallace v. State, 295 Ga. App. 452, 671 S.E.2d 911, 2009 Ga. App. LEXIS 7 (2009) (decided under former O.C.G.A. § 24-2-2).

Prior crimes properly admitted. — Prior crimes committed by defendant, including the murder of a store owner and an armed robbery, were properly admitted, not as similar transactions, but as evidence to show the motive, course of conduct, and bent of mind; moreover, evidence of the robbery was sufficiently similar to the current armed robbery charges. Grimes v. State, 280 Ga. 363, 628 S.E.2d 580, 2006 Ga. LEXIS 195 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting evidence from another burglary because the defendant pled not guilty to the burglary charges, thus making intent a material issue, and the defendant's actions in committing the other burglary and pawning the class ring involved the same mental state as burglarizing a house to obtain gold jewelry to sell for cash; thus, the evidence from the other burglary was relevant to establish intent. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

In an action for, inter alia, armed robbery, the trial court did not abuse the court's discretion by admitting evidence that the defendant previously pled guilty to an armed robbery because the state met the state's burden to show a permissible purpose for admitting the prior conviction, motive and intent, other than the defendant's character. Westbrook v. State, 355 Ga. App. 334, 844 S.E.2d 208, 2020 Ga. App. LEXIS 312 (2020).

Evidence of prior robberies improperly admitted to show identity. — Evidence of the defendant's prior robberies were improperly admitted for purposes of showing identity as the prior robberies were not so similar to the charged robbery offenses that the charged offenses had to have been the defendant's handiwork. Sloan v. State, 351 Ga. App. 199, 830 S.E.2d 571, 2019 Ga. App. LEXIS 425 (2019).

In an action for armed robbery, aggravated assault, and other crimes, the trial court erred when it admitted evidence of a second robbery, including the video and defendant's shoes, as more probative than prejudicial, as the prosecutorial need for the introduction of the video of the second robbery was minimal where the male victim repeatedly identified the defendant as the assailant. Allen v. State, 365 Ga. App. 599, 879 S.E.2d 666, 2022 Ga. App. LEXIS 476 (2022).

Prior crimes evidence should have been admitted. — After the defendant was charged with second-degree burglary, second-degree criminal damage to property, possession of tools for the commission of crime, and smash-and-grab burglary, the trial court erred in denying the state's motion to introduce the other-act evidence of a different second-degree burglary in the same county to which the defendant had pled guilty because the two burglaries at issue both occurred within three weeks of each other and used virtually identical tools, including crowbars and an orange concrete saw, as well as methods, including prying doors and breaking windows, to accomplish the objective of obtaining cash from an ATM after business hours. State v. Plaines, 345 Ga. App. 205, 812 S.E.2d 571, 2018 Ga. App. LEXIS 201 (2018), cert. denied, No. S18C0980, 2018 Ga. LEXIS 645 (Ga. Sept. 10, 2018).

Trial court did not err in granting the state's motion to present evidence of the armed robbery of a residence two days before the victim's murder because the evidence of the armed robbery was admissible to show the motive to commit the victim's murder as the defendant and the co-defendant were concerned that the victim would turn them into the police; evi-

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dence of motive was relevant even if the evidence incidentally placed the defendant's character in issue; there was sufficient proof that the defendant committed the prior armed robbery; and the trial court did not err in finding that the probative value of the evidence outweighed any prejudice from admission. Pike v. State, 302 Ga. 795, 809 S.E.2d 756, 2018 Ga. LEXIS 56 (2018).

Prior aborted attempt at robbery admissible. — Trial court did not err by allowing a witness to testify regarding the group's prior aborted attempt to rob the victim because the testimony was intrinsic evidence to the charged crimes. The earlier attempted robbery involved the same group of people, the same phone number, and the plot to rob the same deliveryman from the same Chinese food restaurant in the same neighborhood. Smith v. State, 350 Ga. App. 336, 829 S.E.2d 408, 2019 Ga. App. LEXIS 298 (2019).

Admission of prior guilty pleas proper. — Trial court did not abuse the court's discretion in admitting evidence of the defendant's two prior guilty pleas to armed robbery because the defendant's testimony that the victim pulled out the gun made intent a challenged element and, thus, the evidence was relevant. Jones v. State, 299 Ga. 377, 788 S.E.2d 477, 2016 Ga. LEXIS 454 (2016).

Evidence of gang membership improperly admitted. — Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. Lingo v. State, 329 Ga. App. 528, 765 S.E.2d 696, 2014 Ga. App. LEXIS 728 (2014).

Evidence improperly admitted to show opportunity. — Evidence of the defendant's prior robberies was improperly admitted for purposes of proving the defendant's opportunity to commit the charged robbery offenses because no special skills or abilities were used during the commission of the crimes; and the state presented no evidence showing where the defendant lived at the time of the prior armed robberies. Sloan v. State, 351 Ga. App. 199, 830 S.E.2d 571, 2019 Ga. App. LEXIS 425 (2019).

Act of armed robbery and "selfie" videos not similar. — State failed to show that the defendant's making of "selfie" videos in which the defendant talked about making money by various means, including armed robbery, amounted to any criminal act, let alone that it required the same or similar intent as the charged offense of armed robbery and, thus, the acts of making the videos and committing the armed robbery were not "similar acts" because they did not share the same intent. State v. Spriggs, 338 Ga. App. 655, 791 S.E.2d 440 (2016).

When extreme prejudice results. — Statement volunteered by police officer, witness for the state, on cross-examination, that the defendant was apprehended after being shot while attempting to break into another house, was so prejudicial that the mere statement by the court that the jury was not to consider it did not cure the error, and a reversal was demanded on this ground. Felton v. State, 93 Ga. App. 48, 90 S.E.2d 607, 1955 Ga. App. LEXIS 471 (1955) (decided under former Code 1933, § 38-202).

Res gestae. — Three robberies of drive-through restaurants located within a short distance of each other occurred in less than a 24-hour period and the suspect walked up to the drive-through window wearing a green army jacket and using a blue car, were sufficiently similar and constituted part of the res gestae; therefore, the trial court did not err in admitting the evidence. Houston v. State, 270 Ga. App.

456, 606 S.E.2d 883, 2004 Ga. App. LEXIS 1471 (2004) (decided under former O.C.G.A. § 24-2-2).

Logical connection between crimes. — When there is no question that the modus operandi of a past burglary for which defendant had been convicted is similar to that of the burglary for which the defendant is on trial, a logical connection exists between the two offenses sufficient to render the prior offense relevant and admissible for the purpose of establishing the defendant's criminal intent in the case for which defendant is on trial. Scott v. State, 162 Ga. App. 541, 292 S.E.2d 125, 1982 Ga. App. LEXIS 2215 (1982) (decided under former O.C.G.A. § 24-2-2).

Admission of evidence of a defendant's theft of another vehicle as similar transaction evidence to show course of conduct, intent, and identity was not an abuse of discretion since, as in the present case, the defendant stole the other car from a salesperson during a test drive with the use of a weapon and then forced the salesperson from the car next to a freeway exit ramp. Mullins v. State, 280 Ga. App. 689, 634 S.E.2d 850, 2006 Ga. App. LEXIS 929 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting evidence of other crimes defendant committed on the same day defendant robbed a convenience store as both of the similar crimes involved robberies of a female victim working alone at a convenience store on the same day, just as occurred with the indicted offense, and the clerks' descriptions of defendant's clothing and physical appearance in the similar crimes resembled those of defendant in the indicted offense; accordingly, sufficient circumstantial evidence connected defendant to the offenses and allowed for admission of the evidence of similar crimes. Ferguson v. State, 262 Ga. App. 28, 584 S.E.2d 618, 2003 Ga. App. LEXIS 658 (2003), cert. denied, No. S03C1592, 2003 Ga. LEXIS 908 (Ga. Oct. 20, 2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence of a first car-jacking to show bent of mind, course of conduct, and identity since: (1) both incidents constituted car-jackings committed with a gun pointed at the victim; (2) the incidents occurred within six days of each other; (3) the first car-jacking involved a car of the same make and color as one used in the car-jacking that was being tried; (4) the victim of the first car-jacking positively identified defendant as the perpetrator of the first car-jacking; and (5) the testimony of the victim of the first car-jacking was sufficient to meet the elements of O.C.G.A. § 16-5-44.1(b). Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340, 2004 Ga. App. LEXIS 663 (2004), cert. denied, No. S04C1634, 2004 Ga. LEXIS 680 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of three similar transaction offenses in defendant's trial for robbery, hijacking a motor vehicle, and possession of a firearm by a convicted felon since the earlier incidents were sufficiently similar to show that defendant had a course of conduct and bent of mind to steal cars, particularly in a certain area, because: (1) on two prior occasions defendant was discovered driving stolen cars and was convicted of theft by receiving; and (2) as to the third similar transaction, a witness testified that a man showed the witness a gun and demanded that the witness give him the keys to a car, defendant was subsequently arrested and identified by the witness, and defendant was indicted for armed robbery and entered a guilty plea to the offense of robbery. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415, 2004 Ga. App. LEXIS 830 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of independent crimes to show identity, bent of mind, and course of conduct because the independent crimes and the charged crimes showed that defendant committed the burglaries with accomplices, that the defendant committed the burglaries during daylight hours, that defendant and the accomplices would choose a home to burglarize by driving around semi-rural areas until they found a home that looked empty and that "sat back"

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some distance from the street on which it was located, and that defendant used the brother's white van to commit the charged crimes and one of the independent crimes. Denny v. State, 280 Ga. 81, 623 S.E.2d 483, 2005 Ga. LEXIS 867 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Evidence of defendant's three prior convictions was properly admitted in defendant's entering an automobile trial as: (1) certified copies of the convictions were introduced and defendant was placed at the scene of the prior crimes; (2) the prior offenses and the charged offenses all involved acts of entering an automobile during the early morning hours in downtown Savannah; (3) the crimes could be admitted to show bent of mind and course of conduct; and (4) the prejudicial impact of the similar transaction evidence did not outweigh the probative value. Williams v. State, 273 Ga. App. 213, 614 S.E.2d 834, 2005 Ga. App. LEXIS 453 (2005) (decided under former O.C.G.A. § 24-2-2).

Because the evidence of the four independent offenses that included car jackings and robberies were sufficiently similar to the charged crimes in the defendant's current case in that the offenses involved the use of a handgun to subdue the victims, cooperation between the defendant and the first co-defendant, the common motive of robbery, and luring the victims to the crime scenes where the victims were assaulted and robbed, the trial court did not err in admitting evidence of the four independent offenses at trial. Geiger v. State, 295 Ga. 648, 763 S.E.2d 453, 2014 Ga. LEXIS 708 (2014).

Evidence of conduct as corroboration may be circumstantial or direct in home invasion case. — Modus operandi evidence in the case was sufficient to corroborate a witness's testimony identifying the appellant as a participant in two additional home invasion crimes because the perpetrators were all Spanish speaking and conducted themselves the same way as to all four home invasions that occurred and each happened over the course of only three weeks and were committed within the same county. Cisneros v. State, 299 Ga. 841, 792 S.E.2d 326, 2016 Ga. LEXIS 656 (2016), cert. denied, 138 S. Ct. 63, 199 L. Ed. 2d 45, 2017 U.S. LEXIS 5262 (2017).

Evidence that defendant was on parole at the time of the crime was not inadmissible since the evidence showed defendant's motive for committing robbery and was material. Cook v. State, 221 Ga. App. 831, 472 S.E.2d 686 (decided under former O.C.G.A. § 24-2-2).

Crime spree evidence. — In the defendant's trial for murder and armed robbery, the trial court did not err in admitting evidence concerning two uncharged offenses against other victims because the evidence suggested that the defendant and the defendant's girlfriend engaged in a week-long crime spree and was part of the same series of transactions as the charged crimes. Mosley v. State, 307 Ga. 711, 838 S.E.2d 289, 2020 Ga. LEXIS 56 (2020).

Defendant's denial of alleged admission of other acts. — Testimony in rebuttal to testimony by defendant that defendant had never told anyone that defendant had robbed and raped some people and thrown guns out of a car window is admissible to impeach defendant's testimony in defendant's own behalf. Baker v. State, 161 Ga. App. 670, 288 S.E.2d 280, 1982 Ga. App. LEXIS 1977 (1982) (decided under former O.C.G.A. § 24-2-2).

Defendant's prior burglary conviction was properly admitted in defendant's burglary trial as: (1) defendant waived any claim that a prior conviction was insufficiently similar to the burglary as defendant did not raise the claim at the pretrial hearing and at trial; (2) defendant failed to preserve any objection to the introduction of the Alabama "Case Action Summary" based on a best evidence theory; and (3) defendant failed to show that the prior conviction was more prejudicial than probative. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829, 2005 Ga. App. LEXIS 607 (2005), overruled in part, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56, 2007 Ga. LEXIS 182 (2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808,

2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413, 2011 Ga. App. LEXIS 537 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of previous arrest for burglary admissible. — In a trial for burglary, the trial court properly admitted evidence of a prior burglary as evidence of intent and state of mind, even though the trial court failed to expressly balance the probative value of the evidence against the prejudicial impact; the evidence was not overly prejudicial as detailed limiting instructions were given when the evidence was admitted and at the close of the case. Clark v. State, 272 Ga. App. 89, 611 S.E.2d 741, 2005 Ga. App. LEXIS 222 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err when the court declined to exclude a witness's testimony that the defendant told the witness that the defendant wanted to go to a "shot house" so that the defendant could rob the house based on the defendant's objection that the statement was rendered inadmissible by the state's failure to follow the procedural rules appropriate to similar transaction evidence, former Ga. Unif. Super. Ct. R. 31.3, because the defendant's statement was neither a crime in and of itself nor a relevant expression of prior difficulties between the defendant and any of the victims of the crimes; an accused's statements were not independent offenses or acts unless those statements in and of themselves constituted a crime, but rather, statements such as the challenged words the witness repeated fell within the definition of character evidence, former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), which was irrelevant and had to be excluded unless admissible for some other legal purpose. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436, 2011 Ga. LEXIS 155 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of uncharged burglaries. — In the defendant's burglary trial, evidence of five uncharged burglaries was admissible because the uncharged and six charged burglaries were part of a two-week crime spree committed by a burglary crew of which the defendant was a part, even if the defendant did not directly participate in some; the uncharged crimes did not fall within O.C.G.A. § 24-4-404(b). Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494, 2016 Ga. App. LEXIS 42 (2016).

Error in admission of evidence was harmless. — Although the state conceded that the trial court erred in admitting evidence of an armed robbery and shooting defendant allegedly committed the day before the murder, reversal was not required because the error was harmless given the strong evidence against the defendant, including surveillance video which captured the shooter's face, profile, and distinctive car, and cell site location data from the defendant's phone placing the defendant near the restaurant during the victim's shift shortly before the shooting. Priester v. State, No. S23A0109, 2023 Ga. LEXIS 75 (Ga. Apr. 18, 2023).

Prosecutor's statement "in her place" that defendant committed the other crimes. — In a robbery case, the trial court erred by finding that the prosecutor's "in her place" proffer in support of a pretrial notice under O.C.G.A. § 24-4-404(b) seeking to admit evidence of another robbery committed by the defendant provided insufficient proof that the defendant committed the other acts, in the absence of objection by the defendant. State v. Battle, 344 Ga. App. 565, 812 S.E.2d 1, 2018 Ga. App. LEXIS 68 (2018).

Evidence of arrest following high speed chase properly admitted. — Trial court did not abuse the court's dis-

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cretion in allowing the evidence of the defendant's arrest following the high-speed chase because it was intrinsic as both necessary to complete the story of the crimes and inextricably intertwined with the evidence regarding the charged offenses since it established a connection between the defendant and the stolen gun used in the bank robbery and the probative value was not substantially outweighed by the danger of unfair prejudice under the circumstances. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162, 2019 Ga. App. LEXIS 494 (2019).

Evidence of prior shoplifting improperly admitted. — Trial court erred by admitting other acts evidence of a prior conviction for theft by shoplifting because the evidence showed nothing more than that the defendant had previously shoplifted from the same store and fell far short of demonstrating a "signature crime" accomplished through a modus operandi unique to the defendant. Gibson v. State, 363 Ga. App. 296, 870 S.E.2d 884, 2022 Ga. App. LEXIS 161 (2022).

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Proper admission of similar transaction evidence. — When, as part of trial strategy, the first defendant elected to introduce evidence of the first defendant's non-involvement in a prior drug sale and attempted to elicit testimony from a codefendant that the first defendant did not participate in the prior drug deal, but when the codefendant testified that the first defendant and the second defendant were the suppliers of the ounce of cocaine sold in that prior transaction, the trial court did not err in admitting evidence of the prior drug deal as a similar transaction because the first defendant could not complain on appeal about the deleterious results stemming from that defendant's own trial strategy. Lopez v. State, 267 Ga. App. 532, 601 S.E.2d 116, 2004 Ga. App. LEXIS 719 (2004) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence proper. See Ryan v. State, 277 Ga. App. 490, 627 S.E.2d 128, 2006 Ga. App. LEXIS 132 (2006) (drugs) (decided under former O.C.G.A. § 24-2-2).

When the defendant was charged with possessing methamphetamine, the trial court properly admitted as a similar transaction a prior conviction for possessing methamphetamine because both involved the defendant's possession of methamphetamine while involved in disorderly conduct. The defendant claimed that the scales on which the drug was found were in a car when the defendant bought it, and evidence of the similar transaction, when officers responding to a disorderly person call found methamphetamine in the defendant's pocket, was relevant to the defendant's intent and bent of mind to possess methamphetamine. Martin v. State, 291 Ga. App. 363, 662 S.E.2d 185, 2008 Ga. App. LEXIS 516 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence during the defendant's trial for possession of methamphetamine and possession of drug related objects because the subsequent incident involved possession of methamphetamine and possession of a glass pipe used to smoke methamphetamine. McGhee v. State, 303 Ga. App. 297, 692 S.E.2d 864, 2010 Ga. App. LEXIS 346 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct because at trial the defendant denied having any knowledge of the cocaine found in the defendant's vehicle or about the sale of cocaine to an informant; therefore, based on the similarity of the prior crimes with the offense at issue, including the similar hand-to-hand nature of the sale of the same drug, for the same price, at a similar time of day, in the same general area, there was no abuse of the trial court's discretion in admitting the evidence of prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343, 2010 Ga. App. LEXIS 1038 (2010) (decided under former O.C.G.A. § 24-2-2).

During defendant's trial for possession of methamphetamine and possession of marijuana, the trial court did not abuse the court's discretion in admitting evidence of the defendant's prior conviction on an obstruction charge because the trial court admitted the evidence for the purpose of showing the defendant's course of conduct only after conducting a hearing, which it was required to do, and the state satisfied the criteria delineated in former Rule 31.3 for the admission of similar-transaction evidence; even assuming that the similar-transaction evidence should have been excluded, any error in the evidence's admission was harmless because there was videotaped evidence that the defendant was driving an obviously stolen vehicle, that the defendant fled from officers who attempted to conduct a traffic stop, that the defendant continued to lead the officers on a chase even after the defendant's tires had been flattened, that the defendant ultimately exited the vehicle and ran on foot, and that methamphetamine and marijuana not belonging to the owner were found inside the vehicle in which the defendant was the sole occupant. Mangum v. State, 308 Ga. App. 84, 706 S.E.2d 612, 2011 Ga. App. LEXIS 124 (2011) (decided under former O.C.G.A. § 24-2-2 and former Ga. Unif. Super. Ct. R. 31.3(B)).

Trial court did not abuse the court's discretion in admitting similar transaction evidence because both the prior incident and the incident for which the defendant was convicted involved the possession of cocaine since the prior possession was for the purpose of distribution, inasmuch as the evidence showed that the defendant did, in fact, distribute cocaine on that occasion, and the possession for which the defendant was convicted was for an unknown purpose and not clearly for personal use; one incident involved possession and sale of less than one gram of cocaine, the other involved possession of less than two grams of cocaine, and both incidents occurred in the county within a span of two weeks. Gaudlock v. State, 310 Ga. App. 149, 713 S.E.2d 399, 2011 Ga. App. LEXIS 453 (2011), cert. denied, No. S11C1610, 2011 Ga. LEXIS 851 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-2-2).

Drug evidence admissible. Defendant failed to establish that the trial court abused the court's discretion by admitting evidence of the defendant's 2001 conviction for possessing cocaine with the intent to distribute because the defendant placed the defendant's intent in issue by pleading not guilty to the charges of trafficking in cocaine and possessing cocaine with the intent to distribute; the defendant did nothing to remove intent as an issue as the defendant told law enforcement that the defendant did not live in the house throughout which the drugs and drug-distribution paraphernalia were found; and the prior conviction was relevant as the defendant's participation in the earlier crime required the same intent as the charged crimes. Gunn v. State, 342 Ga. App. 615, 804 S.E.2d 118, 2017 Ga. App. LEXIS 359 (2017), cert. denied, No. S18C0166, 2018 Ga. LEXIS 217 (Ga. Apr. 16, 2018).

Since the jury was required to consider whether the defendant had the ability to introduce a substance into a victim's drink that was capable of incapacitating the victim without being detected, the other acts evidence, testimony of witnesses who described incidents where the witnesses drank alcohol provided by the defendant and then felt disoriented and fuzzy and one woke up on the defendant's bed partially unclothed and the other with the defendant performing oral sex, was relevant to show that the defendant possessed such a distinctive ability. Jones v. State, 354 Ga. App. 568, 841 S.E.2d 112, 2020 Ga. App. LEXIS 197 (2020).

Trial court did not abuse the court's discretion when the court admitted evidence pertaining to two other robberies into evidence at trial because the two prior robberies were similar to the charged armed robbery in that both robberies involved the defendant entering a gas station and demanding money from the cashiers at gunpoint and the prior robberies were committed in a neighboring county within three days of the armed robbery in the instant case. Broadwater v. State, 359 Ga. App. 87, 854 S.E.2d 767, 2021 Ga. App. LEXIS 72 (2021).

Similar transaction notice was sufficient. — Trial court committed no error in allowing the introduction of similar

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transaction evidence because the trial court was authorized to conclude that the defendant received adequate notice of the similar transactions prior to trial and was not prejudiced by the state's failure to attach the accusation and guilty plea to the state's notice; the prosecutor informed the trial court that since the defendant's counsel entered the case, the prosecutor had a number of discussions with counsel about the defendant's prior drug conviction as part of plea negotiations, and the similar transaction notice the state filed included information identifying the similar transaction, including the date of occurrence, the county in which the crime occurred, the case number, and the date of the guilty plea, as well as a list of potential witnesses who had been involved in the case and their contact information. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841, 2010 Ga. App. LEXIS 807 (2010) (decided under former O.C.G.A. § 24-2-2 and former Ga. Unif. Super. Ct. R. 31.3(B)).

Victim's alleged involvement in the drug trade, without more, was insufficient to permit admission of that evidence to show that the victim was likely to be armed. Wilson v. State, 302 Ga. 106, 805 S.E.2d 98, 2017 Ga. LEXIS 776 (2017).

Evidence of defendant's drug use. — Evidence that defendant's urine sample taken after killing had tested positive for marijuana was relevant and admissible as part of res gestae to show the influence of drugs on defendant's state of mind at the time of the killing. Giddens v. State, 206 Ga. App. 409, 425 S.E.2d 299, 1992 Ga. App. LEXIS 1653 (1992) (decided under former O.C.G.A. § 24-2-2).

Witnesses' brief testimony that the defendant would sell cocaine to the witnesses because of a prior relationship, was necessary to explain why the witnesses were approached to make the purchase, and why neither an undercover officer nor a confidential informant could accompany one of the witnesses to the defendant's residence, and the trial court did not abuse the court's discretion in admitting the testimony. Smith v. State, 278 Ga. App. 315, 628 S.E.2d 722, 2006 Ga. App. LEXIS 321 (2006), cert. denied, No. S06C1314, 2006 Ga. LEXIS 687 (Ga. Sept. 12, 2006) (decided under former O.C.G.A. § 24-2-2).

In a drug case when cocaine, marijuana, and a scale were found in the car the defendant was driving, and the defendant gave police a false name, the trial court did not err in admitting evidence of similar transactions; in all of the transactions, the defendant either possessed cocaine or was in direct proximity to cocaine, the defendant possessed scales in two of the other offenses, and in all but one of the offenses the defendant gave the police a false name. Jackson v. State, 284 Ga. App. 619, 644 S.E.2d 491, 2007 Ga. App. LEXIS 376 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. June 25, 2007), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for two counts of possession of less than one ounce of marijuana, evidence of the defendant's three prior convictions for the same offense was properly admitted. Given that the defendant denied possessing marijuana in two of the prior cases and in the case at bar, the prior transactions were probative of the defendant's bent of mind and course of conduct. Neal v. State, 297 Ga. App. 223, 676 S.E.2d 864, 2009 Ga. App. LEXIS 414 (2009) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence in a case charging the defendant with possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and obstructing or hindering law enforcement officers, O.C.G.A. § 16-10-24, was proper because, in both the similar transaction and the incident leading to the charges being tried, the defendant was arrested in possession of cocaine and "sale-sized" baggies after seeking to avoid police; the trial court also gave an instruction that the similar transaction evidence was limited to the purpose of showing the defendant's bent of mind in committing the charged offenses. Cotton v. State, 297 Ga. App. 664, 678 S.E.2d 128, 2009 Ga. App. LEXIS 515 (2009) (decided under former O.C.G.A. § 24-2-2).

Although the evidence was sufficient to support the defendant's convictions for vehicular homicide under O.C.G.A. § 40-6-391(b), the court's admission of similar-transaction evidence, consisting of a prior methamphetamine conviction, was erroneous as irrelevant character evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. § 24-4-404), and the conviction was reversed. McMullen v. State, 316 Ga. App. 684, 730 S.E.2d 151, 2012 Ga. App. LEXIS 632 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by denying the appellant's pretrial motion to exclude evidence of the purchase and use of marijuana because the evidence was intrinsic since the evidence explained who an individual was and why the appellant believed that the victim would have cash to steal; thus, the drug evidence was necessary to complete the story of the crime for the jury. McCammon v. State, 306 Ga. 516, 832 S.E.2d 396, 2019 Ga. LEXIS 505 (2019).

Any testimony by a witness that the defendant sold the witness drugs or that the defendant used drugs was cumulative of the defendant's own testimony that the defendant sold and used drugs, and thus provided no basis for reversal. Fincher v. State, 363 Ga. App. 439, 870 S.E.2d 833, 2022 Ga. App. LEXIS 147 (2022).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — In a marijuana possession case involving a stop of a car in which the defendant was a passenger, the trial court did not err under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in permitting evidence that the defendant was previously stopped for speeding and a significant amount of marijuana was found in the car; since the defendant's constructive possession was at issue, the state was permitted to use the prior offense to show the defendant's intent, bent of mind, and course of conduct, the incidents occurred approximately a year apart and involved similar conduct, and the probative value of the evidence was not outweighed by any unfair prejudice that resulted. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773, 2006 Ga. App. LEXIS 1301 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest is admissible. — Testimony that an officer had gone to defendant's home to execute an arrest warrant for a probation violation explained the officer's presence at defendant's home and the officer's observation of defendant's use of marijuana; the testimony did not put defendant's character in issue and was, therefore, admissible. Jones v. State, 268 Ga. App. 246, 601 S.E.2d 763, 2004 Ga. App. LEXIS 897 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not ineffective for failing to object to a witnesses reference to marijuana because any challenge to the testimony would have failed; even if the testimony incidentally placed the defendant's character in issue, all circumstances with an accused's arrest were admissible if the circumstances were shown to be relevant, and that was so even if the evidence incidentally put the accused's character in issue. Odom v. State, 304 Ga. App. 615, 697 S.E.2d 289, 2010 Ga. App. LEXIS 579 (2010), cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. Nov. 22, 2010) (decided under former O.C.G.A. § 24-2-2).

Mere accusation or indictment insufficient. — Mere introduction of an accusation with pleas of guilty thereon, embracing the same crime for which defendant is on trial, without proof of details as to the manner in which previous acts were committed, does not constitute similarity of transactions so connected as to reveal knowledge, plan, or system, and therefore the court erred in admitting, over objections, the former accusation and plea of guilty of defendant, charged with possession of non-taxpaid whiskey, to a previous charge of the same offense. Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724, 1947 Ga. App. LEXIS 430 (1947) (decided under former Code 1933, § 38-202); Waters v. State, 82 Ga. App. 608, 61 S.E.2d 794, 1950 Ga. App. LEXIS

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1172 (1950) (decided under former Code 1933, § 38-202).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err when the court admitted evidence of defendant's prior conviction for possession of cocaine with intent to distribute in defendant's current case in which defendant was charged with, inter alia, trafficking in cocaine as the evidence was admitted for the permissible purpose of showing defendant's bent of mind and course of conduct. Kates v. State, 271 Ga. App. 326, 609 S.E.2d 710, 2005 Ga. App. LEXIS 35 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — There was a sufficient connection between an earlier drug crime and the one at issue to support the admission of similar transaction evidence. In both instances defendant's vehicle was stopped on or near a certain interstate highway for driving in an unlawful manner, and upon each stop defendant consented to a search of defendant's vehicle and the search yielded cocaine; there was no doubt that defendant committed the prior act, as defendant confessed to it. Buckholts v. State, 283 Ga. App. 254, 641 S.E.2d 246, 2007 Ga. App. LEXIS 25 (2007) (decided under former O.C.G.A. § 24-2-2).

When the defendant was convicted of armed robbery and possession of a firearm during the commission of a felony, the trial court did not err in admitting evidence of the 2005 robbery charge as similar transaction evidence under the former evidence code because the evidence was admissible for the state's requested purposes of showing course of conduct and bent of mind; and because the evidence was sufficient to show that the defendant was one of the perpetrators in the 2005 offense as the defendant was arrested shortly thereafter in possession of a gun and the victim's belongings after initially fleeing from police. Demps v. State, 337 Ga. App. 657, 788 S.E.2d 525, 2016 Ga. App. LEXIS 382 (2016).

Evidence that defendant had previously transported marijuana. — Evidence that marijuana was found in the trunk of defendant's automobile supported the inference that the defendant had previously transported marijuana and was relevant to prove that defendant was predisposed to commit the crime for which the defendant was indicted and to which the defendant raised the defense of entrapment, so that the evidence was sufficient to withstand a relevancy objection. Fancher v. State, 190 Ga. App. 438, 378 S.E.2d 923, 1989 Ga. App. LEXIS 272 (1989) (decided under former O.C.G.A. § 24-2-2).

Conduct by family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of defendant's family had "been in trouble for marijuana." Hill v. State, 176 Ga. App. 509, 336 S.E.2d 276, 1985 Ga. App. LEXIS 2316 (1985) (decided under former O.C.G.A. § 24-2-2).

Nonconvicted prior drug transactions admissible. — Evidence of prior drug transactions for which defendant was not arrested but in which defendant used a beeper to contact the arrestee and defendant's car to transport the arrestee was relevant to show defendant's participation for distribution of cocaine. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181, 1992 Ga. App. LEXIS 1723 (1992) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting the evidence as the state offered the evidence to show defendant's bent of mind or course of conduct, specifically, to show defendant's conduct in possessing small amounts of cocaine and when caught, denying that the cocaine belonged to defendant; the facts in the two instances were sufficiently similar to allow the introduction of the prior conviction into evidence and that the probative value of the evidence outweighed any prejudicial value. Kidd v. State, 277 Ga. App. 29, 625 S.E.2d 440, 2005 Ga. App. LEXIS 1327 (2005), cert. denied, No. S06C0811, 2006 Ga. LEXIS 443 (Ga. June 12, 2006) (decided under former O.C.G.A. § 24-2-2).

Presence of marijuana and gun not sufficient enough to be admissible. — Trial court erred in admitting evidence surrounding the defendant's prior arrest

and subsequent guilty plea to possession of marijuana and carrying a concealed weapon because the only similarity in each transaction was that the defendant was in a vehicle in which marijuana and a gun were present. In addition, there was insufficient similarity between the independent offense and the crime charged so that proof of the former tended to prove the latter. Talifero v. State, 319 Ga. App. 65, 734 S.E.2d 61, 2012 Ga. App. LEXIS 915 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence too attenuated to be intrinsic. — Defendant's conviction on one count of trafficking in cocaine was reversed because the trial court abused the court's discretion in admitting the evidence of the United States Drug Enforcement Administration (DEA) investigation as intrinsic evidence of the charged trafficking offense since the state failed to sufficiently link the DEA evidence to the events immediately surrounding the defendant's arrest as it was too attenuated in time and space from the events leading up to the charged offense. Sanchez-Villa v. State, 341 Ga. App. 264, 799 S.E.2d 364, 2017 Ga. App. LEXIS 178 (2017), cert. denied, No. S17C1576, 2017 Ga. LEXIS 746 (Ga. Aug. 28, 2017).

Intrinsic evidence admissible. — Although the defendant's character might have been incidentally placed into evidence, the trial court did not abuse the court's discretion in admitting portions of the defendant's statement at issue as intrinsic evidence because the defendant used the defendant's consumption of drugs to explain the defendant's condition on the night of the murder to excuse the defendant's partial lack of recollection, and to deny the defendant's involvement in the shooting; and the portions of the defendant's initial statement to police that admitted the defendant's illicit drug use were inextricably intertwined with the evidence regarding the charged offenses, and were relevant to the defendant's justification defense. Smith v. State, 302 Ga. 717, 808 S.E.2d 661, 2017 Ga. LEXIS 977 (2017).

Admission of babysitter's testimony, who was also the defendant's live in girlfriend, was inextricably intertwined with the charged offenses of child molestation and was admissible as intrinsic evidence. Espinosa v. State, 352 Ga. App. 698, 834 S.E.2d 558, 2019 Ga. App. LEXIS 652 (2019).

Defendant's counsel was not ineffective for failing to object to evidence of other criminal acts as the statements that the defendant made to the narcotics investigator were admissible as intrinsic evidence because the statements explained why the first defendant was transporting drugs and what led the defendant to be passing through the county with a trunk full of methamphetamine and were no doubt intended to convince the police that the defendant did not normally transport drugs and to minimize the defendant's involvement in the drug trade. Hill v. State, 351 Ga. App. 58, 830 S.E.2d 478, 2019 Ga. App. LEXIS 391 (2019).

In a case in which the defendant was convicted of aggravated assault and aggravated battery, trial counsel was not ineffective in failing to object to bad character and bolstering evidence, specifically with respect to testimony from the victim and the defendant's father regarding the parking lot incident because the evidence regarding the parking lot incident was intrinsic to the offense; and the defendant could not show prejudice, as testimony regarding the parking lot incident from the victim and the defendant's father was cumulative of already admitted testimony from the victim's daughter, and, when the defendant testified in the defendant's own defense, the defendant testified to the parking lot incident as well. Smith v. State, 362 Ga. App. 610, 869 S.E.2d 554, 2022 Ga. App. LEXIS 70 (2022).

Trial court did not err by admitting evidence of the defendant's bad character from the two victims the defendant locked inside the bedroom as the intrinsic evidence that the defendant provided one of the victims with drugs was needed to explain why that victim would stay with a man who treated that victim that way. Fincher v. State, 363 Ga. App. 439, 870 S.E.2d 833, 2022 Ga. App. LEXIS 147 (2022).

Facts underlying prior drug conviction inadmissible. — Trial court erred in admitting evidence of the facts

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underlying a prior conviction for possession with intent to distribute marijuana and possession of a firearm during the commission of a crime because, inter alia, the defendant's knowledge was not at issue, and the danger of unfair prejudice under O.C.G.A. § 24-4-403, was significant when the only direct evidence of guilt came from the testimony of a single witness. Wright v. State, 362 Ga. App. 867, 870 S.E.2d 484, 2022 Ga. App. LEXIS 112 (2022).

Trial court failed to make findings of proper purpose and similarity. — Defendant's conviction for possession of cocaine, O.C.G.A. § 16-13-30(a), was reversed because the trial court did determine under former Ga. Unif. Super. Ct. R. 31.3(B) (now O.C.G.A. § 24-4-404(b)) whether the state possessed a proper purpose for admission of similar transaction evidence, or whether the two offenses were sufficiently connected or similar; the error was not harmless because the state could not establish that the defendant had actual possession of the cocaine found in the defendant's girlfriend's vehicle. McCrory v. State, 341 Ga. App. 174, 798 S.E.2d 385, 2017 Ga. App. LEXIS 166 (2017).

d. Miscellaneous Crimes

Admission of similar transaction evidence proper. — In a forgery case, the trial court properly admitted similar transaction evidence of a prior forgery conviction. The trial court admitted the similar transaction evidence to show the defendant's identity and course of conduct, which were proper purposes; furthermore, in both cases, the defendant cashed or tried to cash bogus checks issued to the defendant and endorsed by the defendant at a check-cashing location other than at the bank where the checks were purportedly drawn. Beck v. State, 291 Ga. App. 702, 662 S.E.2d 798, 2008 Ga. App. LEXIS 614 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by allowing evidence that the defendant actually infected a similar transaction witness with HIV as the similar transaction witness's testimony about the witness's HIV status before and after having sexual relations with the defendant, as well as medical testimony verifying the witness's negative status, allowed the jury to find that the defendant transmitted HIV to the witness. Davis v. State, 342 Ga. App. 889, 806 S.E.2d 3, 2017 Ga. App. LEXIS 429 (2017).

Admission of evidence harmless. — Even if the trial court erred in permitting the state to introduce evidence that child pornography had been found on the defendant's computer in an action for child molestation, the error was harmless given the strength of the evidence of the defendant's guilt, including the victim's identification of the defendant and semen stains on the victim's bedding matching the defendant's DNA. Hahn v. State, 356 Ga. App. 79, 846 S.E.2d 258, 2020 Ga. App. LEXIS 413 (2020), cert. denied, No. S20C1540, 2021 Ga. LEXIS 176 (Ga. Mar. 15, 2021), cert. denied, 142 S. Ct. 287, 211 L. Ed. 2d 133, 2021 U.S. LEXIS 4377 (2021).

Incident involving same victim was not a similar transaction. — During defendant's trial for aggravated stalking, the state was permitted to introduce evidence showing that the defendant violated a bond condition by accosting the victim at a department store. The encounter at the store was not a similar transaction just because the encounter involved the same victim; the state gave the defendant notice of the state's intent to submit the evidence, and gave a limiting instruction before the evidence was introduced. Reed v. State, 309 Ga. App. 183, 709 S.E.2d 847, 2011 Ga. App. LEXIS 252 (2011), cert. denied, No. S11C1271, 2011 Ga. LEXIS 686 (Ga. Sept. 12, 2011) (decided under former O.C.G.A. § 24-2-2).

State of feeling between defendant and victim. — On a trial of an indictment for arson, it is not error to admit evidence showing that feelings of anger or dislike existed on the part of the defendant toward the owner of the property. 113 Ga. App. 436, 148 S.E.2d 333 (decided under former Code 1933, § 38-202).

Prior use of a firearm. — Defendant's prior offense of the unprovoked use of a firearm to threaten a driver who disagreed with defendant's taking of a park-

ing space was admissible because the offense showed defendant's propensity to settle disagreements with a gun, to act violently and impulsively to disappointment or misunderstanding, and to resort to the use of a gun with little provocation. Davis v. State, 244 Ga. App. 708, 536 S.E.2d 596, 2000 Ga. App. LEXIS 832 (2000), cert. denied, No. S00C1789, 2000 Ga. LEXIS 741 (Ga. Oct. 6, 2000) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — When a defendant was charged with violating O.C.G.A. § 16-8-60(b), the admission of similar crimes evidence did not violate due process; evidence that following the defendant's arrest on the Georgia charge, the defendant had been arrested in Florida for possession of illegally reproduced recordings was appropriate for showing scheme and course of conduct, and the Florida act was sufficiently similar to the Georgia charges. Hayward-El v. State, 284 Ga. App. 125, 643 S.E.2d 242, 2007 Ga. App. LEXIS 138 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial for escape. — General rule which prohibits reference to other crimes by the accused is not fully applicable to a trial for escape, which by its nature alludes to a prior act resulting in incarceration or conviction; evidence of the escapee's original crime is often an unavoidable aspect of the state's proof with regard to the lawfulness of confinement. Johnson v. State, 188 Ga. 771, 4 S.E.2d 639, 1939 Ga. LEXIS 605 (1939) (decided under former Code 1933, § 38-202); Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417, 1980 Ga. App. LEXIS 2810 (1980) (decided under former Code 1933, § 38-202).

In trial for escape and other offenses, it was not error to introduce record of prior conviction to show lawfulness of confinement without a limiting instruction. Greene v. State, 155 Ga. App. 222, 270 S.E.2d 386, 1980 Ga. App. LEXIS 2535 (1980) (decided under former Code 1933, § 38-202).

Conviction relied upon must have occurred prior to the escape. — When a conviction does not occur prior to the escape and thus is not relied upon to establish the felony grade of offense, reference to the conviction is unnecessary and is error. Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417, 1980 Ga. App. LEXIS 2810 (1980) (decided under former Code 1933, § 38-202).

Logical connection between crimes. — In defendant's trial for forgery and racketeering for selling fake badges for a golf tournament to a ticket agency, the trial court did not abuse the court's discretion in admitting similar transaction evidence because all of the similar transactions were used, not to show identity, but to show bent of mind and course of conduct as: (1) four of the five transactions involved forgeries through which defendant appropriated the checks of other people and attempted to profit from those checks and at issue was whether defendant attempted to profit from badges that were constructed to resemble those created by a golf course; and (2) the final transaction even involved a scheme wherein defendant represented to potential buyers that defendant had golf tournament badges to sell to them, which defendant never delivered. With respect to the similarity requirement for admitting evidence of prior crimes, there can be substantial variation of circumstances when there exists a logical connection between crimes which are essentially dissimilar, and the issue is whether the extrinsic transactions are relevant to the issues in the trial of the case. When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity. Davis v. State, 264 Ga. App. 128, 589 S.E.2d 700, 2003 Ga. App. LEXIS 1414 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in ruling that similar transaction evidence was admissible because the ex-wife's testimony closely paralleled that of the victim, defendant's ex-girlfriend; in both cases defendant violated a restraining order, called the victim names, picked on bodily faults, and threatened both the victim and the victim's children. Maskivish v. State, 276 Ga. App. 701, 624 S.E.2d 160, 2005 Ga.

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App. LEXIS 1206 (2005) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Prejudicial impact of prior crimes evidence did not outweigh the probative value in defendant's fleeing or attempting to elude a police officer trial as the prior crimes evidence showed a pattern of running from police and of resisting arrest and was properly admitted to show course of conduct, bent of mind, and intent. Mills v. State, 273 Ga. App. 699, 615 S.E.2d 824, 2005 Ga. App. LEXIS 603 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — In a trial for driving with a suspended license, the trial court did not improperly admit evidence of seven similar transactions; the similar transactions occurred in the same area and most at about the same time of day as the charged crime, two involved the same car, and all showed the defendant's bent of mind to drive with a suspended license. Williams v. State, 285 Ga. App. 190, 645 S.E.2d 676, 2007 Ga. App. LEXIS 472 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of prior bad acts because, as to both the victim and the other act students, the defendant used the defendant's position of authority as a band director to prey on the girls under the defendant's supervision through suggestive acts and sexual banter, and inappropriate touching, which the defendant intended to entice the girls into indecent or sexual acts arousing their sexual desires or the defendant's sexual desires. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740, 2017 Ga. App. LEXIS 527 (2017), cert. denied, No. S18C0502, 2018 Ga. LEXIS 371 (Ga. May 21, 2018), overruled in part, McElrath v. State, 308 Ga. 104, 839 S.E.2d 573, 2020 Ga. LEXIS 127 (2020).

Testimony of victim describing the telephone calls the victim received from defendant over a period of time and defendant's aborted visit the same month as the crime on trial was evidence of defendant's bent of mind and tended to show that as well as motive, intent, plan, identity, and/or course of conduct. Watson v. State, 180 Ga. App. 82, 348 S.E.2d 557, 1986 Ga. App. LEXIS 2061 (1986) (decided under former O.C.G.A. § 24-2-2).

Perverted behavior evidence inadmissible. — Trial court did not abuse the court's discretion by excluding other acts evidence involving the defendant having exposed oneself to a female customer inside the same store from which the defendant had offered the victim a ride home because undue prejudice might have resulted from the admission of the other acts evidence and created a likelihood that the jury might convict the defendant because of the other perverted behavior. State v. Isham, 348 Ga. App. 356, 823 S.E.2d 47, 2019 Ga. App. LEXIS 9 (2019).

Uncharged anal sodomy not admissible. — Trial court erred in admitting evidence of uncharged anal sodomy as evidence of a continuing course of conduct and the appellate court erred in finding that it was otherwise admissible under O.C.G.A. § 24-4-404(b). State v. Parks, 350 Ga. App. 799, 830 S.E.2d 284, 2019 Ga. App. LEXIS 378 (2019), overruled in part, State v. Hill, 361 Ga. App. 230, 863 S.E.2d 699, 2021 Ga. App. LEXIS 460 (2021).

No mistrial when defendant declines cautionary instructions. — Acts of cruelty to children by the defendant have no relevance whatsoever to the issues in a trial for arson. However, when the defendant expressly declined the trial court's offer to give cautionary instructions to the jury and stated that defendant would stand on defendant's motion for mistrial, it cannot be said that, as a matter of law, the giving of cautionary instructions would have been inadequate so that a mistrial was demanded. Kuchenmeister v. State, 199 Ga. App. 64, 403 S.E.2d 847, 1991 Ga. App. LEXIS 373 (1991), cert. denied, No. S91C0967, 1991 Ga. LEXIS 733 (Ga. May 22, 1991) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was admissible. — Evidence of other transactions was admissible when, as in the charged crime, in the other transactions defendant misrepresented to homeowners how quickly defendant could

begin work and how many laborers defendant would commit to the project, in each transaction, defendant barely started work before abandoning the project, and in each case, defendant avoided customers' inquiries and failed to refund the unearned down payments. Smith v. State, 265 Ga. App. 57, 592 S.E.2d 871, 2004 Ga. App. LEXIS 10 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in sentencing the defendant to a $1,000 fine for speeding in violation of O.C.G.A. § 40-6-181(b)(2) because the defendant did not object to the state's failure to admit certified copies of the defendant's prior convictions, nor did the defendant dispute that the defendant had multiple convictions for traffic violations; when the trial court asked the defendant whether any of the defendant's previous violations occurred while the defendant was operating a motorcycle, the defendant implicitly admitted at least one prior conviction for speeding. Jones v. State, 308 Ga. App. 99, 706 S.E.2d 593, 2011 Ga. App. LEXIS 130 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible in sexual crime. — Even if the trial court erred in admitting evidence of the defendant's other acts, the error was not prejudicial under O.C.G.A. § 24-4-403 as it was harmless given the overwhelming evidence of the defendant's guilt, including the victim's testimony, the testimony of the defendant's roommate that the roommate saw the victim performing oral sex on the defendant and that the victim looked scared, and the recording of a call between the defendant and the defendant's roommate in which they were attempting to cover up the incident. Edmonson v. State, 336 Ga. App. 621, 785 S.E.2d 563, 2016 Ga. App. LEXIS 165 (2016).

Trial court did not err by denying the defendant's request for a continuance after allowing the state to present evidence of prior bad acts, specifically the defendant's relationship with the victim's mother that began when the victim was 14 years old, because the state moved to allow such evidence prior to trial and, thus, there was no surprise to the defendant. Aguilar v. State, 340 Ga. App. 522, 798 S.E.2d 60, 2017 Ga. App. LEXIS 94 (2017).

During the defendant's trial for cruelty to a child, the trial court abused the court's discretion by admitting the defendant's wife's testimony that the wife observed the defendant molesting their two-year-old daughter a day or two after the incident giving rise to the instant charge because the acts were not similar and involved different children, the wife's testimony was not probative of whether the defendant committed the charged crime, and the evidence was extremely prejudicial. The error was not harmless because the defendant denied the charge at trial and the jury acquitted the defendant of family violence battery against the wife despite the wife's testimony. Maqrouf v. State, 349 Ga. App. 174, 825 S.E.2d 569, 2019 Ga. App. LEXIS 134 (2019), overruled in part, Flowers v. State, 307 Ga. 618, 837 S.E.2d 824, 2020 Ga. LEXIS 8 (2020).

Because the defendant was on trial for rape, the defendant's prior instances of rape, sexual battery, and aggravated assault with intent to rape were properly before the jury under O.C.G.A. § 24-4-413 and, as the evidence was admissible under Rule 413, the challenge to the evidence under O.C.G.A. § 24-4-404(b) failed. Riley v. State, 356 Ga. App. 606, 848 S.E.2d 474, 2020 Ga. App. LEXIS 496 (2020).

When the defendant was charged with computer pornography and attempted child molestation, the trial court erred by relying solely upon the defendant's Wisconsin nolo contendere plea to possession of child pornography as a prior bad act because it did not require the state to present evidence of the prior act by testimony or otherwise. Yeamans v. State, 366 Ga. App. 780, 884 S.E.2d 380, 2023 Ga. App. LEXIS 80 (2023).

Evidence of defendant making victim participate in online sexual performance. — Trial court did not err in denying the defendant's motion in limine to exclude evidence that the defendant made the victim participate in online sexual performances because the evidence was relevant to the defendant's intent, identity, and propensity to commit the crimes against the victim and the probative value of the evidence was great because the evidence provided a narrative of

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how the victim's abuse began, how the grooming process began, and why the victim delayed disclosure. Hamby v. State, 358 Ga. App. 105, 853 S.E.2d 874, 2021 Ga. App. LEXIS 11 (2021).

Evidence of prior conviction of bribery. — Admission of an owner's conviction for bribery was harmless error because, although the conviction was irrelevant to claims against a contractor, there was no prejudice demonstrated. Greene v. Bryant, 277 Ga. App. 201, 626 S.E.2d 185, 2006 Ga. App. LEXIS 35 (2006) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior conviction for DUI. — Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior DUI conviction as it was relevant for the limited purpose of establishing the defendant's intent and knowledge in the charged crimes of DUI per se and DUI less safe in that a jury could have inferred from the defendant's intent to drive while under the influence on a prior occasion that the defendant possessed the requisite intent on the subject occasion. State v. Jones, 297 Ga. 156, 773 S.E.2d 170, 2015 Ga. LEXIS 349 (2015).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because it was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414, 2016 Ga. App. LEXIS 547 (2016).

Trial court did not err in admitting the defendant's prior driving under the influence (DUI) conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that the defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245, 2017 Ga. App. LEXIS 68 (2017), cert. denied, No. S17C1278, 2017 Ga. LEXIS 678 (Ga. Aug. 14, 2017).

In a driving under the influence (DUI) per se case, the defendant's prior DUI conviction was improperly admitted to show intent as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the jury could infer intent from the defendant's act of driving after admittedly consuming alcohol without considering the prior DUI, and there was a danger of interjecting unfair prejudice at trial; however, admission of that evidence was harmless as the direct evidence of the defendant's guilt for the DUI-per se charge was overwhelming as the defendant admitted to consuming alcohol, and the breath tests showed the defendant's blood alcohol content was substantially in excess of 0.08 grams. Jones v. State, 301 Ga. 544, 802 S.E.2d 234, 2017 Ga. LEXIS 542 (2017).

Trial court was authorized to conclude that admission of the defendant's federal convictions for possession and distribution of child pornography was not unfairly prejudicial because the state had a need for the evidence based on the victim's delayed outcry and the defendant's attack on the victim's credibility, including testimony from the defendant's mother that the victim never complained about anything hurting when the mother babysat and admitting telling detectives that the victim was a liar because the doors in the mother's home locked. Wrice v. State, 354 Ga. App. 895, 842 S.E.2d 301, 2020 Ga. App. LEXIS 241 (2020).

Trial court abused the court's discretion by denying the state's motion to offer evidence of a prior DUI arrest under O.C.G.A. § 24-4-404 because the court did so solely based on the incorrect basis that admission was unconstitutional without considering the applicability of O.C.G.A. § 24-4-404 or conducting the applicable test. State v. Johnson, 354 Ga. App. 447, 841 S.E.2d 91, 2020 Ga. App. LEXIS 185 (2020).

Admission of the defendant's prior DUI conviction was not erroneous as the evi-

dence supporting the DUI per se conviction was substantial and, thus, it was highly probable that the prior DUI per se guilty plea did not contribute to the jury's verdict of guilty. Webb v. State, 359 Ga. App. 453, 858 S.E.2d 546, 2021 Ga. App. LEXIS 218 (2021).

Evidence of methadone use. — Evidence that the defendant had previously hit a parked car with the defendant's truck after taking a dose of methadone earlier in the day was properly admitted into evidence as the evidence was relevant to whether the defendant intentionally drove while under the influence of methadone. Diaz v. State, 344 Ga. App. 291, 810 S.E.2d 566, 2018 Ga. App. LEXIS 22 (2018), cert. denied, No. S18C0793, 2018 Ga. LEXIS 504 (Ga. Aug. 2, 2018).

Evidence of prior obstruction of police officers admissible. — Other acts evidence regarding two earlier instances of obstructing a law enforcement officer was relevant and admissible because, by expressly challenging whether the officer was lawfully discharging the officer's official duties, the defendant implicitly challenged the defendant's own knowledge that the officer's commands to the defendant were lawful; and it established that, on past occasions, the defendant had encountered officers under similar circumstances and been apprehended or accused of obstructing the officers when the defendant fled, such that the defendant knew that the officer's command that the defendant talk with the officer was made in the lawful discharge of the officer's official duties and that the defendant was not free to flee. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156, 2016 Ga. App. LEXIS 608 (2016).

Prior action of burning sibling. — Evidence that the victim's parent had burned the victim's sibling on another occasion by spilled hot chocolate while in the parent's care could not be used by the jury to show that the parent burned the victim without relying on the impermissible inference that the parent's bad parenting of the sibling made it more likely the parent burned the victim. Pittmon v. State, 342 Ga. App. 874, 805 S.E.2d 628, 2017 Ga. App. LEXIS 427 (2017).

Other transactions admissible to disprove defense of mistake of fact in RICO action. — In a trial on RICO charges arising out of attempts to live in abandoned homes and acquire the homes through adverse possession, the defendant's counsel failed to raise a valid objection to the alleged lateness of the state's O.C.G.A. § 24-4-404(b) notice, waiving any objection; the prior acts of the defendant were relevant to disprove the defendant's defense of mistake of fact and to prove the defendant's intent to fraudulently use the court system in an effort to obtain property and gain financially. Lowery v. State, 347 Ga. App. 26, 815 S.E.2d 625, 2018 Ga. App. LEXIS 435 (2018).

4. Victim's Character

Long-standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

In a trial for homicide, general bad character of the deceased for violence cannot be established by proof of specific acts. Ivey v. State, 42 Ga. App. 357, 156 S.E. 290, 1930 Ga. App. LEXIS 407 (1930) (decided under former Penal Code 1910, § 1019); Wilcher v. State, 87 Ga. App. 93, 73 S.E.2d 57, 1952 Ga. App. LEXIS 618 (1952) (decided under former Code 1933, § 38-202); Henderson v. State, 234 Ga. 827, 218 S.E.2d 612, 1975 Ga. LEXIS 1298 (1975) (decided under former Code 1933, § 38-202); Barrett v. State, 140 Ga. App. 309, 231 S.E.2d 116, 1976 Ga. App. LEXIS 1447 (1976) (decided under former Code 1933, § 38-202); Guevara v. State, 151 Ga. App. 444, 260 S.E.2d 491, 1979 Ga. App. LEXIS 2568 (1979) (decided under former Code 1933, § 38-202); P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413, 1979 Ga. App. LEXIS 2739 (1979) (decided under former Code 1933, § 38-202); Wilson v. State, 153 Ga. App. 215, 265 S.E.2d 79, 1980 Ga. App. LEXIS 1754 (1980) (decided under former Code 1933, § 38-202); Horne v. State, 155 Ga. App. 851,

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273 S.E.2d 193, 1980 Ga. App. LEXIS 2814 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 247 Ga. 453, 276 S.E.2d 633, 1981 Ga. LEXIS 739 (1981) (decided under former Code 1933, § 38-202).

Evidence of victim's violent character may be admitted when defendant acted in self-defense. — Charge that proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, and that the accused had been assaulted and was honestly seeking to defend oneself, was not error. Tatum v. State, 57 Ga. App. 849, 197 S.E. 51, 1938 Ga. App. LEXIS 418 (1938) (decided under former Code 1933, § 38-202); Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28, 1945 Ga. LEXIS 301 (1945), overruled, Milton v. State, 245 Ga. 20, 262 S.E.2d 789, 1980 Ga. LEXIS 672 (1980) (decided under former Code 1933, § 38-202); Beam v. State, 208 Ga. 497, 67 S.E.2d 573, 1951 Ga. LEXIS 410 (1951) (decided under former Code 1933, § 38-202); Henderson v. State, 234 Ga. 827, 218 S.E.2d 612, 1975 Ga. LEXIS 1298 (1975) (decided under former Code 1933, § 38-202); Maynor v. State, 241 Ga. 315, 245 S.E.2d 268, 1978 Ga. LEXIS 956 (1978) (decided under former Code 1933, § 38-202); Smith v. State, 247 Ga. 453, 276 S.E.2d 633, 1981 Ga. LEXIS 739 (1981) (decided under former Code 1933, § 38-202); Hanlon v. State, 162 Ga. App. 46, 290 S.E.2d 285, 1982 Ga. App. LEXIS 2008 (1982) (decided under former O.C.G.A. § 24-2-2).

Proof of a victim's violent character becomes admissible when it is shown prima facie that the deceased was the assailant, that the accused had been assailed, and that the accused was honestly seeking to defend oneself. Williams v. State, 249 Ga. 6, 287 S.E.2d 31, 1982 Ga. LEXIS 730 (1982) (decided under former O.C.G.A. § 24-2-2); Cooper v. State, 249 Ga. 58, 287 S.E.2d 212, 1982 Ga. LEXIS 1110 (1982) (decided under former O.C.G.A. § 24-2-2).

Victim's violent character and general reputation for violence were admissible when the codefendant arguably made a showing that defendant was honestly seeking to defend oneself rather than to act as the aggressor. Smith v. State, 267 Ga. 372, 477 S.E.2d 827, 1996 Ga. LEXIS 912 (1996), overruled in part, State v. Jackson, 287 Ga. 646, 697 S.E.2d 757, 2010 Ga. LEXIS 484 (2010) (decided under former O.C.G.A. § 24-2-2).

Because a murder defendant did not assert a justification defense, there was no basis for defendant to seek to introduce evidence of victims' characters. Lance v. State, 275 Ga. 11, 560 S.E.2d 663, 2002 Ga. LEXIS 92 (2002), cert. denied, 537 U.S. 1050, 123 S. Ct. 620, 154 L. Ed. 2d 525, 2002 U.S. LEXIS 8763 (2002), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018) (decided under former O.C.G.A. § 24-2-2).

Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

Since the defendant failed to make a prima facie showing that the defendant acted in self-defense when the defendant shot the victim because the defendant was the aggressor and the victim would have been justified in using force to subdue the defendant, the trial court did not abuse the court's discretion in excluding evidence of the victim's propensity for violence. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

Evidence of victim's character when defendant claims self defense. — Assuming without deciding that the defendant's inquiry into the victim's character would have been permitted, it was not an abuse of discretion to disallow the inquiry since the trial court had already afforded the defendant, who was claiming self defense, wide latitude to cross-exam-

ine a witness by asking the witness about the details of the two armed robbery charges that had been brought against the victim. Griffin v. State, 309 Ga. 860, 849 S.E.2d 191, 2020 Ga. LEXIS 661 (2020).

Victim's general character for violence cannot be established by proof of prior specific acts of violence, but a defendant should be allowed to offer evidence that the victim had a reputation for a particular type of violence. Williams v. State, 249 Ga. 6, 287 S.E.2d 31, 1982 Ga. LEXIS 730 (1982) (decided under former O.C.G.A. § 24-2-2).

Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant's mind at the time the defendant killed the victim. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582, 2012 Ga. LEXIS 569 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior incident involving victim irrelevant and inadmissible. Trial court did not err by barring evidence that the victim was involved in an altercation with a third party on the evening before the killing because there was no evidence to support a claim of self-defense and, thus, the alleged earlier incident involving the victim and a third person was irrelevant to any issue presented at trial. White v. State, 307 Ga. 882, 838 S.E.2d 828, 2020 Ga. LEXIS 83 (2020).

Counsel was not deficient for failing to seek admission of evidence that the victim had previously pulled a gun on someone because it would not have been admissible because it was classic propensity evidence. In addition, the victim's intent and opportunity to wield a gun was not relevant to the self-defense claim. Davis v. State, 315 Ga. 252, 882 S.E.2d 210, 2022 Ga. LEXIS 323 (2022).

Evidence of victim's good character. — Trial counsel performed deficiently as counsel should have objected to the inadmissible statements of three witnesses that improperly placed the victim's good character in issue, but counsel's deficient performance was not prejudicial because, considering the totality of the evidence, there was no reasonable probability that, had trial counsel objected to that testimony, the outcome in the defendant's case would have been different. Revere v. State, 302 Ga. 44, 805 S.E.2d 69, 2017 Ga. LEXIS 778 (2017).

In the defendant's murder trial, when the defendant's sole defense was that the victims were the first aggressors, justifying the shooting, error in the state's premature introduction of evidence of the deceased victim's character for not fighting, O.C.G.A. § 24-4-404(a)(2), before the defendant's evidence that the victims were the aggressors was harmless. Mondragon v. State, 304 Ga. 843, 823 S.E.2d 276, 2019 Ga. LEXIS 19 (2019).

Admission of photographs of victim for depicting character. — Trial court did not err by allowing the state to introduce an in-life photograph of the victim wearing a graduation cap and gown and holding a diploma while declining to allow the defense to offer its own in-life photographs of the victim as the state's photograph depicted the victim alone and was proffered through a non-family member; the mere indication of the victim's graduation was not offered or argued as evidence of good character, and did not open the door to the admission of evidence of the victim's alleged bad character; and the defendant did not argue that the defense's photographs were offered to prove a character trait that was an essential element of a charge, claim, or defense. Walker v. State, 312 Ga. 232, 862 S.E.2d 285, 2021 Ga. LEXIS 576 (2021).

Evidence of victim's drug use. — Trial court did not err by refusing to allow the defendant to show that crack cocaine was found inside the ambulance that transported the victim to the hospital as a police officer testified that crack cocaine was found in the ambulance; moreover, defendant was permitted to impeach the victim with certified copies of the victim's prior felony convictions, including two for drug possession. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448, 2006 Ga. App.

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LEXIS 194 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in granting the state's motion in limine to exclude evidence of the victim's cocaine use under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) because the evidence as to effects of the cocaine in the victim's body was merely speculative since there was no evidence about the quantity of cocaine in the victim's system or when the cocaine was ingested; evidence of drug use is inadmissible when the evidence is intended only to impugn a victim's character and has no relevance to any disputed issues in the case. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925, 2011 Ga. App. LEXIS 652 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not plainly err in granting the state's motion to exclude evidence of the victim's drug dealing and drug use as the jury heard testimony from multiple witnesses and the defendant that the victim tended toward violence and frequently directed that violence at the defendant; and, whether the victim's drug use exacerbated such violence would be of marginal value to a jury that was aware of the victim's violence toward the defendant. Thus, the trial court did not violate the defendant's right to present a full and fair defense by excluding evidence of the victim's drug use and related criminal history. Martin v. State, 306 Ga. 747, 833 S.E.2d 122, 2019 Ga. LEXIS 604 (2019).

Evidence of victim's relationships. — In a murder prosecution in which the victim's body was never found, evidence of the victim's relationships at the time of the victim's disappearance was relevant because it rendered the inference that the victim did not run away but was killed more probable than it would be without the evidence. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365, 2006 Ga. LEXIS 390 (2006) (decided under former O.C.G.A. § 24-2-2).

Whether or not the victim was a prostitute was not relevant to the determination of who killed the victim. Bryant v. State, 249 Ga. 242, 290 S.E.2d 75, 1982 Ga. LEXIS 1125 (1982) (decided under former O.C.G.A. § 24-2-2).

School disciplinary record of victim inadmissible. — Trial court did not err in granting the state's motion in limine, which sought to prevent the defendant from introducing the victim's school records in an attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in the prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67, 1981 Ga. App. LEXIS 1852 (1981) (decided under former Code 1933, § 38-202).

Victim's bomb threat irrelevant. — Because making a bomb threat did not unambiguously reflect on a child victim's credibility, honesty, or imagination, was not related to the victim's testimony, and was not material to the issues on trial, the trial court did not abuse the court's discretion in refusing to allow the defense to introduce the evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Bentley v. State, 277 Ga. App. 483, 627 S.E.2d 61, 2006 Ga. App. LEXIS 72 (2006), cert. denied, No. S06C1050, 2006 Ga. LEXIS 435 (Ga. June 12, 2006) (decided under former O.C.G.A. § 24-2-2).

Evidence of assault victim's character not relevant. — In a prosecution for aggravated assault, to the extent that the defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of cross-examination to the issues directly related to the incidents. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706, 2006 Ga. App. LEXIS 313 (2006) (decided under former O.C.G.A. § 24-2-2).

Testimony as to the general reputation of the deceased, when admissible in a murder case, may come from two sources: the accused or a witness. Henderson v. State, 234 Ga. 827, 218 S.E.2d 612, 1975 Ga. LEXIS 1298 (1975) (decided under former Code 1933, § 38-202).

Evidence of victim's violent acts. — Defendant was not improperly prohibited from introducing evidence of a victim's

violent acts against third persons during the state's case, despite evidence that: (1) the victim pinned defendant against a wall; (2) defendant ran into defendant's house screaming that the defendant had been robbed and reported the robbery to the police; (3) defendant had fresh cuts or bruises on defendant's neck; and (4) defendant reported to police that defendant had shot at someone as defendant tried to fend off a robber; it did not necessarily follow that defendant honestly sought to defend oneself when defendant fired a gun at the victim, given evidence that the victim turned away or ran from defendant before the shooting and that the victim was shot in the back from at least two and one-half feet away. Nelloms v. State, 273 Ga. App. 448, 615 S.E.2d 153, 2005 Ga. App. LEXIS 471 (2005), cert. denied, No. S05C1585, 2005 Ga. LEXIS 548 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continuance would be unsuccessful. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113, 2011 Ga. LEXIS 674 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in refusing to let the defendants call the co-indictee as a witness to testify about the prior acts of violence the co-indictee committed in 1994 for choking the co-indictee's mother and in 2004 for choking another person because the co-indictee's counsel announced that the co-indictee would invoke the co-indictee's privilege against self-incrimination as to any questions about those prior acts and the trial court reasonably concluded that any questions as to the co-indictee's past violent acts could incriminate the co-indictee and affect the co-indictee's pending trial. Brown v. State, 295 Ga. 804, 764 S.E.2d 376, 2014 Ga. LEXIS 751 (2014).

Even if the first defendant's counsel performed deficiently by failing to obtain the victim's criminal history, which the first defendant alleged would have shown the existence of a prior incident of domestic violence in Alabama and the victim's propensity for violence, the first defendant failed to show prejudice because it was not clear that any such specific incident of violence would have been admissible at the first defendant's trial as the first defendant's case was tried after the enactment of Georgia's new Evidence Code; and because, at the motion for new trial hearing, the first defendant did not present any witnesses to authenticate the Alabama domestic violence police report. Ballard v. State, 297 Ga. 248, 773 S.E.2d 254, 2015 Ga. LEXIS 366 (2015).

Even if any of the victim's alleged prior crimes involved specific acts of violence, because the defendant never introduced into evidence at the motion for new trial hearing any of the victim's alleged prior convictions, the defendant could not support the defendant's claim that the defendant's counsel could have been ineffective for failing to attempt to introduce such evidence at trial. Revere v. State, 302 Ga. 44, 805 S.E.2d 69, 2017 Ga. LEXIS 778 (2017).

Trial court did not abuse the court's discretion in excluding evidence that the victim pulled a gun on a third person at a dice game the week prior to the murder because the defendant failed to show how that evidence met basic admissibility requirements as to relevancy and offered nothing more than speculation and conjecture that the third person could have been involved in the victim's murder, regardless of the applicability of O.C.G.A. § 24-4-404(b). Roberts v. State, 305 Ga. 257, 824 S.E.2d 326, 2019 Ga. LEXIS 107 (2019).

Trial counsel was not ineffective in failing to obtain and use at trial the services of an expert in the field of domestic violence because counsel did not believe it advisable to employ an expert witness to evaluate the defendant and to testify concerning battered person syndrome or other psychiatric disorders as the defendant's history was replete with violent tendencies that predated the defendant's

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relationship with the victim, and made the defendant look bad; and an expert's testimony attributing the defendant's violent response to the defendant's history with the victim could have opened the door to the state's adducing rebuttal evidence of the defendant's violent tendencies that trial counsel sought to have excluded. Martin v. State, 306 Ga. 747, 833 S.E.2d 122, 2019 Ga. LEXIS 604 (2019).

Evidence of victim's prior child molestation against defendant not admitted. — In a defendant's trial for aggravated battery against a victim more than 65 years of age in violation of O.C.G.A. § 16-5-24(a) and (d), evidence that the victim had fondled the defendant's genitals when the defendant was 15 was not admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) to support the defendant's claim of justification under O.C.G.A. § 16-3-21. Strozier v. State, 300 Ga. App. 199, 685 S.E.2d 743, 2009 Ga. App. LEXIS 1122 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence that victim used cocaine. — Whether the victim of an aggravated assault and false imprisonment was addicted to cocaine was irrelevant to the issue of whether defendant assaulted the victim and held the victim against the victim's will, and the trial court did not err in ruling that defendant could not present evidence of the victim's prior cocaine use other than certified copies of convictions. Harris v. State, 196 Ga. App. 304, 396 S.E.2d 288, 1990 Ga. App. LEXIS 901 (1990) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for murder, the victim's prior conviction for possession of cocaine did not tend to prove a reputation for violence nor the reasonableness of defendant's belief that deadly force was necessary, and the court properly refused to admit such evidence. Russell v. State, 264 Ga. 121, 441 S.E.2d 750, 1994 Ga. LEXIS 287 (1994) (decided under former O.C.G.A. § 24-2-2).

Toxicology report showing the presence of cocaine metabolites in a homicide victim's blood was properly excluded because the evidence was too attenuated to warrant speculation about the effects of cocaine on the victim at the time of the shooting. Bell v. State, 280 Ga. 562, 629 S.E.2d 213, 2006 Ga. LEXIS 240 (2006) (decided under former O.C.G.A. § 24-2-2).

Exchanging sex for drugs. — Although the victim's past cocaine use was irrelevant, the defendant was allowed to discuss any arrangement that the victim had made with the defendant in exchange for sex and question the victim as to the victim's use of drugs on the night in question. Goodwin v. State, 208 Ga. App. 707, 431 S.E.2d 473, 1993 Ga. App. LEXIS 555 (1993) (decided under former O.C.G.A. § 24-2-2).

In a prosecution of defendant for possession of methamphetamine in defendant's body, evidence of prior convictions for the sale of that drug were not admissible. King v. State, 230 Ga. App. 301, 496 S.E.2d 312 (decided under former O.C.G.A. § 24-2-2).

Reckless behavior of victim. — In a prosecution for involuntary manslaughter, the trial court did not abuse the court's discretion in disallowing evidence of the victim's past reckless conduct, which consisted of the testimony of a police officer that the victim had, on several occasions in the past, been found in the early morning hours intoxicated and sitting in the victim's wheelchair in the road, creating a dangerous condition. Casillas v. State, 233 Ga. App. 752, 505 S.E.2d 251 (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion for mistrial after a witness testified to other drug transactions defendant was involved in even though defendant's general character and especially defendant's conduct in other drug transactions were irrelevant matter as such statements were unsolicited, the trial court immediately instructed the jury to disregard the testimony, and the witness did not tell the jury anything the jury did not already know about defendant. McCollum v. State, 258 Ga. App. 574, 574 S.E.2d 561, 2002 Ga. App. LEXIS 1421 (2002) (decided under former O.C.G.A. § 24-2-2).

Trial court's refusal to allow defendant to introduce a certified copy of the victim's

prior conviction for simple assault, even though the testimony of the investigating officer was also offered, was harmless error in light of the fact that the trial court permitted the defense to present testimony from five witnesses concerning other incidents. Jones v. State, 265 Ga. App. 97, 592 S.E.2d 888, 2004 Ga. App. LEXIS 22 (2004) (decided under former O.C.G.A. § 24-2-2).

In the defendant's trial for homicide by vehicle in the first degree, serious injury by vehicle, driving under the influence of alcohol, and reckless driving, the trial court did not abuse its discretion in excluding as irrelevant evidence of a victim's two prior traffic citations because a trooper testified unequivocally that the impact occurred in the lane in which the victim and the victim's family were traveling, and there was no evidence introduced to the contrary; moreover, there was no evidence that the victim was speeding at the time of the fatal collision. Potter v. State, 301 Ga. App. 411, 687 S.E.2d 653, 2009 Ga. App. LEXIS 1402 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's criminal activity. — Evidence that the victim was driving an allegedly stolen vehicle at the time the victim was shot by defendant was not relevant to the defense of justification. Wilson v. State, 262 Ga. 588, 422 S.E.2d 536, 1992 Ga. LEXIS 940 (1992), overruled in part, Sanders v. State, 281 Ga. 36, 635 S.E.2d 772, 2006 Ga. LEXIS 638 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion to admit evidence of the victim's robbery conviction because the defendant failed to meet the requirements for admission of evidence of violent acts by the victim against third parties by relying on the language of the indictment associated with the victim's conviction and offering no witnesses or other evidence to establish the facts underlying the crime; the trial transcript did include defense counsel's unchallenged recitation of the allegation set forth in the indictment, and although that language set forth certain elements of the crime of robbery, O.C.G.A. § 16-8-40(a)(1) and (2), it did not provide a factual basis for determining whether an act of violence was involved in the robbery at issue. Arnold v. State, 286 Ga. 418, 687 S.E.2d 836, 2010 Ga. LEXIS 112 (2010) (decided under former O.C.G.A. § 24-2-2).

Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification and that is so because the key showing must be that the victim was the aggressor in the fatal encounter. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582, 2012 Ga. LEXIS 569 (2012) (decided under former O.C.G.A. § 24-2-2).

5. Jury Instructions

Jury charge as to good character. — Good character affords no license for committing a crime, and it is entirely proper to charge the jury that the jury would be authorized to convict, notwithstanding proof of good character, if upon consideration of all the evidence the jury believes the defendant guilty beyond a reasonable doubt. Mote v. State, 184 Ga. App. 333, 361 S.E.2d 523, 1987 Ga. App. LEXIS 2243 (1987) (decided under former O.C.G.A. § 24-2-2).

Jury charge on similar transaction evidence admissibility correct. — Trial court did not commit plain error by charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413 because the charge was not erroneous as such evidence was admissible as relevant. Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583, 2016 Ga. App. LEXIS 240, overruled in part, Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391, 2016 Ga. App. LEXIS 460 (2016).

Instruction on defense of good character must generally be requested. — Except in "exceptional cases," such as one in which the good character defense is the sole defense against the uncorroborated allegations of the prosecuting witness and the state's case, apart from those allegations, is based solely on highly tenuous circumstances and is extremely weak, the court's failure to give an instruction on good character, absent a timely request, does not warrant a new

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trial. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595, 1983 Ga. App. LEXIS 3280 (1983) (decided under former O.C.G.A. § 24-2-2).

Mistrial not warranted when curative instruction given. — After a witness stated in an answer not responsive to the question asked of the witness that the defendant and the victim had smoked crack cocaine together, the trial court properly denied the defendant's motion for a mistrial on the ground that the defendant's character had been improperly put in issue; a curative instruction was sufficiently prompt and clear. Rhines v. State, 288 Ga. App. 128, 653 S.E.2d 500, 2007 Ga. App. LEXIS 1108 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court properly denied a mistrial based on allegedly improper character evidence after an officer did not specifically indicate that defendant had a criminal record when asked if the officer knew defendant, and after the trial court gave an adequate curative instruction, the officer clarified that the officer knew defendant to be a nice person and outstanding football player; moreover, even if there was error, it was harmless in light of the overwhelming evidence of guilt. Gartrell v. State, 291 Ga. App. 21, 660 S.E.2d 886, 2008 Ga. App. LEXIS 425 (2008) (decided under former O.C.G.A. § 24-2-2).

As the trial court instructed the jury to disregard the information contained in a witness's non-responsive answer to a question from the prosecutor, which impugned the defendant's character, the defendant was not entitled to a mistrial. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716, 2009 Ga. LEXIS 396 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892, 2010 U.S. LEXIS 296 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in failing to grant a mistrial based on the prosecutor's allegedly impermissible argument because the trial court immediately reminded the jury of the limited purpose for which the jury could consider the other acts evidence regarding two earlier instances in which the defendant obstructed a law enforcement officer; and that reminder supplemented the other points in the trial when the trial court instructed the jury as to the limited purpose of the other acts evidence. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156, 2016 Ga. App. LEXIS 608 (2016).

New trial denied when defendant failed to object to curative instruction given. — Defendant's motion for a new trial was properly denied because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given. Bryant v. State, 285 Ga. App. 508, 646 S.E.2d 717, 2007 Ga. App. LEXIS 559 (2007) (decided under former O.C.G.A. § 24-2-2).

Limiting instruction on consideration of prior conviction proper. — Trial court's charge on the jury's consideration of the defendant's prior 1989 convictions did not likely affect the outcome of the proceedings because the trial court gave the jurors a limiting instruction prohibiting the jurors from considering the 1989 convictions for any purpose other than course of conduct and modus operandi; and the jury charge as given and when considered as a whole properly set forth the elements of the charged crimes, instructed the jury on the state's burden of proof and burden to show intent, and instructed the jury that only slight evidence from another source was necessary to support the accomplice's testimony. Paschal v. State, 335 Ga. App. 411, 780 S.E.2d 681, 2015 Ga. App. LEXIS 780 (2015), cert. denied, No. S16C0579, 2016 Ga. LEXIS 287 (Ga. Apr. 4, 2016).

Meritless objection not required. — Appellant's claim of ineffective assistance of trial counsel failed because the trial court properly instructed the jury on how to consider character evidence and, thus, the objection to instruction would have been meritless as trial counsel does not perform deficiently by failing to make a meritless objection. Wright v. State, 315

Ga. 459, 883 S.E.2d 294, 2023 Ga. LEXIS 12 (2023).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 356 et seq.

C.J.S.

32 C.J.S., Evidence, §§ 559 et seq., 767 et seq.

ALR.

Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 A.L.R. 8; 68 A.L.R. 1068.

Habit, custom, or reputation of one injured or killed as evidence of his own negligence or freedom from negligence, 15 A.L.R. 125; 18 A.L.R. 1109.

Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached, 15 A.L.R. 1065; 33 A.L.R. 1220.

Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant, 22 A.L.R. 1016; 27 A.L.R. 357; 63 A.L.R. 602.

Evidence of other forgeries or alterations on issue as to forgery or alteration in civil cases, 33 A.L.R. 427.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 64 A.L.R. 1029; 1 A.L.R.3d 571.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 A.L.R. 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 A.L.R. 81.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 66 A.L.R. 1328; 48 A.L.R.2d 1259.

Negative proof of good character or reputation of defendant in criminal case, 67 A.L.R. 1210.

Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 A.L.R. 447.

Admissibility of evidence of good character of party for truth and honesty on issue of fraud in civil action, 78 A.L.R. 643.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 80 A.L.R. 1306; 78 A.L.R.2d 1359.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 A.L.R. 685.

Admissibility, in prosecution for violation of intoxicating liquor law, of general reputation of person with whom defendant had dealings, as tending to show such violation, 83 A.L.R. 1401.

Admissibility, in prosecution for receiving stolen property, of evidence of transactions other than, but similar to, that upon which the prosecution is based, for purpose of showing guilty knowledge or intent, 105 A.L.R. 1288.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 A.L.R. 1443.

Admissibility of evidence in a bastardy proceeding of defendant's reputation or character as to chastity and morality, 110 A.L.R. 335.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 A.L.R. 380.

Admissibility in criminal prosecution of evidence of notice of one other than defendant to commit the crime, 121 A.L.R. 1362.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 A.L.R. 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal

injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 A.L.R. 1194.

Admissibility, on cross-examination or otherwise, of evidence that witness in a civil action had been under arrest, indictment, or other criminal accusation on a charge growing out of the accident, transaction, or occurrence involved in the civil action, 149 A.L.R. 935.

Admissibility of evidence of character or reputation of party in civil action for assault (other than for purpose of impeaching him as a witness), 154 A.L.R. 121.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 A.L.R. 604.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 A.L.R. 565; 77 A.L.R.2d 841; 2 A.L.R.4th 330.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 A.L.R. 969.

Admissibility in criminal case of evidence relevant to the crime charged, as affected by incidental disclosure of another crime by defendant, 170 A.L.R. 306.

Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved, 8 A.L.R.2d 446.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 A.L.R.2d 205.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 A.L.R.2d 606; 24 A.L.R.6th 747.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 A.L.R.2d 1080.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 A.L.R.2d 304.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents, 20 A.L.R.2d 1210.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 A.L.R.2d 1217; 88 A.L.R.3d 74.

Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution, 20 A.L.R.2d 1421.

Admissibility of evidence of unperformed compromise agreement, 26 A.L.R.2d 858.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 A.L.R.2d 857.

Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Pardon as affecting impeachment by proof of conviction of crime, 30 A.L.R.2d 893.

Admissibility, in forgery prosecution, of other acts of forgery, 34 A.L.R.2d 777.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 A.L.R.2d 817.

Admissibility, in robbery prosecution, of evidence of other robberies, 42 A.L.R.2d 854.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 A.L.R.2d 1055.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 A.L.R.2d 9.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R.2d 103.

Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury, 59 A.L.R.2d 1379.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 A.L.R.2d 806.

Admissibility, in prosecution for maintaining liquor nuisance, or evidence of general reputation of premises, 68 A.L.R.2d 1300.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 A.L.R.2d 891.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 A.L.R.2d 968.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 A.L.R.2d 903.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 A.L.R.2d 1097.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial, 3 A.L.R.3d 965.

Impeachment of witness with respect to intoxication, 8 A.L.R.3d 749.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 A.L.R.3d 327.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Admissibility of evidence of habit, customary behavior, or reputation as to care of motor vehicle driver or occupant, on question of his care at time of occurrence giving rise to his injury or death, 29 A.L.R.3d 791.

Malpractice: admissibility of evidence that defendant physician has previously performed unnecessary operations, 33 A.L.R.3d 1056.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 A.L.R.3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 A.L.R.3d 897.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 A.L.R.3d 659.

Admissibility, in action against notary public, of evidence as to usual business practice of notary public of identifying person seeking certificate of acknowledgment, 59 A.L.R.3d 1327.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 A.L.R.3d 293.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 A.L.R.3d 1001; 38 A.L.R.4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

Admissibility of testimony as to general reputation at place of employment, 82 A.L.R.3d 525.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 A.L.R.3d 1170.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 A.L.R.3d 926.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case, 97 A.L.R.3d 1150.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 A.L.R.4th 1298.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

Admissibility of evidence of accused's membership in gang, 39 A.L.R.4th 775.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Habit or routine practice evidence under Uniform Evidence Rule 406, 64 A.L.R.4th 567.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 A.L.R.5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 A.L.R.5th 871.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like, 18 A.L.R.5th 804.

Admissibility of evidence of commission of similar crime by one other than accused, 22 A.L.R.5th 1.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 A.L.R.5th 615.

Application of "doctrine of chances" in homicide, sexual crimes, and other offenses against the person, 11 A.L.R.7th 1.

Application of "doctrine of chances" in criminal offenses against property, 11 A.L.R.7th 2.

24-4-405. Methods of proving character.

(a) In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.

History.

Code 1981, § 24-4-405, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Methods of proving character, Fed. R. Evid. 405.

Editor's notes.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-404, for cases discussing character and specific instances of previous conduct; Code Section 24-4-412, for cases discussing the complainant's character in sexual assault cases; Code Section 24-4-413, for cases discussing sexual assault; Code Section 24-4-414, for cases discussing child molestation; and Code Section 24-4-417, for cases discussing driving under the influence.

Law reviews.

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

Good character conduct evidence in child molestation trial. — In a child molestation case, the appellate court could not reach the merits of the defendant's claim regarding the exclusion of specific instances of conduct testimony from character witnesses for the defense because the affidavits from three of the

character witnesses who testified at trial failed to identify any specific instance of the defendant's conduct that the witnesses were unable to testify to; furthermore, the defendant was able to present a variety of evidence regarding the defendant's good character, including specific instances of conduct. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753, 2014 Ga. App. LEXIS 835 (2014), cert. denied, No. S15C0681, 2015 Ga. LEXIS 263 (Ga. Apr. 20, 2015).

Testimony regarding defendant's character trait of moral behavior and trustworthiness. — In a child molestation case, the trial court did not restrict the defendant's character witnesses' ability to testify as to the defendant's character trait of moral behavior and trustworthiness with children as three witnesses testified as to that character trait, and any additional testimony regarding the defendant's morality and trustworthiness with children would have been cumulative. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753, 2014 Ga. App. LEXIS 835 (2014), cert. denied, No. S15C0681, 2015 Ga. LEXIS 263 (Ga. Apr. 20, 2015).

Defendant's malice murder conviction was upheld because defendant did not identify any error and by testifying that defendant had never actually hurt anyone before, defendant invited state to cross-examine defendant on the matter in an attempt to contradict and discredit defendant's testimony. Wynn v. State, 313 Ga. 827, 874 S.E.2d 42, 2022 Ga. LEXIS 160 (2022).

Defendant's admission of 11 character witnesses opened door to state. — Trial court did not abuse the court's discretion in finding that the defense intentionally placed the defendant's general character in issue and triggered the state's right to cross-examine a character witness about the defendant's criminal history as although defense counsel may not have specifically aimed at eliciting character testimony, the door was opened when defense counsel did not object or move to strike the testimony that the defendant was a man of integrity as nonresponsive, and, in fact, presented 11 character witnesses. Montgomery v. State, 350 Ga. App. 244, 828 S.E.2d 620, 2019 Ga. App. LEXIS 278 (2019).

Jury charge regarding character evidence. — Trial court did not commit plain error in the court's charge to the jury on good character evidence because the defendant used the idea that the defendant did not have a reputation for violence as a means of attempting to show the defendant's good character, and the trial court merely reflected that in the court's charge to the jury; and the jury was properly left to determine whether the defendant would have acted consistently with the defendant's purported character with respect to violence, which was to not act violently towards anyone, including the victim; further, giving that proper charge did not amount to the trial court commenting on the evidence. Jacobs v. State, 303 Ga. 245, 811 S.E.2d 372, 2018 Ga. LEXIS 144 (2018).

Plain error did not occur given that character instruction given by the trial court fully and adequately explained to the jury how the jury ought to consider the defendant's character trait of truthfulness; thus, the defendant failed to show that simply adding a reference to the defendants general character would have likely affected the outcome of the trial court proceedings. Montgomery v. State, 350 Ga. App. 244, 828 S.E.2d 620, 2019 Ga. App. LEXIS 278 (2019).

Failure to make meritless objection. — Appellant's claim of ineffective assistance of trial counsel failed because the trial court properly instructed the jury on how to consider character evidence and, thus, objection to the instruction would have been meritless as trial counsel does not perform deficiently by failing to make a meritless objection. Wright v. State, 315 Ga. 459, 883 S.E.2d 294, 2023 Ga. LEXIS 12 (2023).

Admission of photographs of victim. — Trial court did not err by allowing the state to introduce an in-life photograph of the victim wearing a graduation cap and gown and holding a diploma while declining to allow the defense to offer its own in-life photographs of the victim as the state's photograph depicted the victim alone and was proffered through a non-

family member; the mere indication of the victim's graduation was not offered or argued as evidence of good character, and did not open the door to the admission of evidence of the victim's alleged bad character; and defendant did not argue that the defense's photographs were offered to prove a character trait that was an essential element of a charge, claim, or defense. Walker v. State, 312 Ga. 232, 862 S.E.2d 285, 2021 Ga. LEXIS 576 (2021).

Admission of defendant's violence-prone Facebook posts error. — Trial court erred in allowing the state to introduce evidence in its case in chief of threatening posts the defendant had made on Facebook as evidence of the defendant's allegedly violent character and behavior in conformity therewith because O.C.G.A. § 24-4-405 required such proof be made by testimony as to reputation or in the form of an opinion; however, the error was harmless. Timmons v. State, 302 Ga. 464, 807 S.E.2d 363, 2017 Ga. LEXIS 928 (2017).

Long-standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

Evidence of prior incident involving victim irrelevant and inadmissible. — Trial court did not err by barring evidence that the victim was involved in an altercation with a third party on the evening before the killing because there was no evidence to support a claim of self-defense and, thus, the alleged earlier incident involving the victim and a third person was irrelevant to any issue presented at trial. White v. State, 307 Ga. 882, 838 S.E.2d 828, 2020 Ga. LEXIS 83 (2020).

Failure to obtain victim's criminal history not prejudicial. — Even if the first defendant's counsel performed deficiently by failing to obtain the victim's criminal history, which the first defendant alleged would have shown the existence of a prior incident of domestic violence in Alabama and the victim's propensity for violence, the first defendant failed to show prejudice because it was not clear that any such specific incident of violence would have been admissible at the first defendant's trial as the first defendant's case was tried after the enactment of Georgia's new Evidence Code; and because, at the motion for new trial hearing, the first defendant did not present any witnesses to authenticate the Alabama domestic violence police report. Ballard v. State, 297 Ga. 248, 773 S.E.2d 254, 2015 Ga. LEXIS 366 (2015).

Failure to make prima facie case of self defense meant victim's propensity for violence irrelevant. — Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606, 2014 Ga. App. LEXIS 692 (2014).

Evidence of victim's prior convictions. — Even if any of the victim's alleged prior crimes involved specific acts of violence, because the defendant never introduced into evidence at the motion for new trial hearing any of the victim's alleged prior convictions, the defendant could not support the defendant's claim that the defendant's counsel could have been ineffective for failing to attempt to introduce such evidence at trial. Revere v. State, 302 Ga. 44, 805 S.E.2d 69, 2017 Ga. LEXIS 778 (2017).

Counsel was not ineffective for failing to present evidence that the first victim had a criminal history and was a gang member as the defendant did not come forward with any evidence that the first victim was ever in a gang; the defendant did not show that any of the first victim's prior convictions would have been admissible; and the first victim's prior convictions

would not have been admissible to show the defendant's state of mind or the reasonableness of the defendant's conduct as the defendant was not aware of those convictions at the time of the shootings. Wofford v. State, 305 Ga. 694, 827 S.E.2d 652, 2019 Ga. LEXIS 278 (2019).

Limited examination on criminal charges pending against victim. — Assuming without deciding that the defendant's inquiry into the victim's character would have been permitted, it was not an abuse of discretion to disallow the inquiry since the trial court had already afforded the defendant wide latitude to cross-examine a witness by asking the witness about the details of the two armed robbery charges that had been brought against the victim. Griffin v. State, 309 Ga. 860, 849 S.E.2d 191, 2020 Ga. LEXIS 661 (2020).

Limiting evidence as cumulative. — Trial court did not err in limiting the scope of evidence regarding the defendant's good character as the additional testimony the defendant sought to have introduced would have been cumulative. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753, 2014 Ga. App. LEXIS 662 (2014).

Reversible error occurred by admitting character evidence. — Trial court committed reversible error by admitting character evidence and holding that the evidence was intrinsic to the alleged crimes of robbery as the defendant did not testify as to character and the character trait was not an essential element of a charge, claim, or defense; the text introduced a specific bad act, possible fraud, which was not allowed and the fact that the defendant may have attempted to defraud an apartment complex a week earlier did not arise out of the same transaction. Holt v. State, 352 Ga. App. 504, 835 S.E.2d 336, 2019 Ga. App. LEXIS 593 (2019).

Evidence of victim's good character. — Trial counsel performed deficiently as counsel should have objected to the inadmissible statements of three witness that improperly placed the victim's good character in issue, but counsel's deficient performance was not prejudicial because, considering the totality of the evidence, there was no reasonable probability that, had trial counsel objected to that testimony, the outcome in the defendant's case would have been different. Revere v. State, 302 Ga. 44, 805 S.E.2d 69, 2017 Ga. LEXIS 778 (2017).

Character of defendant charged with rape. — In an action for rape and aggravated stalking, any error in the exclusion of good character witness testimony from the defendant's wife concerning the defendant's non-violent sexual nature was harmless because there was strong evidence of the defendant's guilt, including that the victim promptly reported the rape, appeared tearful, had visible injuries as well as injuries internally which were consistent with rape, the victim's bedroom was disheveled, and the victim's clothing was torn. Hong v. State, 366 Ga. App. 476, 883 S.E.2d 426, 2023 Ga. App. LEXIS 29 (2023).

Evidence of multiple serious violent acts improperly admitted to show intent. — Appellant's convictions for felony murder, aggravated assault, and knife-possession offenses were reversed because the Georgia Supreme Court could not say that the trial court's erroneous admission of the voluminous evidence that the appellant had previously committed multiple serious violent acts did not contribute to the guilty verdicts that the jury returned. Strong v. State, 309 Ga. 295, 845 S.E.2d 653, 2020 Ga. LEXIS 467 (2020).

Harmless error in limiting character evidence on relationship with children. — In a case in which the defendant was convicted of malice murder arising out of the beating death of a child, any error by the trial court in limiting the witnesses' testimony about whether the defendant was good around children or about specific instances of good character was harmless because the jury heard testimony from seven character witnesses, and most of them testified to numerous specific examples of the defendant's conduct with children, including the deceased child and the child's brother as well as the witnesses' own children or grandchildren; the evidence presented by the witnesses on the defendant's motion for new trial was largely cumulative of their trial testimony; and the evidence of the defendant's

guilt was very strong. Truett v. State, 311 Ga. 313, 857 S.E.2d 690, 2021 Ga. LEXIS 152 (2021).

RESEARCH REFERENCES

ALR.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 A.L.R.5th 749.

24-4-406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice.

History.

Code 1981, § 24-4-406, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Habit; routine practice, Fed. R. Evid. 406.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Habit and customs. — Witness may testify as to the witness's fixed and uniform habit but not as to the habit and customs of another, when the actor is available to testify personally. Feinberg v. Durga, 189 Ga. App. 733, 377 S.E.2d 33, 1988 Ga. App. LEXIS 1501 (1988) (decided under former O.C.G.A. § 24-2-2).

Not habit evidence. — Testimony about the defendant's prior driving on the curve in question was not habit evidence. Evans-Glodowski v. State, 335 Ga. App. 484, 781 S.E.2d 591, 2016 Ga. App. LEXIS 11 (2016).

Business's routine practice may be admissible. — In a dispute over a storage facility's storage of a customer's seed, in which the facility sought to bind the customer to limitations printed on the reverse of the facility's warehouse receipts, the trial court erred by concluding that evidence that the facility routinely mailed warehouse receipts to the facility's customers was sufficient to bind the customer as a matter of law; because the customer denied receiving the receipts, the customer's assent was a question for the jury. Turfgrass Group v. Ga. Cold Storage Co., 346 Ga. App. 659, 816 S.E.2d 716, 2018 Ga. App. LEXIS 436 (2018).

24-4-407. Subsequent remedial measures.

In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of

evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted.

History.
Code 1981, § 24-4-407, enacted by Ga. L. 2011, p. 99, § 2/HB 24.
Cross references.
Subsequent remedial measures, Fed. R. Evid. 407.

Editor's notes.
In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-404, which may also be applicable to this Code section.

JUDICIAL DECISIONS

Knowledge of contemplated litigation. — In a premises liability case, the trial court's finding of spoliation based on the defendant painting the parking bumpers yellow five days after the plaintiff's fall and the sanction that the defendant would be barred from introducing evidence or argument that the parking bumpers were not a potential hazard was reversed because there was no indication that the trial court considered whether the defendant knew or reasonably should have known that the plaintiff was contemplating litigation when the defendant had the parking bumpers painted. Brixmor New Chastain Corners SC, LLC v. James, 367 Ga. App. 235, 884 S.E.2d 393, 2023 Ga. App. LEXIS 81 (2023).

Doctor's remedial measure not admissible for impeachment purposes. — In a medical malpractice case in which the doctor placed a halo device on the patient with the opening in the front, the trial court erred in holding that evidence of the doctor's alleged remedial measure of placing the opening of the halo device in the rear was admissible by the patient for impeachment purposes because the deposition testimony of the president of the company that manufactured the halo device was that there was nothing wrong, from a structural engineering standpoint, with placing the halo opening in the front and that placement decisions were left to the surgeon; and the company president's testimony did not contradict the doctor's later decision to exercise the doctor's discretion to position the halo openings in the rear. Mark v. Agerter, 332 Ga. App. 879, 775 S.E.2d 235, 2015 Ga. App. LEXIS 418 (2015).

24-4-408. Compromises and offers to compromise.

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not

require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

History.

Code 1981, § 24-4-408, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Compromise offers and negotiations, Fed. R. Evid. 408.

Law reviews.

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3712, former Code 1868, § 3736, former Code 1873, § 3789, former Code 1882, § 3789, former Civil Code 1895, § 5194, former Civil Code 1910, § 5781, former Code 1933, § 38-408, and former O.C.G.A. § 24-3-37 are included in the annotations for this Code section.

Former statute enlarged the common-law rule, which did not exclude the admission of distinct facts. McElrath v. Haley, 48 Ga. 641, 1873 Ga. LEXIS 139 (1873) (decided under former Code 1868, § 3736).

Distinction between compromise and settlement. — There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of the latter character will be admissible when one made in an offer of the former character will not. See as bearing somewhat on the point. Hatcher v. Bowen, 74 Ga. 840, 1885 Ga. LEXIS 446 (1885) (decided under former Code 1882, § 3789); Cooper v. Jones, 79 Ga. 379, 4 S.E. 916, 1887 Ga. LEXIS 231 (1887) (decided under former Code 1882, § 3789); Akers v. Kirke, 91 Ga. 590, 18 S.E. 366, 1893 Ga. LEXIS 289 (1893) (decided under former Code 1882, § 3789); Teasley v. Bradley, 110 Ga. 497, 35 S.E. 782, 1900 Ga. LEXIS 567 (1900) (decided under former Civil Code 1895, § 5194); Austin v. Long, 5 Ga. App. 551, 63 S.E. 640, 1909 Ga. App. LEXIS 60 (1909) (decided under former Civil Code 1895, § 5194); Wilson v. Wilder, 23 Ga. App. 30, 97 S.E. 447, 1918 Ga. App. LEXIS 24 (1918) (decided under former Civil Code 1910, § 5781); Lewis v. Joyner, 29 Ga. App. 92, 113 S.E. 829, 1922 Ga. App. LEXIS 74 (1922); Broyles v. Haas, 48 Ga. App. 321, 172 S.E. 742, 1934 Ga. App. LEXIS 57 (1934) (decided under former Civil Code 1910, § 5781); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765, 1952 Ga. App. LEXIS 671 (1952) (decided under former Code 1933, § 38-408).

Admission made in an offer to settle will be admissible while one made in an offer to compromise will not be admissible. Charter Mtg. Co. v. Ahouse, 165 Ga. App. 497, 300 S.E.2d 328, 1983 Ga. App. LEXIS 1923 (1983) (decided under former O.C.G.A. § 24-3-37).

Trial court erred in denying a homeowner the opportunity to cross-examine the chair of a homeowners' association's architectural control committee regarding independent facts that demonstrated the association's violation of the restrictive covenants in the subdivision as those statements were not part of admissions towards settlement negotiations that

should have been excluded under former O.C.G.A. § 24-3-37; the homeowner was being sued for not having sought prior approval of the committee prior to commencing construction, and the homeowner's attempt to show that the association had violated the covenants when the homeowner submitted the proper paperwork for the construction, after the lawsuit was filed, and the association did not respond in a timely manner was relevant to the issues being litigated. Bounds v. Coventry Green Homeowners' Ass'n, 268 Ga. App. 69, 601 S.E.2d 440, 2004 Ga. App. LEXIS 846 (2004) (decided under former O.C.G.A. § 24-3-37).

Benevolent gestures encouraged. — Evidence of activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability. Deese v. Carroll City County Hosp., 203 Ga. App. 148, 416 S.E.2d 127, 1992 Ga. App. LEXIS 379 (1992) (decided under former O.C.G.A. § 24-3-37).

Placement of rejected plea offers on record. — In an action for trafficking in methamphetamine, the act of placing the rejected plea offers on the record during the pretrial proceedings did not violate O.C.G.A. § 24-4-408 or Ga. Unif. Super. Ct. R. 33.5. Gage v. State, 358 Ga. App. 855, 856 S.E.2d 440, 2021 Ga. App. LEXIS 142 (2021).

Basis for rule. — Rule against allowing evidence of compromise was founded upon recognition of the fact that such testimony was inherently harmful for the jury would draw conclusions therefrom, in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing the jury as to the weight to be given such evidence. Newton Bros. v. Shank, 240 Ga. 471, 241 S.E.2d 231, 1978 Ga. LEXIS 764 (1978) (decided under former Code 1933, § 38-408); Central Nat'l Ins. Co. v. Dixon, 188 Ga. App. 680, 373 S.E.2d 849, 1988 Ga. App. LEXIS 1155 (1988) (decided under former O.C.G.A. § 24-3-37).

Former statute was created in order to encourage settlements by letting a party which made an admission or proposition with a view toward compromise rest assured that the party's good-faith settlement attempt would not later be used against the party in court. Benn v. McBride, 140 Ga. App. 698, 231 S.E.2d 438, 1976 Ga. App. LEXIS 1604 (1976) (decided under former Code 1933, § 38-408).

Purpose of former O.C.G.A. § 24-3-37 was to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits. Computer Communications Specialists, Inc. v. Hall, 188 Ga. App. 545, 373 S.E.2d 630, 1988 Ga. App. LEXIS 1122 (1988) (decided under former O.C.G.A. § 24-3-37).

Former statute was very broad and excluded the introduction in evidence of propositions with a view to compromise and also admissions made with a view to compromise. Atlantic Coast Line R.R. v. Wells, 78 Ga. App. 859, 52 S.E.2d 496, 1949 Ga. App. LEXIS 996 (1949) (decided under former Code 1933, § 38-408).

Proscription of propositions made with view to compromise refers to civil, not criminal, cases. Reed v. State, 163 Ga. App. 364, 295 S.E.2d 108, 1982 Ga. App. LEXIS 3205 (1982) (decided under former Code 1933, § 38-408).

Exclusion of extrinsic evidence. — When parol evidence regarding a refund and repair was contained in an offer of compromise, such evidence was properly excluded. Topeka Mach. Exch., Inc. v. Stoler Indus., Inc., 220 Ga. App. 799, 470 S.E.2d 250 (decided under former O.C.G.A. § 24-3-37).

Defendant challenging witness's testimony based on Fifth Amendment. — Defendant in a civil action lacks standing to challenge the admission of testimony given in a previous criminal action on the ground that such action violated the witness's Fifth Amendment rights or the immunity agreement between the witness and the state. The privilege against self-incrimination is that of the person under examination as a witness and is intended for that person's protection only. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-37).

Application and Illustrations

Former statute applied to civil cases and not to criminal cases. Moore v. State, 230 Ga. 839, 199 S.E.2d 243, 1973 Ga. LEXIS 1074 (1973), superseded by statute as stated in Gage v. State, 358 Ga. App. 855, 856 S.E.2d 440, 2021 Ga. App. LEXIS 142 (2021) (decided under former Code 1933, § 38-408); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473, 1976 Ga. App. LEXIS 2549 (1976) (decided under former Code 1933, § 38-408); Williams v. State, 178 Ga. App. 216, 342 S.E.2d 703, 1986 Ga. App. LEXIS 1638 (1986), superseded by statute as stated in Gage v. State, 358 Ga. App. 855, 856 S.E.2d 440, 2021 Ga. App. LEXIS 142 (2021) (decided under former O.C.G.A. § 24-3-7).

Former O.C.G.A. § 24-3-37 applied to preclude the introduction into evidence of offers of compromise, although the evidence of such offers was propounded by the offeror. Davidson v. American Fitness Ctrs., Inc., 171 Ga. App. 691, 320 S.E.2d 824, 1984 Ga. App. LEXIS 2319 (1984) (decided under former O.C.G.A. § 24-3-7).

Question made to explore compromise offer excluded. — Exclusion of the defendant's question, "What is it going to take to make you folks happy?," was appropriate. The statement was an effort to explore an offer to compromise a claim still being disputed. Houston v. KinderCare Learning Ctrs., Inc., 208 Ga. App. 235, 430 S.E.2d 24, 1993 Ga. App. LEXIS 462 (1993), cert. denied, No. S93C1098, 1993 Ga. LEXIS 766 (Ga. July 1, 1993) (decided under former O.C.G.A. § 24-3-7).

Separate judicial proceeding. — Unsigned memoranda of proposals made within the confines of probate court administration proceedings were properly admissible in a later action to recover property of an estate. Myers v. Myers, 195 Ga. App. 529, 394 S.E.2d 374, 1990 Ga. App. LEXIS 610 (1990) (decided under former O.C.G.A. § 24-3-7).

Rebuttal of admitted testimony. — When there was sufficient offer of proof by appellant on the issue, the trial court erred by excluding settlement negotiation evidence, which was admissible for the limited but permissible purpose of rebutting appellee's testimony about an unconditional offer. Holbrook Contracting, Inc. v. Tyner, 181 Ga. App. 838, 354 S.E.2d 22, 1987 Ga. App. LEXIS 1562 (1987) (decided under former O.C.G.A. § 24-3-7).

When statement not made with view to compromise. — Former O.C.G.A. § 24-3-37 did not apply to a statement that the appellant owned decedent's interest in land and had a deed to prove ownership because this admission was not offered with a view to a compromise or settlement proposition, and no evidence existed to show that the statement was made with a view to a compromise. Graves v. Graves, 252 Ga. 27, 310 S.E.2d 901, 1984 Ga. LEXIS 572 (1984) (decided under former O.C.G.A. § 24-3-7).

Although civil engineer's testimony may have been construable as referring to an offer to compromise a claim, the engineer's brief reference to a discussion regarding reimbursement of defendant-homeowner for corrective measures against soil erosion produced by developer-plaintiff did not require grant of a mistrial. Ross v. Hagler, 209 Ga. App. 201, 433 S.E.2d 124, 1993 Ga. App. LEXIS 820 (1993) (decided under former O.C.G.A. § 24-3-7).

Defendant's unsolicited offer to settle for the entire amount claimed by plaintiff was an offer to settle and not a proposition to compromise and was admissible at trial. Charter Mtg. Co. v. Ahouse, 165 Ga. App. 497, 300 S.E.2d 328, 1983 Ga. App. LEXIS 1923 (1983) (decided under former O.C.G.A. § 24-3-7).

Admission adduced at a criminal trial pursuant to a grant of immunity from prosecution was not an admission "obtained by constraint" within the meaning of former O.C.G.A. § 24-3-37. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-7).

Guilty plea to a reduced criminal charge was proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-7).

Admission when no effort made to compromise. — Admission of liability contained in an offer to settle, brought

about by a simple demand for settlement, was not inadmissible on the ground that such admission was "made with a view to a compromise," when there was nothing whatever to indicate that there had been any effort to compromise, and when it cannot be inferred from the circumstances under which the offer was made that there had been such an effort. Williams v. Smith, 71 Ga. App. 632, 31 S.E.2d 873, 1944 Ga. App. LEXIS 180 (1944) (decided under former Code 1933, § 38-408); Campbell v. Mutual Serv. Corp., 152 Ga. App. 493, 263 S.E.2d 202, 1979 Ga. App. LEXIS 2974 (1979) (decided under former Code 1933, § 38-408).

In a condemnation proceeding, the trial court did not err in denying the lessees' motion in limine to exclude evidence of an alleged pre-condemnation offer of compromise contained in a letter because the letter, which was sent to an appraiser and not to the Georgia Department of Transportation, was not an inadmissible offer of compromise under former O.C.G.A. § 24-3-37; no condemnation proceeding was pending when the letter was sent, the terms of the letter sought to persuade against the condemnation of the property, or, alternatively, to ensure that the lessees would receive the full amount that the lessees believed would be the lessees' just and adequate compensation if condemnation occurred, and the letter did not propose a compromise of that amount. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862, 2010 Ga. App. LEXIS 1152 (2010) (decided under former O.C.G.A. § 24-3-37).

No specific terms of compromise suggested. — Even if a general proposition of settlement has been made by one party, the admissions of the opposite party may be admissible if no specific terms of compromise have been suggested, and the admissions of a party who may desire a settlement are not to be excluded when, so far as appears from the evidence, the opposite party did nothing to induce the statement, and did not contemplate a compromise or abatement of the party's demand. Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765, 1952 Ga. App. LEXIS 671 (1952) (decided under former Code 1933, § 38-408).

Evidence of a settlement agreement is admissible when the parties have successfully reached a posture of agreement settling the issues between the parties. Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666, 1977 Ga. App. LEXIS 2081 (1977) (decided under former Code 1933, § 38-408).

Settlement negotiations were not admissible in evidence, and dd not constitute a "waiver" of either party's claim or defense. Citadel Corp. v. Sun Chem. Corp., 212 Ga. App. 875, 443 S.E.2d 489, 1994 Ga. App. LEXIS 431 (1994) (decided under former O.C.G.A. § 24-3-37).

General partners' motion for a new trial was properly denied as evidence of the limited partners' attempts to liquidate their interests in the partnership was properly excluded as evidence of settlement negotiations. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310, 2006 Ga. App. LEXIS 895 (2006) (decided under former O.C.G.A. § 24-3-37).

Documents of offers and counteroffers in divorce proceedings. — In a divorce proceeding, the trial court did not err by excluding certain written documents exchanged between the parties that, according to the wife, showed the parties reached an agreement regarding the wife's support because at no time prior to trial did the wife claim a financial settlement and, at most, those documents were evidence of the parties' offers and counteroffers made in attempts to negotiate the issues raised in the divorce proceeding and were not admissible at trial. Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693, 2016 Ga. LEXIS 430 (2016).

Settlement offers admissible in divorce action. — In a divorce action, the settlement offers were admissible for the purpose of determining whether an ex-husband's actions constituted delay or abuse of process based on statutory language and the ex-husband waived that argument when the ex-husband agreed to address the settlement offers in the affidavits submitted to the trial court. Reid v. Reid, 348 Ga. App. 550, 823 S.E.2d 860, 2019 Ga. App. LEXIS 46 (2019), cert. denied, No. S19C0832, 2019 Ga. LEXIS 689 (Ga. Oct. 7, 2019).

Since a telephone conversation transcript between plaintiff and defen-

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dant showed that defendant made an offer as an effort to compromise a claim which was still being disputed, the trial court did not err in excluding this evidence. Stover v. Candle Corp. of Am., 238 Ga. App. 657, 520 S.E.2d 7 (decided under former O.C.G.A. § 24-3-37).

Application to pleadings. — Offer to compromise a disputed claim was no more allowable in pleadings than in evidence. Malcolm v. Dobbs, 127 Ga. 487, 56 S.E. 622, 1907 Ga. LEXIS 412 (1907) (decided under former Civil Code 1895, § 5194).

Independent statements of fact. — Admissions which were to be rejected because "made with a view to a compromise," within the terms of the former statute, were those admissions which were made as a concession to bring about a compromise or settlement; but independent statements of fact by a party, even though made while the parties were trying to settle, are not necessarily inadmissible. Scales v. Shackleford, 61 Ga. 170 (1879) (decided under former Code 1873, § 3789); Austin v. Long, 5 Ga. App. 551, 63 S.E. 640, 1909 Ga. App. LEXIS 60 (1909) (decided under former Civil Code 1895, § 5194).

While offers of compromise, with the view to settle or prevent litigation, were inadmissible, yet an independent acknowledgement of a fact may be received, although made pending a treaty for the amicable adjustment of a controversy. Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 173 Ga. 602, 160 S.E. 775, 1931 Ga. LEXIS 362 (1931) (decided under former Civil Code 1910, § 5781).

Evidence material to other issues. — Terms of a proposition to compromise made to a party, and the party's reply thereto, were admissible in evidence against the party when the reply was material on certain issues. Lucas v. Parsons, 27 Ga. 593, 1859 Ga. LEXIS 126 (1859) (decided under former law).

Conversation between an attorney for the beneficiary and a proper official of the company is admissible for the purpose of illustrating, if it does, good or bad faith of the company in refusing to pay the amount claimed when the evidence negatives an effort to compromise. Progressive Life Ins. Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411, 1944 Ga. App. LEXIS 307 (1944) (decided under former Code 1933, § 38-408).

In a suit alleging fraud and other claims, the trial court erred by granting the motion to dismiss for lack of personal jurisdiction of two property companies for not being served with the summons and complaint because the trial court erred in rejecting the plaintiff's evidence of a settlement proposal between the plaintiff and the two property companies since the settlement proposal was not prohibited by former O.C.G.A. § 24-3-37 as the proposal was being offered to show an agency relationship between the two property companies and a defending business person. Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883, 2012 Ga. App. LEXIS 1032 (2012) (decided under former O.C.G.A. § 24-3-37).

Evidence of value of property as per compromise. — When there was no testimony from which an inference would arise that the offer of the defendant insurance company to pay $1000.00 as the cash value of a barn destroyed by fire was offered in a spirit of compromise, liability to pay the amount of loss being undisputed, it was not error to allow such testimony as tending to show the value placed upon the property by the defendant, since one of the major issues of the case was whether or not the amount of the award was so grossly inadequate as to constitute a badge of fraud. Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765, 1952 Ga. App. LEXIS 671 (1952) (decided under former Code 1933, § 38-408).

While evidence as to settlement negotiations ordinarily was inadmissible at a trial to determine the issue of liability, after a divorce and alimony case had been settled by agreement (except as to attorney fees), the effort needed by counsel to reach such settlement was a matter which could be considered in determining the amount of attorney fees to be awarded. Fenters v. Fenters, 238 Ga. 131, 231 S.E.2d 741, 1977 Ga. LEXIS 923 (1977)

(decided under former Code 1933, § 38-408).

Evidence material to claim for attorney's fees. — In a breach of contract action with regard to the installation of a landscape irrigation system, the trial court did not err by allowing the irrigation company to rely upon two pre-litigation letters from the customer during the customer's cross-examination as the question was not intended to solicit evidence to prove the validity of the irrigation company's claim or the amount at issue. Rather, the letters were offered to support the company's claim for attorney fees. Christie v. Rainmaster Irrigation, Inc., 299 Ga. App. 383, 682 S.E.2d 687, 2009 Ga. App. LEXIS 817 (2009), cert. denied, No. S09C2074, 2009 Ga. LEXIS 708 (Ga. Nov. 2, 2009) (decided under former O.C.G.A. § 24-3-37).

Introduction into evidence of an agreement to delay trial or ancillary proceedings was not prohibited because neither the agreement nor any testimony showed that the agreement was executed with a view to compromise. Kaiser v. Simmons, 52 Ga. App. 355, 183 S.E. 343, 1936 Ga. App. LEXIS 627 (1936) (decided under former Code 1933, § 38-408).

Former statute did not apply to a defendant's statements to the plaintiff to the effect that the defendant had damaged the plaintiff's property and that the defendant would pay the full amount of damage in a few days and the remainder after finding what the damage would be. Wilson v. Wilder, 23 Ga. App. 30, 97 S.E. 447, 1918 Ga. App. LEXIS 24 (1918) (decided under former Civil Code 1910, § 5781).

When an offer was one to pay the hospital bill rather than an offer to settle or compromise the defendant's liability or the prosecutor's right to proceed with a bastardy prosecution, the evidence was admissible and did not come within the proscription of the former statute. Fowler v. State, 111 Ga. App. 856, 143 S.E.2d 553, 1965 Ga. App. LEXIS 1119 (1965) (decided under former Code 1933, § 38-408).

Demands for settlement. — There was no error in allowing complainant's attorney to show that demands were made on the defendant for a settlement of the matters in controversy, and the refusal of the latter to comply with such demand. This differed from admitting in evidence negotiations for a compromise. Mayor of Columbus v. Howard, 6 Ga. 213, 1849 Ga. LEXIS 28 (1849) (decided under former law); Sasser v. Sasser, 73 Ga. 275, 1884 Ga. LEXIS 116 (1884) (decided under former Code 1882, § 3789).

When the same substantial facts affect equally the claims of three clients, that the attorney has settled with one was evidence for the others on an action brought by the clients and was not excluded. Howland v. Barlett, 86 Ga. 669, 12 S.E. 1068, 1891 Ga. LEXIS 42 (1891) (decided under former Code 1882, § 3789).

No offer to compromise found. — In action on contract for sale of land, when vendee agrees to deliver truck to vendor as part of consideration, statement of plaintiff vendor that plaintiff had offered to leave settlement of dispute as to condition the truck was to be in "to disinterested men," after testifying that defendant vendee would do nothing toward fixing the truck, did not show such an offer or proposition made with a view to compromise as to come within the prohibition of the former statute. Walker v. Smith, 87 Ga. App. 517, 74 S.E.2d 374, 1953 Ga. App. LEXIS 784 (1953) (decided under former Code 1933, § 38-408).

Admission is not admissible in evidence as an admission of guilt if the admission was made with a view to compromise or to effect a postponement of the case and was, therefore, not made freely and voluntarily by the defendant. Jester v. State, 133 Ga. App. 652, 211 S.E.2d 909, 1975 Ga. App. LEXIS 2231 (1975) (decided under former Code 1933, § 38-408).

Evidence of a tender of money designed to prevent the rebuilding of a dam alleged to be a nuisance related to a proposition with a view to compromise and was not admissible. Mayor of Montezuma v. Minor, 73 Ga. 484, 1884 Ga. LEXIS 154 (1884) (decided under former Code 1882, § 3789).

Evidence of a settlement with a third person injured in the same casualty ought to be excluded. Firemen's Ins. Co. v. Larsen, 52 Ga. App. 140, 182 S.E. 677, 1935 Ga. App. LEXIS 77 (1935) (decided under former Code 1933, § 38-408).

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Conservator's argument that the probate court improperly considered an offer of compromise and settlement by the conservator's surety for $25,000 to settle the claims of the ward's estate against the conservator was rejected. The probate court was aware of the offer but nothing in the record indicated that the court assigned any probative value to the fact that the administrator and the surety had agreed to settle the estate's claim against the conservator. In re Hudson, 300 Ga. App. 340, 685 S.E.2d 323, 2009 Ga. App. LEXIS 1124 (2009) (decided under former O.C.G.A. § 24-3-37).

Statements by attorney. — When an attorney for the plaintiff met with a member of the plaintiff's firm and the defendant for the purpose of discussing an account in issue between the parties, and made statements including that the attorney hoped they would be able to settle it without any resort to the courts, admissions by the defendant which were induced by such suggestions were inadmissible as evidence in behalf of the plaintiff in a subsequent suit upon the account. Hill Bros. v. Render, 33 Ga. App. 13, 125 S.E. 79, 1924 Ga. App. LEXIS 677 (1924) (decided under former Civil Code 1910 § 5781).

Letters. — Letter written by the attorney of record for plaintiff to attorney of record for defendant, containing admissions as to client's indebtedness to defendant, and offering a compromise settlement pending litigation, was not admissible in evidence. Georgia Chem. Works v. Malcolm, 186 Ga. 275, 197 S.E. 763, 1938 Ga. LEXIS 593 (1938) (decided under former Code 1933, § 38-408).

Letter written with a view toward settlement, and cross-examination of a witness in regard to that letter are properly excluded as not being proper evidence. Brooks v. Fincher, 150 Ga. App. 201, 257 S.E.2d 326, 1979 Ga. App. LEXIS 2118 (1979) (decided under former Code 1933, § 38-408).

In dispossessory proceeding wherein the plaintiff alleged that the defendant was the plaintiff's tenant and was holding over, a letter written to the plaintiff by the defense attorney with a view toward settlement and compromise between the plaintiff and the bank being represented by the defense attorney following the defendant's bankruptcy was properly refused admission into evidence. Hogan v. Tiger Auto Parts, Inc., 163 Ga. App. 448, 294 S.E.2d 655, 1982 Ga. App. LEXIS 2524 (1982) (decided under former O.C.G.A. § 24-3-7).

Plaintiff's letter which did not make a demand for an exact sum but instead set out what plaintiff believed was owed to plaintiff and invited the defendant to respond and to set forth defendant's contentions and defendant's letter which set forth a figure defendant was willing to pay which amounted to a difference of less than $400 than the amount plaintiff used in plaintiff's letter constituted evidence of offers of compromise on behalf of each of the parties and therefore was inadmissible as evidence. Allen v. Brackett, 165 Ga. App. 415, 301 S.E.2d 486, 1983 Ga. App. LEXIS 1892 (1983) (decided under former O.C.G.A. § 24-3-7).

Correspondence from plaintiff's former attorney, written within the context of good faith negotiations, was properly excluded. McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 203 Ga. App. 640, 418 S.E.2d 87, 1992 Ga. App. LEXIS 589 (1992), cert. denied, No. S92C0888, 1992 Ga. LEXIS 486 (Ga. June 11, 1992) (decided under former O.C.G.A. § 24-3-7).

In the slip and fall case, the owner should have been barred under former O.C.G.A. § 24-3-37 from admitting into evidence certain portions of a letter, allegedly conflicting with the occupant's position at trial, sent by the occupant to the owner setting out the reasons for the fall and seeking to enter settlement negotiations; the letter's statement as to how the occupant fell was made with a view toward compromise of the claim, and the letter was an offer to compromise a doubtful or disputed claim. Nevitt v. CMD Realty Inv. Fund IV, L.P., 282 Ga. App. 533, 639 S.E.2d 336, 2006 Ga. App. LEXIS 1352 (2006), cert. denied, No. S07C0501, 2007 Ga. LEXIS 290 (Ga. Mar. 26, 2007) (decided under former O.C.G.A. § 24-3-7).

Neither former O.C.G.A. § 24-3-37 nor former O.C.G.A. § 24-3-37.1 (see now

O.C.G.A. § 24-4-416) prevented admitting a letter from the defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that the manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338, 2008 U.S. Dist. LEXIS 12921 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-7).

Insurance claims. — In an action by the assignee of a claim under a fire insurance policy, evidence as to whether other companies, having policies covering the same property, had paid claims under those policies, was inadmissible. Firemen's Ins. Co. v. Larsen, 52 Ga. App. 140, 182 S.E. 677, 1935 Ga. App. LEXIS 77 (1935) (decided under former Code 1933, § 38-408).

Evidence that the plaintiff, in attempting to discuss plaintiff's claims arising out of an automobile collision, could not get a response from the defendant, plaintiff's insurer, did not show "negotiations and offers of compromise or settlement," which were not proper evidence under former O.C.G.A. § 24-3-37, but was properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiff to unnecessary trouble or expense. U-Haul Co. v. Ford, 171 Ga. App. 744, 320 S.E.2d 868, 1984 Ga. App. LEXIS 2329 (1984) (decided under former O.C.G.A. § 24-3-37).

In action for abuse of process, the trial court properly allowed the plaintiff to testify as to the offers of settlement made by the defendant's attorney immediately prior to trial. The settlement offers were not made during the course of the litigation in which they were offered in evidence, but in the context of settling the original suit by the defendant. Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298, 1988 Ga. App. LEXIS 616 (1988) (decided under former O.C.G.A. § 24-3-37).

Conditional offer to pay half of claim. — When a person held a claim against another in a certain amount, a proposition by the latter to pay one-half of the claim provided another person paid the other half, was a proposal of compromise, and inadmissible. This was true even assuming that the person making the proposal and such other person were partners. English v. Moore, 28 Ga. App. 265, 110 S.E. 737, 1922 Ga. App. LEXIS 439 (1922) (decided under former Civil Code 1910, § 5781).

Offer to pay less than contract sum. — On an issue of whether the contract was procured by the fraudulent representation of the plaintiff of a material fact, the admission of evidence that the defendant offered to pay a less sum in compromise of any liability under the contract is harmful error. Dance v. Mize, 134 Ga. 646, 68 S.E. 434, 1910 Ga. LEXIS 302 (1910) (decided under former Civil Code 1910, § 5781).

Former statute was applied to reject admission made with view of compromise in the following cases. — See Duncan v. Bailey, 162 Ga. 457, 134 S.E. 87, 1926 Ga. LEXIS 216 (1926) (decided under former Civil Code 1910, § 5781); Slade v. Raines, 165 Ga. 89, 139 S.E. 805, 1927 Ga. LEXIS 309 (1927) (decided under former Civil Code 1910, § 5781).

Erroneous admission. — Trial court erred in admitting evidence of an agreement between the prosecutor and the defendant in a bastardy case for the payment by the defendant of a sum of money in return for an agreement that the case should be dead docketed since such evidence could have had only the purpose of showing an admission of guilt by the accused and as such it was inadmissible as not having been freely and voluntarily made. Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356, 1958 Ga. App. LEXIS 532 (1958) (decided under former Code 1933, § 38-408).

When trial court informed the jury that testimony leading up to an offer of compromise was being excluded, if the trial court's usage of the word "compromise" was in error, such error was rendered harmless by the trial court clearly stating to the jury that offers in compromise were inadmissible, that the court was sustaining the objection to the

Application and Illustrations (Cont'd)

extent that it might have any bearing on an offer in compromise, or any element of it, that the court was offering no opinion whatever of any kind, and that if anything had been said about an offer in compromise to disregard it as it was not admissible. Southeastern Metal Prods., Inc. v. De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305, 1959 Ga. App. LEXIS 905 (1959) (decided under former Code 1933, § 34-408).

RESEARCH REFERENCES

C.J.S.

31A C.J.S., Evidence, §§ 380, 387 et seq.

ALR.

Admissibility of evidence of unperformed compromise agreement, 26 A.L.R.2d 858.

Admissibility of admissions made in connection with offers or discussions of compromise, 15 A.L.R.3d 13.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 A.L.R.3d 1185.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 A.L.R.3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

24-4-409. Payment of medical and similar expenses.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury.

History.

Code 1981, § 24-4-409, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Offers to pay medical and similar expenses, Fed. R. Evid. 409.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-37.1 are included in the annotations for this Code section.

Application and illustrations. — Neither former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408) nor former O.C.G.A. § 24-3-37.1 (see now O.C.G.A. § 24-4-416) prevented admitting letter from defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338, 2008 U.S. Dist. LEXIS 12921 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-37.1).

Evidence properly excluded. — In a medical negligence action, the trial court properly excluded statements of regret made by the doctor sued pursuant to the plain meaning of former O.C.G.A. § 24-3-37.1(c) (see now O.C.G.A. § 24-4-416), despite the suing patient's claim that such should have been admitted as statements against interest and under the res gestae exception to the hearsay rule; moreover, retroactive application was not improper as the Georgia General Assembly intended that the law be applied to cases pending at the time it was passed. Aira-

sian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600, 2008 Ga. App. LEXIS 139 (2008) (decided under former O.C.G.A. § 24-3-37.1).

24-4-410. Inadmissibility of pleas, plea discussions, and related statements; exceptions.

Except as otherwise provided by law, evidence of the following shall not, in any judicial or administrative proceeding, be admissible against the criminal defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings in which a guilty plea or a plea of nolo contendere was entered and was later withdrawn, vacated, or set aside; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn, vacated, or set aside;

provided, however, that the statements described in paragraphs (1) through (4) of this Code section shall be admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it or in a criminal proceeding for perjury or false statement if the statement was made by the accused under oath, on the record, and in the presence of counsel or after the accused voluntarily waived his or her right to counsel.

History.

Code 1981, § 24-4-410, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Pleas, plea discussions, and related statements, Fed. R. Evid. 410.

Editor's notes.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 17-7-93 and 17-7-95, which may also be applicable to this Code section.

Law reviews.

For article, "The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence," see 54 Ga. L. Rev. 927 (2020).

JUDICIAL DECISIONS

Withdrawn guilty plea not admissible. — In two cousins' trial for the murder of a drug dealer, cousin one's trial counsel did not provide ineffective assistance by failing to seek admission of statements that cousin two made, which exonerated cousin one, when cousin two attempted to plead guilty because under former O.C.G.A. § 17-7-93(b) (see now O.C.G.A. § 24-4-410), cousin two's with-

drawn guilty plea was not admissible. Esprit v. State, 305 Ga. 429, 826 S.E.2d 7, 2019 Ga. LEXIS 159 (2019).

24-4-411. Liability insurance.

In all civil proceedings involving a claim for damages, evidence that a person was or was not insured against liability shall not be admissible except as provided in this Code section. This Code section shall not require the exclusion of evidence of insurance against liability in proceedings under Code Section 40-1-112 or when such evidence is offered for a relevant purpose, including, but not limited to, proof of agency, ownership, or control, and the court finds that the danger of unfair prejudice is substantially outweighed by the probative value of the evidence.

History.

Code 1981, § 24-4-411, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.

Cross references.

Liability insurance for performance of educational duties authorized, § 20-2-991.

Liability insurance, Fed. R. Evid. 411.

Law reviews.

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

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Testimony from passenger on receipt of settlement. — Trial court did not abuse the court's discretion by ruling that a second passenger's testimony was admissible because the jury heard no direct evidence regarding the defendant's liability insurance, only that the second passenger and others had received money to settle any claims against the defendant and that the truck driver had not paid any money and the court properly balanced the plaintiff's interest in showing that the second passenger could possibly be biased against the defendant's interest. Brown v. Tucker, 337 Ga. App. 704, 788 S.E.2d 810, 2016 Ga. App. LEXIS 399 (2016).

RESEARCH REFERENCES

ALR.

Abuse and Molestation Exclusion in Liability Insurance Policies, 57 A.L.R.7th 1.

24-4-412. Complainant's past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions.

(a) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; trafficking persons for labor servitude or sexual servitude in violation of Code Section 16-5-46; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; keeping a place of prostitution in violation of Code Section 16-6-10; pimping in violation of Code Section

16-6-11; pandering in violation of Code Section 16-6-12; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; trafficking persons for labor servitude or sexual servitude in violation of Code Section 16-5-46; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; keeping a place of prostitution in violation of Code Section 16-6-10; pimping in violation of Code Section 16-6-11; pandering in violation of Code Section 16-6-12; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, the court may admit the following evidence relating to the past sexual behavior of the complaining witness, following the procedure described in subsection (c) of this Code section:

(1) Evidence of specific instances of a victim's or complaining witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) Evidence of specific instances of a victim's or complaining witness's sexual behavior with respect to the defendant if it supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution;

(3) Evidence of specific instances of a victim's or complaining witness's sexual behavior with respect to the defendant or another person if offered by the prosecutor; and

(4) Evidence whose exclusion would violate the defendant's constitutional rights.

(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) If a party intends to offer evidence under subsection (b) of this Code section, the party must:

(A) File a motion that specifically describes the evidence and states the purpose for which it is to be offered; and

(B) Do so at least three days before trial unless the court, for good cause, sets a different date; and

(2) Before admitting the evidence under this Code section, the court shall conduct an in camera hearing to examine the merits of the motion.

History.

Code 1981, § 24-4-412, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2019, p. 81, § 5/HB 424; Ga. L. 2020, p. 493, § 24/SB 429.

Editor's notes.

Ga. L. 2019, p. 81, § 8/HB 424, not codified by the General Assembly, provides, in part: "Sections 4 and 5 of this Act shall apply to any motion made or hearing or trial commenced on or after the effective date of this Act." This Act became effective April 18, 2019.

Law reviews.

For comment on Teague v. State, 208 Ga. 459, 67 S.E.2d 467 (1951), see 14 Ga. B.J. 363 (1952).

For comment on Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for rape, see 19 Ga. B.J. 95 (1956).

For comment, "Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?," see 36 Mercer L. Rev. 991 (1985).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992).

For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws," see 20 Ga. St. U.L. Rev. 565 (2004).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 741, § 1 and former O.C.G.A. §§ 24-2-2 and 24-2-3 are included in the annotations for this Code section.

Constitutionality. — Former O.C.G.A. § 24-2-3 did not violate a defendant's Sixth Amendment right of confrontation; the former statute served a variety of state interests which outweighed that right. Harris v. State, 257 Ga. 666, 362 S.E.2d 211, 1987 Ga. LEXIS 1005 (1987) (decided under former O.C.G.A. § 24-2-3).

Former statute was a strong legislative attempt to protect the victim-prosecutor in rape cases by the exclusion of evidence which might reflect on the character of the witness without contributing materially to the issue of the guilt or

innocence of the accused. Parks v. State, 147 Ga. App. 617, 249 S.E.2d 672, 1978 Ga. App. LEXIS 2868 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Former O.C.G.A. § 24-2-3 sought to eliminate the philosophy that women of promiscuous sexual reputation were entitled to less protection under the rape laws than women of chaste reputation. Singleton v. State, 157 Ga. App. 192, 276 S.E.2d 685, 1981 Ga. App. LEXIS 1731 (1981) (decided under Ga. L. 1976, p. 741, § 1); Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547, 1981 Ga. App. LEXIS 2848 (1981) (decided under Ga. L. 1976, p. 741, § 1); Snyder v. State, 201 Ga. App. 66, 410 S.E.2d 173, 1991 Ga. App. LEXIS 1212 (1991) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 was a legislative attempt to exclude evidence which might reflect on the character of the witness without contributing materially to the issue of the guilt or innocence of the accused. Martin v. State, 196 Ga. App. 145, 395 S.E.2d 391, 1990 Ga. App. LEXIS 795 (1990) (decided under former O.C.G.A. § 24-2-3).

Discretion of court to apply "rape shield" principle. — Trial court did not err in applying the former "rape shield" principle to exclude evidence that the victim had allegedly engaged in sexual activity with her ex-boyfriend immediately prior to the alleged act of sexual battery; the court had discretion to apply such principle even when the exclusion was not mandated under former O.C.G.A. § 24-2-3. Bates v. State, 216 Ga. App. 597, 454 S.E.2d 811, 1995 Ga. App. LEXIS 225 (1995) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion in excluding the defendant's claim that his victim had prior consensual sex with him and that he reasonably believed she consented on the night of the offense, since the victim testified to the events of that night, there was a trail of clothing left near the crime scene, and evidence of her injuries was offered. Davis v. State, 235 Ga. App. 362, 509 S.E.2d 655 (decided under former O.C.G.A. § 24-2-3).

Construction with former O.C.G.A. § 24-3-38. — Despite former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822), giving a party the right to have a whole conversation heard, former O.C.G.A. § 24-2-3 prohibited the admission of a portion of defendant's statement in which the defendant said that the victim had sexual intercourse with the victim's cousin. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (decided under former O.C.G.A. § 24-2-3).

Rape shield law was not implicated since the testimony of the victim concerned prior physical abuse, not sexual abuse. Demetrios v. State, 246 Ga. App. 506, 541 S.E.2d 83, 2000 Ga. App. LEXIS 1274 (2000), cert. denied, No. S01C0479, 2001 Ga. LEXIS 400 (Ga. May 7, 2001), overruled in part, White v. State, 305 Ga. 111, 823 S.E.2d 794, 2019 Ga. LEXIS 66 (2019) (decided under former O.C.G.A. § 24-2-3).

Evidence of relationship with boyfriend. — Given that the defendant was not charged with rape, evidence of the victim's sexual activity, and the fact that she had a boyfriend, with whom she allegedly had sexual intercourse during the time of the alleged sexual abuse, should not have been excluded under either the 2004 or 2005 version of the former Rape Shield statute as: (1) that evidence acted as a possible explanation for the victim's physical trauma, placing her credibility and the defendant's guilt into question; (2) the jury's split verdict supported the defendant's argument that even without the excluded testimony, the state's case was far less than overwhelming; and (3) the appeals court could not determine what role the excluded evidence would have played in the jury's deliberations; hence, a new trial as to the charges of child molestation and incest was ordered. Gresham v. State, 281 Ga. App. 116, 635 S.E.2d 316, 2006 Ga. App. LEXIS 924 (2006) (decided under former O.C.G.A. § 24-2-3).

Victim's prior accusations of sexual misconduct. — Former rape shield law did not necessarily prohibit testimony as to the falsity of a victim's prior accusations of sexual misconduct directed against persons other than the defendant. Benton v. State, 265 Ga. 648, 461 S.E.2d 202, 1995 Ga. LEXIS 708 (1995), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400

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(2019) (decided under former O.C.G.A. § 24-2-3).

Defendant was not required to make a threshold showing that the victim's previous molestation allegations were false before the defendant was entitled to a hearing on the reasonable probability of falsity. Peters v. State, 224 Ga. App. 837, 481 S.E.2d 898 (decided under former O.C.G.A. § 24-2-3).

Testimony of previous false allegations by the victim was not prohibited; however, the defendant failed to make the threshold showing of a reasonable probability that the victim's three previous rape reports were false. Banks v. State, 250 Ga. App. 728, 552 S.E.2d 903, 2001 Ga. App. LEXIS 850 (2001), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err by prohibiting the defendant from questioning one of the victims about allegations of molestation committed by other parties because the evidence was not admissible. Stevens v. State, 356 Ga. App. 847, 847 S.E.2d 649, 2020 Ga. App. LEXIS 493 (2020), cert. denied, No. S21C0336, 2021 Ga. LEXIS 389 (Ga. May 3, 2021).

Victim's false accusation of sexual abuse improperly barred. — Lower appellate court properly reversed the ruling excluding the victim's admittedly false statement of sex because the false allegation plainly described the event involving someone else at a separate time; thus, there was no basis for confusion and, as such, O.C.G.A. § 24-4-403 did not pose a bar to the jury learning about the victim's false statement. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Georgia Supreme Court overruled Smith v. State, 259 Ga. 135 (1989) and similar holdings, which held that Georgia's Rape Shield statute (now O.C.G.A. § 24-4-412), as it then existed, did not prohibit testimony of previous false allegations by the victim as the court held that although Smith's bright-line test was not unworkable, neither was the alternative of applying familiar and usual rules of evidence, which trial courts routinely do every day. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Pregnancy of victim. — Evidence of a victim's past sexual behavior for the purpose of showing that she may have been pregnant at the time the allegations were made and may have therefore made up the charge to justify or explain the pregnancy was barred by former O.C.G.A. § 24-2-3. Green v. State, 221 Ga. App. 436, 472 S.E.2d 1 (decided under former O.C.G.A. § 24-2-3).

Evidence that a child rape victim had sex with her boyfriend six months before the alleged rape was properly excluded since, while relevant to show that the victim's pregnancy was not caused by the defendant, it was insufficiently probative due to the time frames involved. (decided under former O.C.G.A. § 24-2-3).

"Quite possibly pregnant" evidence disallowed. — Cross-examination of the victim with regard to sexual acts with males other than the defendant and the fact that she was "quite possibly pregnant" was properly disallowed since the only proffer made by the defendant concerning the possible pregnancy as a motive for lying was counsel's mere statement, and the defendant denied ever having sexual relations with the victim. Gibbs v. State, 196 Ga. App. 140, 395 S.E.2d 387, 1990 Ga. App. LEXIS 828 (1990) (decided under former O.C.G.A. § 24-2-3).

Miscarriage by victim. — With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not abuse the court's discretion by excluding as barred by the former rape shield statute evidence of the victim's prior miscarriage since the former rape shield statute barred evidence relating to the past sexual behavior of the complaining witness. Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191, 2008 Ga. App. LEXIS 1295 (2008) (decided under former O.C.G.A. § 24-2-3).

Parent status of minor victim was irrelevant fact. — Trial court correctly excluded all reference to the fact that the 16-year-old victim had a child of approximately 21 months of age. Johnson v. State, 245 Ga. App. 690, 538 S.E.2d 766, 2000

Ga. App. LEXIS 1057 (2000) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute provided the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape. The res gestae rule, impeachment techniques, and other traditional means for introducing evidence which was otherwise inadmissible could have no effect in this situation. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363, 1978 Ga. App. LEXIS 2319 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Former rape shield statute superseded all evidentiary exceptions, including the res gestae rule. Phillips v. State, 196 Ga. App. 267, 396 S.E.2d 57, 1990 Ga. App. LEXIS 877 (1990) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 did not prohibit testimony of previous false allegations by the victim; however, before such evidence could be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity existed. Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 1989 Ga. LEXIS 128 (1989), cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53, 1989 U.S. LEXIS 3991 (1989), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019), overruled in part as stated in Ray v. State, 356 Ga. App. 266, 841 S.E.2d 477, 2020 Ga. App. LEXIS 225 (2020), overruled in part as stated in State v. Ray, 367 Ga. App. 329, 884 S.E.2d 414, 2023 Ga. App. LEXIS 89 (2023) (decided under former O.C.G.A. § 24-2-3).

Once the court determined that a child-victim's previous allegation of abuse was unreliable, testimony of the previous allegation was no longer subject to the former rape shield statute protection and should have been admitted. Hines v. State, 221 Ga. App. 193, 470 S.E.2d 787 (decided under former O.C.G.A. § 24-2-3).

Evidence of prior false claims improperly barred. — Evidence concerning allegedly false prior rape claims made by the prosecutor was not barred by former O.C.G.A. § 24-2-3 as the subject testimony was admissible, not merely to impeach the witness credibility, but as substantive evidence tending to establish that there had been no rape, but mere consensual sexual intercourse; accordingly, the trial court abused the court's discretion in denying the defendant's motion for a new trial. Humphrey v. State, 207 Ga. App. 472, 428 S.E.2d 362, 1993 Ga. App. LEXIS 244 (1993), cert. denied, No. S93C0883, 1993 Ga. LEXIS 601 (Ga. May 13, 1993), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-2-3).

Evidence of the admittedly false accusation by the victim, the defendant's stepdaughter, was not barred by the rape shield statute as evidence of the victim's alleged false allegations of sexual misconduct by persons other than the defendant did not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct. Burns v. State, 345 Ga. App. 822, 813 S.E.2d 425, 2018 Ga. App. LEXIS 226 (2018), aff'd, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Evidence of prior false claims properly barred. — In a sexual molestation case, the trial court did not abuse the court's discretion in concluding that the defendant's evidence that the victim once falsely alleged that another man had molested the victim did not establish by a reasonable probability that the prior allegation was in fact false. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122, 2011 Ga. App. LEXIS 148 (2011) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute prohibited all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards; in other words, her reputation concerning past sexual activity with persons other than the defendant. The exceptions were, if so found by the judge after an in camera hearing, that the past behavior involving participation by the accused, or that the evidence supported an inference that the accused could have reasonably believed that the com-

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plaining witness consented to the conduct complained of. Parks v. State, 147 Ga. App. 617, 249 S.E.2d 672, 1978 Ga. App. LEXIS 2868 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Evidence of prior sexual experience was not permitted by former O.C.G.A. § 24-2-3. Roberts v. State, 158 Ga. App. 309, 279 S.E.2d 753, 1981 Ga. App. LEXIS 2177 (1981) (decided under Ga. L. 1976, p. 741, § 1); Raines v. State, 191 Ga. App. 743, 382 S.E.2d 738, 1989 Ga. App. LEXIS 762 (1989) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in refusing to admit evidence of the victim's past marital problems when the defendant admitted that the victim did not tell him which type of marital problem it was. Hence, his lack of knowledge that the victim's marital problem related to infidelity could have had no reasonable bearing on whether the victim would consent to the conduct complained of. Burley v. State, 190 Ga. App. 75, 378 S.E.2d 328, 1989 Ga. App. LEXIS 128 (1989) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute precluded the introduction of evidence of the victim's past sexual behavior. Obviously, a prior rape committed against the victim had nothing to do with her past sexual behavior. Raines v. State, 191 Ga. App. 743, 382 S.E.2d 738, 1989 Ga. App. LEXIS 762 (1989) (decided under former O.C.G.A. § 24-2-3).

Trial court properly disallowed the defendant's proffer that the victim might have said the defendant raped her on occasions other than the two charged since it was not clear how such evidence would have aided the defendant and there was no indication that the victim was lying about the other incidents of rape. Gibbs v. State, 196 Ga. App. 140, 395 S.E.2d 387, 1990 Ga. App. LEXIS 828 (1990) (decided under former O.C.G.A. § 24-2-3).

Evidence of portions of a conversation between the defendant and the victim that involved her past sexual abuse by family members and others was properly excluded. Hicks v. State, 222 Ga. App. 828, 476 S.E.2d 101 (decided under former O.C.G.A. § 24-2-3).

Evidence of character or other crimes. — Proffered testimony of a defense witness that the witness had exchanged sex with the victim for money and that defendant knew of this at the time of the incident was not admissible under the "highly material category" of subsection (c)(2) of former O.C.G.A. § 24-2-3. Brown v. State, 214 Ga. App. 676, 448 S.E.2d 723, 1994 Ga. App. LEXIS 1012 (1994) (decided under former O.C.G.A. § 24-2-3).

Victim's testimony that victim had not had intercourse in five months admissible. — After the state attempted to prove the defendant's rape of the victim by showing that the defendant passed herpes to the victim, the trial court's permission for the victim to testify that the victim had not had sex for five months prior to the rape did not violate the rape shield law, former O.C.G.A. § 24-2-3, as the victim's testimony was relevant to exclude the possibility that someone other than defendant had sexual contact with the victim and gave the victim herpes. (decided under former O.C.G.A. § 24-2-3).

Testimony of defendant concerning overheard conversations was properly disallowed. — Even though the trial court allowed defendant to testify that the defendant had prior sexual intercourse with the complaining witness, the court properly disallowed testimony from defendant that the defendant had overheard conversations by the victim's family members that the victim "ran around." Marks v. State, 192 Ga. App. 64, 383 S.E.2d 626, 1989 Ga. App. LEXIS 887 (1989) (decided under former O.C.G.A. § 24-2-3).

Exceptions to the general rule of inadmissibility listed in the former statute were exclusive and those exceptions were provided solely for the benefit of the defendant who, by proper and timely objection, could prevent the state from introducing the evidence excluded by the former statute. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363, 1978 Ga. App. LEXIS 2319 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Two exceptions contained in former O.C.G.A. § 24-2-3 were exclusive.

Jones v. State, 190 Ga. App. 416, 379 S.E.2d 189, 1989 Ga. App. LEXIS 257 (1989) (decided under former O.C.G.A. § 24-2-3).

Virginity irrelevant. — Admitting testimony that an alleged victim was not a virgin to support an inference that an accused reasonably believed she consented to his advances is erroneous since it is against just such reasoning that rape shield laws have been enacted. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363, 1978 Ga. App. LEXIS 2319 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Admission of victim's testimony that during the attack she told defendant she was a virgin was harmless error since the defense was based upon a claim of mistaken identity, not alleged consent by the victim. Veal v. State, 191 Ga. App. 445, 382 S.E.2d 131, 1989 Ga. App. LEXIS 634 (1989) (decided under former O.C.G.A. § 24-2-3).

Evidence inadmissible despite physician's testimony that victim was sexually active. — Inquiry into the victim's past sexual experiences was properly refused, even after a physician testified that in examining the victim it was obvious she had been sexually active. Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251, 1987 Ga. App. LEXIS 1876 (1987), cert. denied, 183 Ga. App. 905 (decided under former O.C.G.A. § 24-2-3).

Harmless error in admission of rape kit evidence. — Even though the trial court plainly erred when the court admitted the state's evidence that the rape kit exam showed signs of male DNA, but not the defendant's, because the victim had voluntary intercourse the day before the attack with a different man, the error was harmless because the evidence's admission was not likely to affect the outcome of the proceedings given that the defendant's accomplice pled guilty to the rape and admitted to the jury that the accomplice had thrown water on the victim and that the accomplice and the defendant acted in concert in assaulting the victim in front of the victim's children. Palencia v. State, 359 Ga. App. 307, 855 S.E.2d 782, 2021 Ga. App. LEXIS 161 (2021), rev'd in part, 313 Ga. 625, 872 S.E.2d 681, 2022 Ga. LEXIS 130 (2022), vacated in part, 366 Ga. App. 316, 881 S.E.2d 461, 2022 Ga. App. LEXIS 538 (2022).

Applicability to noncomplaining witness. — Former O.C.G.A. § 24-2-3 included cross-examination of the other witnesses about the sexual conduct of the complaining witness so the argument that the former statute applied only to cross-examination of the complaining witness was without merit. Ellis v. State, 181 Ga. App. 630, 353 S.E.2d 822, 1987 Ga. App. LEXIS 2570 (1987) (decided under former O.C.G.A. § 24-2-3).

Harmless to deny examination as to incident victim denied. — Any error in denying the defendant a thorough and sifting cross-examination of the victim concerning a past sexual experience with the defendant was harmless when the defendant subsequently testified to such an experience and the victim then denied the experience. Clarke v. State, 169 Ga. App. 433, 313 S.E.2d 716, 1984 Ga. App. LEXIS 1580 (1984) (decided under former O.C.G.A. § 24-2-3).

When the defendant had never seen or known the victim prior to her abduction, evidence of past sexual activity was not admissible on the question of consent. Fuller v. State, 169 Ga. App. 488, 313 S.E.2d 505, 1984 Ga. App. LEXIS 1603 (1984) (decided under former O.C.G.A. § 24-2-3).

Prohibition inapplicable to impeachment as to victim's attire. — Former rape shield law was not applicable to evidence offered to impeach the victim as to her mode of dress at the time in question. Villafranco v. State, 252 Ga. 188, 313 S.E.2d 469, 1984 Ga. LEXIS 638 (1984) (decided under former O.C.G.A. § 24-2-3).

Reversible error when defendant was not allowed to show wife's medical records. — When a physician testified that the victim had a venereal disease and that she maintained she had not had sexual intercourse with anyone else, it was reversible error not to allow the defendant to show by his wife's medical records, or otherwise, that his wife was then undergoing medical treatment and tests for pregnancy and showed no sign of the disease and therefore, by logical ex-

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tension, that defendant did not have the disease. Reece v. State, 192 Ga. App. 14, 383 S.E.2d 572, 1989 Ga. App. LEXIS 872 (1989) (decided under former O.C.G.A. § 24-2-3).

Evidence of infectious discharge in victim's body. — Exclusion of medical testimony regarding an infectious discharge discovered in the victim's body within hours after the alleged rape was reversible error since the excluded testimony was relevant to defendant's claim that he did not penetrate the victim because of the victim's gross physical condition. White v. State, 201 Ga. App. 53, 410 S.E.2d 441, 1991 Ga. App. LEXIS 1187 (1991) (decided under former O.C.G.A. § 24-2-3).

Evidence victim dropped out of school and missed prior court date not barred. — Defense's question to the victim concerning her status as a high school dropout and her failure to keep a previous court appointment did not violate former O.C.G.A. § 24-2-3, since the questions did not directly reflect on her past sexual behavior. George v. State, 257 Ga. 176, 356 S.E.2d 882, 1987 Ga. LEXIS 778 (1987) (decided under former O.C.G.A. § 24-2-3).

Evidentiary exhibit properly excluded. — Exhibit, which was apparently a fictional work about someone's sexual experiences and was to be used in an attack upon the victim's reputation for prior sexual behavior, was properly excluded under former O.C.G.A. § 24-2-3. Kilgore v. State, 195 Ga. App. 884, 395 S.E.2d 337, 1990 Ga. App. LEXIS 709 (1990) (decided under former O.C.G.A. § 24-2-3).

Identification of alternate sexual partner. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, trial counsel was not ineffective in failing to investigate alternate sources of the victim's pregnancy and injuries because trial counsel testified that identifying an alternate sexual partner might have conflicted with the rape shield statute; any sexual contact after the crime would not have been relevant to the victim's injuries and would have been highly prejudicial; and, in light of the victim's testimony, the victim's immediate outcry, and the evidence of male DNA found inside the victim and the victim's vaginal injury, it was not reasonably likely that the result of the trial would have been different. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588, 2014 Ga. App. LEXIS 693 (2014) (decided under former O.C.G.A. § 24-2-3).

Denial of hearing held error. — When defendant offered to prove that the complaining witness had prior sexual encounters with the defendant and others and that the defendant knew about the others and of her reputation at the time of the incident on trial, it was error to deny a hearing on the defendant's offer of proof relating to the witness's past sexual behavior. Hamilton v. State, 185 Ga. App. 536, 365 S.E.2d 120, 1987 Ga. App. LEXIS 2872 (1987) (decided under former O.C.G.A. § 24-2-3).

Appellate standard of review. — Appellate court reviewed the trial court's exclusion of evidence under the former rape shield statute, former O.C.G.A. § 24-2-3, for abuse of discretion. Jackson v. State, 254 Ga. App. 562, 562 S.E.2d 847, 2002 Ga. App. LEXIS 428, aff'd sub nom. Curtis v. State, 275 Ga. 576, 571 S.E.2d 376, 2002 Ga. LEXIS 918 (2002) (decided under former O.C.G.A. § 24-2-3).

Child Molestation

Former rape shield law applicable in child molestation cases. — In a prosecution for child molestation, evidence of the victim's past sexual behavior and preoccupation with sex was properly excluded. McGarity v. State, 224 Ga. App. 302, 480 S.E.2d 319 (decided under former O.C.G.A. § 24-2-3).

Trial court properly refused to allow defense counsel to question an investigator about the victim's prior sexual activity in a child molestation case as the rape shield law, former O.C.G.A. § 24-2-3 (prohibiting the introduction of evidence of the past sexual behavior of the complaining witness in rape cases), was also applicable in child molestation cases, and no exceptions to the rape shield law was implicated. Flowers v. State, 255 Ga. App. 660,

566 S.E.2d 339, 2002 Ga. App. LEXIS 672 (2002) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3(b) was applicable in child molestation cases and excluded evidence relating to the past sexual behavior of the complaining witness with some limited exceptions which include: (1) to show that someone other than the defendant caused the injuries to the child; (2) to show lack of victim credibility if the victim's prior allegations of molestation were false; and (3) to show other possible causes for the symptoms exhibited. Since no exception applied, inquiry into a later rape of defendant's victim was properly foreclosed in defendant's rape and incest trial. Taylor v. State, 268 Ga. App. 333, 601 S.E.2d 815, 2004 Ga. App. LEXIS 915 (2004) (decided under former O.C.G.A. § 24-2-3).

In 2005, former O.C.G.A. § 24-2-3 was amended to provide expressly that the former rape shield law applied to prosecutions for child molestations. Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394, 2005 Ga. App. LEXIS 854 (2005), cert. denied, No. S06C0113, 2006 Ga. LEXIS 33 (Ga. Jan. 17, 2006) (decided under former O.C.G.A. § 24-2-3).

Early masturbation of victim irrelevant evidence. — In a child molestation case, evidence of the victim's possibly engaging in masturbation at an early age would not have been admissible as the defendant made no allegation that the victim had any unusually early or sudden sexual knowledge; thus, the victim's sexual history was irrelevant under the circumstances. Hughes v. State, 297 Ga. App. 581, 677 S.E.2d 674, 2009 Ga. App. LEXIS 388 (2009), cert. denied, No. S09C1440, 2009 Ga. LEXIS 560 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-2-3).

Admission of evidence that victim molested at age six. — Trial court did not err in excluding the evidence that the victim was molested at the age of six because even if the evidence arguably bore some minimal relevance to defendant's guilt in the case, the trial court acted within the court's discretion in concluding that the minor probative value of any such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or waste of time. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

State may not introduce evidence of victim's sexual activity. — In the defendant's trial for child molestation against three victims, the trial court erred in allowing the state to introduce evidence of one victim's prior sexual activity involving the defendant's molestation of the defendant's two step-sisters; this evidence was inadmissible under the Rape Shield Statute, O.C.G.A. § 24-4-412, even if introduced by the state for the purpose of showing the effects of the defendant's molestation of the victim. However, the error was harmless. White v. State, 305 Ga. 111, 823 S.E.2d 794, 2019 Ga. LEXIS 66 (2019).

Expert testimony on abuse accommodation syndrome. — Defendant's claim that the defendant should have been able to question witnesses about the victim's alleged molestation by her stepfather and step-uncle was rejected as a nurse's testimony that the victim's behavioral characteristics were consistent with those of a child who had been sexually molested fell far short of the expert testimony regarding abuse accommodation syndrome that warranted the admission of evidence of previous molestation by others. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240, 2006 Ga. App. LEXIS 972 (2006) (decided under former O.C.G.A. § 24-2-3).

Rape shield law inapplicable in child molestation cases. — By the former statute's plain terms the former rape shield statute, former O.C.G.A. § 24-2-3(a), applied only in prosecutions for rape and not to child molestation cases; however, the trial court did not err by applying former § 24-2-3(a) to defendant's case because defendant was prosecuted for, among other offenses, rape, and the fact that defendant was acquitted of the rape charge did not require a new trial on the other charges. Abdulkadir v. State, 279 Ga. 122, 610 S.E.2d 50, 2005 Ga. LEXIS 161 (2005), superseded by statute as stated in Brown v. State, 275 Ga. App.

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281, 620 S.E.2d 394, 2005 Ga. App. LEXIS 854 (2005), superseded by statute as stated in Segura v. State, 280 Ga. App. 685, 634 S.E.2d 858, 2006 Ga. App. LEXIS 928 (2006), superseded by statute as stated in Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786, 2007 Ga. App. LEXIS 778 (2007) (decided under former O.C.G.A. § 24-2-3).

Child abuse accommodation syndrome. — Contrary to the defendant's contention, the trial court properly excluded evidence consisting of any prior abuse committed against the victims by persons other than the defendant on relevancy grounds, given that the state's fact witness, a social worker, did not testify that the victims' demeanor exhibited symptoms consistent with child abuse accommodation syndrome. The court noted that the evidence was not excludable under the former rape shield statute as contended by the state. Segura v. State, 280 Ga. App. 685, 634 S.E.2d 858, 2006 Ga. App. LEXIS 928 (2006) (decided under former O.C.G.A. § 24-2-3).

Evidence of a child sexual abuse victim's previous sexual activity was properly excluded under former O.C.G.A. § 24-2-3(b) because medical evidence indicated the child had been sexually violated within the last 48 hours. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780, 2002 Ga. App. LEXIS 927 (2002), cert. denied, No. S02C1766, 2002 Ga. LEXIS 895 (Ga. Sept. 30, 2002) (decided under former O.C.G.A. § 24-2-3).

In a rape case, the trial court properly found that under former O.C.G.A. § 24-2-3, the defendant failed to show that the child victim had made three prior false allegations of sexual misconduct. In the first case, the defendant asserted a vague claim unsupported by any evidence that when the child was two years old, the child might have made some unspecified allegation against a relative against whom no charges were brought; in the second case, the allegations led to a guilty plea; in the third case, police found that a minor had touched the victim but that no crime had been committed. Osborne v. State, 291 Ga. App. 711, 662 S.E.2d 792, 2008 Ga. App. LEXIS 621 (2008), cert. denied, No. S08C1643, 2008 Ga. LEXIS 783 (Ga. Sept. 22, 2008), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-2-3).

With regard to defendant's convictions for sexual battery and child molestation of a step-child, the trial court properly excluded defendant's attempt to introduce evidence of a purported false allegation by the victim that the victim was the victim of date rape in 2006 under the former rape shield law as defendant did not seek to introduce the evidence to show that the victim had psychological problems, rather, defendant argued that the victim had made a previous false allegation. Birkbeck v. State, 292 Ga. App. 424, 665 S.E.2d 354, 2008 Ga. App. LEXIS 703 (2008), cert. denied, No. S08C1917, 2008 Ga. LEXIS 874 (Ga. Oct. 27, 2008), overruled in part, State v. Gardner, 286 Ga. 633, 690 S.E.2d 164, 2010 Ga. LEXIS 121 (2010) (decided under former O.C.G.A. § 24-2-3).

Trial court did not violate Georgia's rape shield statute, O.C.G.A. § 24-4-412, in determining that proposed testimony regarding a separate, independent investigation into child molestations allegations by the victim against another man was inadmissible because the proposed statements were not false allegations of sexual misconduct but were statements that another man had not engaged in sexual misconduct with the victim when, in fact, some sort of sexual misconduct had occurred. Frye v. State, 344 Ga. App. 704, 811 S.E.2d 460, 2018 Ga. App. LEXIS 128 (2018), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Evidence not admissible in child molestation case. — In a prosecution for child molestation, the trial court did not abuse the court's discretion by granting the state's motion to exclude evidence that the victim told her physician that she was sexually active with her boyfriend. Cox v. State, 241 Ga. App. 388, 526 S.E.2d 887, 1999 Ga. App. LEXIS 1641 (1999) (decided under former O.C.G.A. § 24-2-3).

Evidence not admissible. — At a trial in which defendant was accused of sexual offenses against the daughter, the

trial court did not err under former O.C.G.A. § 24-2-3(b) in refusing to admit evidence of the possibility that the daughter was previously sexually molested by the babysitter; such evidence was inadmissible in a molestation case to show the victim's reputation for nonchastity or the victim's preoccupation with sex, and an exception to this rule did not apply as the state presented neither medical evidence showing that the victim had been molested nor evidence showing that the victim had indicated symptoms consistent with the child abuse accommodation syndrome. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569, 2005 Ga. App. LEXIS 1285 (2005), cert. denied, No. S06C0610, 2006 Ga. LEXIS 224 (Ga. Mar. 27, 2006), overruled in part, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56, 2007 Ga. LEXIS 182 (2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest and the trial pursuant to the former Rape Shield Statute, former O.C.G.A. § 24-2-3, because the evidence was cumulative to the extent that a portion of a letter from the victim recounting the victim's prior sexual activity supported an inference that the victim consented to sexual conduct since the jury was aware that the victim was pregnant with the defendant's child; to the extent that the portion of a letter from the victim in which the victim described future sexual activities that the victim would like to engage in with the defendant was relevant and admissible to show that the victim still had feelings for the defendant, that evidence was cumulative to the victim's testimony that the victim still loved the defendant and remained in contact with the defendant. Morgan v. State, 303 Ga. App. 358, 693 S.E.2d 504, 2010 Ga. App. LEXIS 66 (2010), cert. denied, No. S10C1272, 2010 Ga. LEXIS 736 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest and the trial pursuant to the former Rape Shield Statute, former O.C.G.A. § 24-2-3, because although the trial court initially indicated that the former Rape Shield Statute prohibited admission of the letters, the court clearly indicated that it would consider any future proper attempt to admit the evidence, but the defendant declined to do so; assuming that the ruling was erroneous, the verdict was sustainable because the evidence in the letters that the victim had a previous sexual relationship with the defendant before the incident and wanted to have one with the defendant in the future was not relevant to the charges for which the defendant was convicted, namely kidnapping, kidnapping with bodily injury, family violence aggravated assault, and false imprisonment. Morgan v. State, 303 Ga. App. 358, 693 S.E.2d 504, 2010 Ga. App. LEXIS 66 (2010), cert. denied, No. S10C1272, 2010 Ga. LEXIS 736 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-2-3).

Defendant's convictions for child molestation in violation of O.C.G.A. § 16-6-4(a) and sexual battery in violation of O.C.G.A. § 16-6-22.1(b) were vacated because the trial court erred by applying former O.C.G.A. § 24-2-3(a) to the case and striking the testimony regarding the victim's previous alleged sexual conduct with the victim's brother based on the court's conclusion that the former rape shield statute prohibited the defendant from presenting evidence regarding the victim's prior sexual history, and the error in excluding the evidence of the victim's prior sexual history could have contributed to the jury's verdict since the only direct evidence of the defendant's guilt was the victim's testimony that the defendant sexually abused the victim; the former provisions did not apply to prosecutions for child molestation or sexual battery. Robinson v. State, 308 Ga. App. 562, 708 S.E.2d 303, 2011 Ga. App. LEXIS 235 (2011) (decided under former O.C.G.A. § 24-2-3).

Under Georgia's Rape Shield Statute, O.C.G.A. § 24-4-412, the trial court did not err in excluding evidence of the alleged prior false allegation of child molestation made by the victim against the

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victim's father as the testimony at a hearing supported the trial court's finding that falsity was not established by a reasonable probability. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

Even if the evidence of the scientific testing of the bed sheet were relevant to the victim's knowledge of sexual acts, it was inadmissible as it did not fall within one of the limited exceptions in the Rape Shield Statute, O.C.G.A. § 24-4-412, because the evidence of the victim's prior allegation against the victim's father was not relevant to explain the victim's knowledge of the sexual acts that the victim described at trial; and that evidence would not have been admissible even if the defendant's trial counsel had objected to the state's argument regarding the victim's sexual knowledge. Vallejo v. State, 362 Ga. App. 33, 865 S.E.2d 640, 2021 Ga. App. LEXIS 555 (2021).

In an action for various sexual offenses involving the defendant's daughter, the trial court did not abuse its discretion in denying the defendant's motion in limine to pierce the Rape Shield Statute, O.C.G.A. § 24-4-412, excluding evidence the victim made an allegation of sexual abuse against another man when she was seven years old, because such evidence did not fall within the sole statutory exception of the applicable Rape Shield Statute. Priddy v. State, 362 Ga. App. 434, 868 S.E.2d 831, 2022 Ga. App. LEXIS 47 (2022).

Evidence may be excluded even if the charge was not aggravated molestation. — Although the former rape shield statute, former O.C.G.A. § 24-2-3, did not require the exclusion of evidence of a child molestation victim's past boyfriends and difficult past because the charge was not an aggravated charge, the trial court was authorized to evaluate the relevance of any evidence and exclude the evidence on that basis. Cantu v. State, 304 Ga. App. 655, 697 S.E.2d 310, 2010 Ga. App. LEXIS 594 (2010), cert. denied, No. S10C1767, 2010 Ga. LEXIS 868 (Ga. Nov. 1, 2010) (decided under former O.C.G.A. § 24-2-3).

Sexual activity of household excluded. — Evidence that a child sexual abuse victim was raised in a household where sexual activity was open was properly excluded, under former O.C.G.A. § 24-2-3(b), because nothing in the proffered evidence showed that this would cause the victim to have knowledge of the sexual acts performed on the victim by defendant. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780, 2002 Ga. App. LEXIS 927 (2002), cert. denied, No. S02C1766, 2002 Ga. LEXIS 895 (Ga. Sept. 30, 2002) (decided under former O.C.G.A. § 24-2-3).

Evidence that victim had venereal disease not admissible. — Trial court did not err in granting the state's motion to suppress evidence that the victim had a venereal disease one year after the last act of molestation since there was no evidence or offer of proof that the defendant did not have the disease. Van Ricks v. State, 249 Ga. App. 80, 546 S.E.2d 919, 2001 Ga. App. LEXIS 365 (2001), cert. denied, No. S01C1136, 2001 Ga. LEXIS 702 (Ga. Sept. 7, 2001) (decided under former O.C.G.A. § 24-2-3).

Exception did not apply. — When the state did not offer any medical evidence to prove the girl had been molested or any testimony to show that she had displayed symptoms consistent with the child abuse accommodation syndrome, the exception to the admissibility of past sexual activity did not apply and inquiry into the victim's sexual history was precluded by former O.C.G.A. § 24-2-3(b). Rocha v. State, 248 Ga. App. 53, 545 S.E.2d 173, 2001 Ga. App. LEXIS 430 (2001) (decided under former O.C.G.A. § 24-2-3).

Evidence in child sexual abuse cases. — Trial court did not err in refusing to allow cross-examination of a child sex abuse victim concerning alleged prior false accusations of molestation made against the victim's half brother after the trial court conducted a hearing to determine if the allegations at issue had a "reasonable probability of falsity," and ruled that the defense had not carried the defense's burden of showing a reasonable

probability that the victim's accusation against the victim's half-brother was false; it was apparent that the trial court was faced with the conflicting testimony of the victim and the victim's half-brother and found that of the victim more credible. Williams v. State, 266 Ga. App. 578, 597 S.E.2d 621, 2004 Ga. App. LEXIS 431 (2004), cert. denied, No. S04C1346, 2004 Ga. LEXIS 751 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-2-3).

Reference to evidence prohibited by rape shield law did not create manifest necessity for mistrial. — At defendant's trial for various sexual offenses based on allegations by his stepdaughter, which were later recanted, there was no manifest necessity for a mistrial over defendant's objection when a child abuse investigator mentioned, in violation of the trial court's ruling on a motion in limine based on former O.C.G.A. § 24-2-3, that the stepdaughter had viewed pornographic movies even though the trial court did not abuse the court's discretion in granting the state's motion in limine to exclude the evidence; defense counsel's question to the investigator did not call for the improper response and, once the issue had been injected, the defense was entitled to clarify that defendant bore no responsibility for the victim's viewing of the pornographic movies. (decided under former O.C.G.A. § 24-2-3).

Child molestation victim was not entitled to a new trial based on the victim's testimony that she was a virgin prior to his first assault of her. Even assuming that the testimony violated the former rape shield statute, former O.C.G.A. § 24-2-3(a), the challenged testimony was cumulative of other testimony to which defendant did not object. Collins v. State, 310 Ga. App. 613, 714 S.E.2d 249, 2011 Ga. App. LEXIS 623 (2011) (decided under former O.C.G.A. § 24-2-3).

Although the trial court erred by excluding evidence of one child victim's alleged homosexual relationship in defendant's trial on 14 counts of child molestation and 11 counts of aggravated child molestation, it was highly probable that the error did not contribute to the jury's verdict; even if defendant was given the opportunity to cross-examine the victim about the victim's past sexual behavior, the judge would have been unlikely to have adjudged that evidence as credible, completely disregarding defendant's guilty plea and the other evidence that such a similar transaction did occur. Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394, 2005 Ga. App. LEXIS 854 (2005), cert. denied, No. S06C0113, 2006 Ga. LEXIS 33 (Ga. Jan. 17, 2006) (decided under former O.C.G.A. § 24-2-3).

Constitutional challenge of rape shield statute denied. — Evidence that the victim was molested by her stepfather would not have diminished evidence that defendant molested the victim; therefore, application of the former rape shield statute did not deny him a fair trial. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, 1992 Ga. App. LEXIS 1025 (1992), cert. denied, No. S92C1314, 1992 Ga. LEXIS 760 (Ga. Sept. 11, 1992) (decided under former O.C.G.A. § 24-2-3).

Question regarding victim's previous accusation against defendant. — Defense counsel was properly prohibited from asking the 11-year-old victim on cross-examination whether she had previously accused the defendant, her stepfather, of molesting her. Allen v. State, 210 Ga. App. 447, 436 S.E.2d 559, 1993 Ga. App. LEXIS 1219 (1993), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-3).

Questioning about motive to fabricate allegations not barred. — Limitation on cross-examination of an alleged child molestation victim, precluding examination of whether she was dating an older man, did not preclude questioning whether she had a motive to fabricate the allegations due to conflicts with defendant over parental discipline. Nixon v. State, 234 Ga. App. 797, 507 S.E.2d 833 (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's sexually transmitted disease allowed. — Since the defendant was convicted of incest and child molestation, the trial court erred in disallowing the defendant to introduce medical evidence of a sexually transmit-

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ted disease for which the victim had tested positive for the purpose of corroborating defendant's defense, not for the purpose of exploring the victim's past or other sexual behavior. Chambers v. State, 205 Ga. App. 78, 421 S.E.2d 326, 1992 Ga. App. LEXIS 1073 (1992), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-2-3).

Questioning about promiscuity precluded. — In a prosecution for child molestation and incest, the defendant was properly precluded from questioning the victim about her alleged promiscuity. Walker v. State, 234 Ga. App. 40, 506 S.E.2d 179 (decided under former O.C.G.A. § 24-2-3).

Because evidence of the victim's disease was inadmissible under former O.C.G.A. § 24-2-3(a), trial counsel's performance could not be considered deficient based on a failure to contest the receipt of the medical information; thus, an order granting defendant's petition for a writ of habeas corpus was reversed because even if counsel had requested a continuance for the purpose of testing the defendant, no reasonable likelihood existed that the outcome of the trial would have been different, and in fact, a negative result for defendant at the time of trial would not have established the medical condition at the time of the crimes, or rule out the possibility that the defendant had molested the victim. Murrell v. Ricks, 280 Ga. 427, 627 S.E.2d 546, 2006 Ga. LEXIS 153 (2006) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's sexual activity improperly excluded. — Trial court abused the court's discretion in excluding evidence that a child molestation victim had been having sex with her boyfriend because the evidence would provide an alternate explanation as to why the victim's hymen had been penetrated, and absent the evidence of the sexual relationship with the boyfriend, the obvious inference was that the defendant had caused the penetration injuries; the state decided to present evidence of the penetration damage to the victim's hymen, and it was the state's affirmative act of "opening the door" to the area that required the trial court to allow the defendant to present evidence that someone other than the defendant caused the injury. Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920, 2010 Ga. App. LEXIS 921 (2010), overruled in part, White v. State, 305 Ga. 111, 823 S.E.2d 794, 2019 Ga. LEXIS 66 (2019) (decided under former O.C.G.A. § 24-2-3).

Inapplicable to victim's prior alleged molestations. — Former O.C.G.A. § 24-2-3 did not bar the introduction of victim's prior alleged molestations to show that someone other than defendant caused the injuries to the two victims. Lemacks v. State, 207 Ga. App. 160, 427 S.E.2d 536, 1993 Ga. App. LEXIS 112 (1993) (decided under former O.C.G.A. § 24-2-3).

Evidence of child victim's alleged viewing of pornography. — Trial court did not err in limiting inquiry into a child victim's alleged viewing of the victim's brother's pornographic materials because there was no showing of relevance when the victim denied seeing the movies and did not use words of a sexual nature that normally would not be in the victim's vocabulary. Montgomery v. State, 277 Ga. App. 142, 625 S.E.2d 529, 2006 Ga. App. LEXIS 9 (2006) (decided under former O.C.G.A. § 24-2-3).

In the absence of a showing of relevance, evidence of a sexual molestation victim's exposure to sexually explicit photographs or sexually explicit conversation was wholly irrelevant to the issue of whether the defendant committed the acts alleged by the victim, and was thus properly excluded by the trial court pursuant to former O.C.G.A. § 24-2-3(a). Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122, 2011 Ga. App. LEXIS 148 (2011) (decided under former O.C.G.A. § 24-2-3).

Evidence of sexually transmitted disease. — Trial court did not err in refusing to allow the offered testimony regarding other sexual assaults upon the victim after defendant failed to offer proof that the victim's stepfather was also infected with gonorrhea. Any evidence of the victim's sexual activity with her stepfather would have shed no light on the origin of the victim's sexually transmitted

disease. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, 1992 Ga. App. LEXIS 1025 (1992), cert. denied, No. S92C1314, 1992 Ga. LEXIS 760 (Ga. Sept. 11, 1992) (decided under former O.C.G.A. § 24-2-3).

Charge stating child under 16 could not consent to sexual intercourse. — Trial court did not plainly err in charging the jury that a child under the age of 16 years could not consent to sexual intercourse. Algren v. State, 330 Ga. App. 1, 764 S.E.2d 611, 2014 Ga. App. LEXIS 727 (2014).

Harmless error. — Although the defendant in a child molestation case should have been allowed to question one of the teenagers involved about her sexual relationship with the defendant's child because at the time of the trial, the former rape shield statute applied only to rape cases, the error was harmless; such a relationship was placed into evidence by the teenager's own statements. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786, 2007 Ga. App. LEXIS 778 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. Oct. 9, 2007) (decided under former O.C.G.A. § 24-2-3).

Incest

Incest. — Former rape shield statute was applicable in prosecution for incest. Estes v. State, 165 Ga. App. 453, 301 S.E.2d 504, 1983 Ga. App. LEXIS 1902 (1983), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former O.C.G.A. § 24-2-3).

Flirtation between child and parent inadmissible. — Trial court did not err by excluding evidence concerning daughter's alleged flirtation with her stepfather because the former rape shield statute bars such evidence. Murphy v. State, 195 Ga. App. 878, 395 S.E.2d 76, 1990 Ga. App. LEXIS 695 (1990) (decided under former O.C.G.A. § 24-2-3).

Incest was a sexual crime included within former O.C.G.A. § 24-2-3. Haynes v. State, 180 Ga. App. 202, 349 S.E.2d 208, 1986 Ga. App. LEXIS 2091 (1986) (decided under former O.C.G.A. § 24-2-3).

In the defendant's trial for rape, incest, and aggravated child molestation of the defendant's daughter over a period of years, the trial court did not err in excluding evidence of a sexual incident between the victim and the victim's older brother because the evidence did not come within the exception to the Rape Shield Statute, O.C.G.A. § 24-4-412; the evidence was not admissible to show that the older brother's testimony was biased. Torres v. State, 353 Ga. App. 470, 838 S.E.2d 137, 2020 Ga. App. LEXIS 25 (2020).

Rape

Evidence not admissible in rape case. — In a prosecution for rape and other offenses, the trial court properly precluded defendant from examining an officer regarding intimate photographs and letters written by the victim to her husband while he was in prison. Martin v. State, 219 Ga. App. 277, 464 S.E.2d 872, 1995 Ga. App. LEXIS 1016 (1995), cert. denied, No. S96C0547, 1996 Ga. LEXIS 417 (Ga. Mar. 8, 1996) (decided under former O.C.G.A. § 24-2-3).

Victim impact statement in which the victim stated that defendant "took her virginity" was not admissible for impeachment purposes under the former rape shield statute. Fetterolf v. State, 223 Ga. App. 744, 478 S.E.2d 889 (decided under former O.C.G.A. § 24-2-3).

In a rape trial, the trial court did not err in refusing to allow defense counsel to impeach the victim with a certified copy of a misdemeanor conviction for prostitution because moral turpitude was no longer the impeachment standard. The prostitution conviction was inadmissible under former O.C.G.A. § 24-9-84.1(a)(3) (see now O.C.G.A. § 24-6-609) because the conviction did not involve an element of dishonesty or false statement, and the conviction was barred from admission by the rape shield statute because the conviction related to the victim's past sexual behavior and did not come within an exception in former O.C.G.A. § 24-2-3. Green v. State, 291 Ga. 287, 728 S.E.2d 668, 2012 Ga. LEXIS 630 (2012) (decided under former O.C.G.A. § 24-2-3).

Trial counsel was not deficient for failing to seek to introduce evidence at trial that the victim had consensual sexual intercourse with the victim's partner be-

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fore the sexual assault because the defendant failed to show any prejudice resulting from the alleged deficiency as the victim identified the defendant as the victim's attacker at trial and in a show-up identification and photographic lineup before trial and unequivocally testified that the defendant forced the victim to have sexual intercourse. Lanham v. State, 345 Ga. App. 657, 813 S.E.2d 184, 2018 Ga. App. LEXIS 239 (2018), cert. denied, No. S18C1287, 2018 Ga. LEXIS 768 (Ga. Nov. 15, 2018).

When the defendant was convicted of rape, the trial court did not abuse the court's discretion by refusing to allow the defendant to introduce sexually explicit photographs the victim allegedly sent to the defendant, which the defendant argued would communicate to the jury that the defendant could have assumed that the victim consented to have sex with the defendant because the defendant conceded that the photographs were sent before the defendant and the victim had ended their relationship, at least 10 months before the rape; and it was undisputed that the parties had a consensual, sexual relationship when the photographs were sent. Bryant v. State, 346 Ga. App. 176, 815 S.E.2d 596, 2018 Ga. App. LEXIS 344 (2018).

Evidence concerning a romantic relationship between the victim and a recused prosecuting attorney was inadmissible. Griffin v. State, 224 Ga. App. 225, 480 S.E.2d 608 (decided under former O.C.G.A. § 24-2-3).

There was no error in the trial court's refusal to allow defendant to introduce evidence of the victim's past sexual behavior to explain how her hymen became perforated. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (decided under former O.C.G.A. § 24-2-3).

Even though defendant obtained a pretrial order allowing him to present testimony that he and the victim had previously had consensual intercourse, his asking a nurse about the victim's statement to her about a prior act of voluntary intercourse violated the former rape shield statute since this evidence was not included in defendant's proffer. Banks v. State, 230 Ga. App. 258, 495 S.E.2d 877 (decided under former O.C.G.A. § 24-2-3).

Trial court properly excluded evidence as to the victims' past sexual behavior in defendant's rape and aggravated assault trial as defendant failed to satisfy either prong of former O.C.G.A. § 24-2-3(b) since: (1) the victims were beaten; (2) one victim testified that she was pushed to the ground and hit in the face; (3) the other victim was dragged to an abandoned yard and told repeatedly to "shut up" while being punched in the face; and (4) the victims testified that they never had sex with defendant before the night in question. Williams v. State, 257 Ga. App. 54, 570 S.E.2d 362, 2002 Ga. App. LEXIS 1043 (2002) (decided under former O.C.G.A. § 24-2-3).

Since the victim never claimed that defendant was the father of her child, evidence of her sexual conduct was irrelevant pursuant to former O.C.G.A. § 24-2-3(b). Carson v. State, 259 Ga. App. 21, 576 S.E.2d 12, 2002 Ga. App. LEXIS 1565 (2002), overruled in part, Watson v. State, 297 Ga. 718, 777 S.E.2d 677, 2015 Ga. LEXIS 663 (2015) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for rape and sodomy, the trial court properly refused to allow the defendant to present evidence as to the victim's past conduct in which she allegedly consented to sex in exchange for drugs as defendant did not proffer any evidence to demonstrate the basis for his belief that the victim consented to his conduct. Brown v. State, 260 Ga. App. 77, 579 S.E.2d 87, 2003 Ga. App. LEXIS 317 (2003), cert. denied, No. S03C0934, 2003 Ga. LEXIS 565 (Ga. June 9, 2003) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute was properly used to exclude testimony of the victim's mother and in limiting victim's cross-examination; the evidence excluded under the former rape shield statute involved the victim's sexual act with a third party and was also excludable on relevancy grounds. Abdulkadir v. State, 264 Ga. App. 805, 592 S.E.2d 433, 2003 Ga. App. LEXIS 1513 (2003), aff'd, 279 Ga. 122, 610 S.E.2d 50, 2005 Ga. LEXIS 161 (2005) (decided under former O.C.G.A. § 24-2-3).

Evidence of the sexual history of defendant's wife was properly excluded under the former Georgia Rape Shield Statute, former O.C.G.A. § 24-2-3, as defendant was charged with the aggravated assault of his wife in conjunction with a rape charge; trial counsel was not ineffective for failing to argue that evidence of the prior sexual history of defendant's wife was admissible. Osterhout v. State, 266 Ga. App. 319, 596 S.E.2d 766, 2004 Ga. App. LEXIS 363 (2004) (decided under former O.C.G.A. § 24-2-3).

Trial court properly refused to allow testimony that a victim of domestic violence had been seen working as a prostitute because that information had no relevance to the aggravated assault and false imprisonment charges for which a defendant was convicted and, further, the defendant failed to produce any evidence that could have provided a nexus between the alleged prostitution and a conclusion that someone else might have inflicted the victim's injuries. Moorer v. State, 290 Ga. App. 216, 659 S.E.2d 422, 2008 Ga. App. LEXIS 286 (2008) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion in excluding the defendant's testimony regarding statements the victim allegedly made to the defendant because the statements were prohibited by the former Rape Shield Statute, former O.C.G.A. § 24-2-3(a), since the statements made reference to the victim's past sexual behavior by implying that the victim had sex in the past with her boyfriend and with older men; the defendant would not have reasonably believed that the victim consented to sex because there was testimony that the victim was intoxicated, in and out of consciousness, and unable to move. Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545, 2011 Ga. App. LEXIS 944 (2011) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in refusing to allow the defendant to cross-examine his daughter, the victim's friend, about a comment she posted on a website concerning the victim because the testimony the defendant sought to elicit, that the victim had sex with other men, was the very type of evidence prohibited by the former Rape Shield Statute, former O.C.G.A. § 24-2-3(a). Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545, 2011 Ga. App. LEXIS 944 (2011) (decided under former O.C.G.A. § 24-2-3).

Evidence of past sexual behavior not admissible when it did not involve participation by defendant. — When the state also prosecuted the defendant for the rape of the victim's older sister, the rape shield statute barred the evidence sought by the defendant because the evidence related to the past sexual behavior of the older sister and did not fall within the statutory exceptions as the past sexual behavior of the older sister having sex with boys for money did not involve the participation of the defendant and did not support an inference that the defendant reasonably believed that the older sister consented to the defendant's alleged sexual activities with the older sister. Jones v. State, 340 Ga. App. 568, 798 S.E.2d 87, 2017 Ga. App. LEXIS 101 (2017).

Rape shield law precluded fishing expedition. — Trial court did not err in prohibiting the defendant from seeking testimony regarding the victim's prior sexual activity because the defendant wanted to perform a fishing expedition for all possible persons who could have been the father of the victim's child and then backtrack for a motive to lie, which was the type of unfettered exploration the statute was designed to prevent. Atkins v. State, 304 Ga. 240, 818 S.E.2d 567, 2018 Ga. LEXIS 542 (2018).

Testimony about ongoing customer-prostitute relationship should be allowed. — Defendant's aggravated sodomy conviction was reversed after the trial court erroneously refused to allow testimony concerning defendant's five-year relationship with the victim, a prostitute, under Georgia's former Rape Shield Statute, former O.C.G.A. § 24-2-3; the ongoing customer-prostitute relationship between the two would support a reasonable inference that defendant believed that the defendant's sexual relationship with the victim on the night in question was consensual; the evidence also had a direct bearing on the victim's motivation to fabricate the rape allega-

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tion, and therefore was admissible; defendant's proposed cross-examination of the victim was confined to the existence of an ongoing relationship between them. Ivey v. State, 264 Ga. App. 377, 590 S.E.2d 781, 2003 Ga. App. LEXIS 1484 (2003) (decided under former O.C.G.A. § 24-2-3).

Use of term "virgin" prohibited. — Any evidence of physical injuries a victim received during the commission of a rape, including the condition of the hymen, was admissible, but the term "virgin" was a comment on prior sexual history and therefore not admissible. Herndon v. State, 232 Ga. App. 129, 499 S.E.2d 918 (decided under former O.C.G.A. § 24-2-3).

Inquiry about dress prohibited. — Trial court properly refused to permit defendant to introduce evidence or to make inquiry about the mode of the victim's dress on the night of the rape. Alford v. State, 243 Ga. App. 212, 534 S.E.2d 81, 2000 Ga. App. LEXIS 427 (2000) (decided under former O.C.G.A. § 24-2-3).

Victim's desire to keep knowledge of sexual activity from parents. — Despite defendant's contention that defendant should have been allowed to present evidence that the victim had the motive to fabricate her claim of rape in order to prevent her parents from knowing that she had become sexually active, the trial court did not abuse the court's discretion in restricting defendant's cross-examination of the victim regarding her past sexual history based on Green v. State, 221 Ga. App. 436 (1996). Lloyd v. State, 263 Ga. App. 234, 587 S.E.2d 372, 2003 Ga. App. LEXIS 1123 (2003), cert. denied, No. S04C0214, 2004 Ga. LEXIS 170 (Ga. Feb. 16, 2004) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's prior sexual history properly excluded. — Trial court did not err in failing to grant a motion in limine in which the defendant's counsel sought to cross-examine the victim as to the victim's prior sexual history as an exception to Georgia's Rape Shield Statute, O.C.G.A. § 24-4-412, because nothing about the victim's past sexual behavior with other people showed that the victim knew the defendant or consented to the sexual encounter with the defendant. Freeman v. State, 367 Ga. App. 57, 885 S.E.2d 27, 2023 Ga. App. LEXIS 110 (2023).

Effectiveness of counsel in questioning. — Failure of defense counsel to cross-examine rape victim regarding her prior sexual history was not ineffective assistance of counsel since such questioning was clearly prohibited under former O.C.G.A. § 24-2-3. Brown v. State, 225 Ga. App. 49, 483 S.E.2d 318.

Inquiring about areas of victim fabrication. — When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the former rape shield law, former O.C.G.A. § 24-2-3(a), did not prohibit defendant from inquiring of the victim about a theory that the victim fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish a romantic relationship with the boyfriend because defendant was not seeking to inquire about the victim's character for sexual behavior. Richardson v. State, 276 Ga. 639, 581 S.E.2d 528, 2003 Ga. LEXIS 544 (2003) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion by excluding cross-examination and testimony concerning a 15-year-old rape victim's alleged past sexual encounters under the former Rape Shield Statute, former O.C.G.A. § 24-2-3, despite the defendants' claims that the victim fabricated her story in retaliation for the defendant telling her mother that she was sexually active. McIntyre v. State, 311 Ga. App. 173, 715 S.E.2d 431, 2011 Ga. App. LEXIS 589 (2011), aff'd, 291 Ga. 45, 727 S.E.2d 465, 2012 Ga. LEXIS 439 (2012) (decided under former O.C.G.A. § 24-2-3).

Applies to any prosecution for rape, making no distinction between the different phases of the trial. Singleton v. State, 157 Ga. App. 192, 276 S.E.2d 685, 1981 Ga. App. LEXIS 1731 (1981) (decided under Ga. L. 1976, p. 741, § 1).

Statutory rape. — Although the former rape shield statute was applicable by the statute's terms to rape cases, logic and the intent of the former statute showed

that it should be equally applicable in statutory rape cases, except that the exceptions in the former statute relating to consent and the accused's prior participation would be inapplicable in statutory rape cases. Barnes v. State, 244 Ga. 302, 260 S.E.2d 40, 1979 Ga. LEXIS 1217 (1979) (decided under Ga. L. 1976, p. 741, § 1); Hill v. State, 159 Ga. App. 489, 283 S.E.2d 703, 1981 Ga. App. LEXIS 2661 (1981) (decided under Ga. L. 1976, p. 741, § 1); Brown v. State, 173 Ga. App. 640, 327 S.E.2d 515, 1985 Ga. App. LEXIS 2661 (1985) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for statutory rape, evidence of sexual intercourse between the victim and other individuals was properly excluded under former O.C.G.A. § 24-2-3; in the absence of any indication that the prior acts of sexual intercourse were forcibly accomplished, evidence of sexual intercourse with others would relate to past sexual behavior and reflect upon the character of the victim. Berry v. State, 210 Ga. App. 789, 437 S.E.2d 630, 1993 Ga. App. LEXIS 1350 (1993), cert. denied, No. S94C0243, 1994 Ga. LEXIS 166 (Ga. Jan. 21, 1994), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-2-3).

Evidence of other sexual activity with defendant allowed. — Former O.C.G.A. § 24-2-3 permitted introduction of evidence of other sexual activity of the complaining witness only if such behavior involved the defendant or if such evidence supported an inference that the defendant reasonably believed the complaining witness would have consented to his actions. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, 1992 Ga. App. LEXIS 1025 (1992), cert. denied, No. S92C1314, 1992 Ga. LEXIS 760 (Ga. Sept. 11, 1992) (decided under former O.C.G.A. § 24-2-3).

Evidence that victim had contracted gonorrhea three months before she was raped, that she wore sexually suggestive clothing and acted promiscuously when she frequented nightclubs, and that she demanded money from another man threatening to claim that he raped her was properly ruled inadmissible. Ford v. State, 189 Ga. App. 395, 376 S.E.2d 418, 1988 Ga. App. LEXIS 1446 (1988) (decided under former O.C.G.A. § 24-2-3).

Victim's statements to defendant about past relationships. — Former rape shield statute applied to victim's statements to defendant about her having had sexual relations with black men and having had children by these men which defendant sought to introduce as evidence that defendant believed the victim consented to have sex with him. Logan v. State, 212 Ga. App. 734, 442 S.E.2d 883, 1994 Ga. App. LEXIS 398 (1994), cert. denied, No. S94C1164, 1994 Ga. LEXIS 843 (Ga. July 1, 1994) (decided under former O.C.G.A. § 24-2-3).

Exclusion of previous consensual sexual relationship. — In a case decided under former O.C.G.A. § 24-2-3, the trial court did not err in granting the state's motion in limine to exclude evidence that the defendant and the victim had a prior sexual relationship as there was no way, given the circumstances of the episode, that the defendant reasonably believed the victim consented to sexual intercourse, even if the victim had previously done so. Johnson v. State, 322 Ga. App. 612, 744 S.E.2d 903, 2013 Ga. App. LEXIS 573 (2013) (decided under former O.C.G.A. § 24-2-3).

Reasonable belief that victim consented. — Since the defendant knew the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. Lamar v. State, 243 Ga. 401, 254 S.E.2d 353, 1979 Ga. LEXIS 913 (1979) (decided under Ga. L. 1976, p. 741, § 1).

Proffered testimony of two young men regarding the victim's advances toward them was inadmissible in a rape case since there was no evidence of consent by the victim, nor any evidence that defendant had knowledge of the alleged conduct between the victim and the two young men. Moore v. State, 195 Ga. App. 851,

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395 S.E.2d 13 (1990) (decided under former O.C.G.A. § 24-2-3).

Evidence that a victim of an attempted rape had recorded a phone-sex tape did not support an inference that the defendant could have reasonably believed that she consented to the attempted sexual intercourse. Sweeney v. State, 233 Ga. App. 862, 506 S.E.2d 150 (decided under former O.C.G.A. § 24-2-3).

Refusal to allow cross-examination of rape victim on existence of pubic hairs found on victim inconsistent with those of appellant and victim was not error. Tremble v. State, 162 Ga. App. 761, 292 S.E.2d 442, 1982 Ga. App. LEXIS 2330 (1982) (decided under former O.C.G.A. § 24-2-3).

In rape cases, proof of prior consent without regard to identity of persons or similarity of circumstances may be admitted to allow the jury to weigh or calculate the probability of consent with respect to an entire class of "unchaste" women when the court finds that the evidence supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of. Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547, 1981 Ga. App. LEXIS 2848 (1981) (decided under Ga. L. 1976, p. 741, § 1).

State's introduction of evidence that victims contracted gonorrhea after rape and that defendant had gonorrhea during time in question did not authorize defendant to question victims concerning their prior sexual conduct. McNeese v. State, 170 Ga. App. 118, 316 S.E.2d 564, 1984 Ga. App. LEXIS 1821 (1984) (decided under former O.C.G.A. § 24-2-3).

Sexual Battery

No application in sexual battery cases. — Trial court did not err in refusing to charge the jury that it could consider the victim's character in determining whether the sexual contact with defendant was consensual or against the victim's will since the former rape shield statute, former O.C.G.A. § 24-2-3, on which defendant relied in arguing for the instruction, did not apply directly to sexual offenses such as sexual battery or aggravated sexual battery, and also because there was no evidence of any past sexual behavior between defendant and the victim. Stinson v. State, 256 Ga. App. 902, 569 S.E.2d 858, 2002 Ga. App. LEXIS 700 (2002), cert. denied, No. S02C1912, 2002 Ga. LEXIS 987 (Ga. Oct. 28, 2002) (decided under former O.C.G.A. § 24-2-3).

Evidence not admissible in sexual assault case. — Trial court correctly granted the state's motion in limine to exclude evidence concerning the sexual assault victim having had consensual sex with her boyfriend before defendant sexually assaulted her because the former Georgia rape shield statute, former O.C.G.A. § 24-2-3, barred the sexual assault victim's prior sexual history as having any relevance to defendant's intent at the time of his sexual assault on the victim. Bing v. State, 256 Ga. App. 88, 567 S.E.2d 731, 2002 Ga. App. LEXIS 841 (2002) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 was applicable to prosecutions for aggravated assault with intent to rape, and trial court did not err in sustaining the state's objection to defense counsel's questions concerning the prosecutors' previous sexual conduct. Blount v. State, 172 Ga. App. 120, 322 S.E.2d 323, 1984 Ga. App. LEXIS 2423 (1984) (decided under former O.C.G.A. § 24-2-3).

Sodomy

Evidence not admissible in sodomy case. — Evidence of any previous consensual homosexual fantasies the victim may have had was not admissible because it would in no way support an inference that the accused could have reasonably believed that the victim consented to the conduct complained of in the prosecution, which included armed robbery and kidnapping, as well as non-consensual aggravated sodomy at knife point. Rogers v. State, 247 Ga. App. 219, 543 S.E.2d 81, 2000 Ga. App. LEXIS 1407 (2000), cert. denied, No. S01C0522, 2001 Ga. LEXIS 388 (Ga. May 7, 2001), cert. denied, No. S01C0492, 2001 Ga. LEXIS 395 (Ga. May

7, 2001) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for aggravated sodomy, even though the former rape shield statute did not apply, evidence of the victim's sexual behavior with persons other than the defendant was properly excluded as not relevant since the defendant's defense was that he was not there, rather than that the victim had consented. Mobley v. State, 212 Ga. App. 293, 441 S.E.2d 780, 1994 Ga. App. LEXIS 227 (1994) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's prior relationships with defendant. — Trial court did not abuse the court's discretion in excluding evidence of a rape victim's alleged past sexual behavior with defendant as the evidence of alleged prior sexual encounters with the victim did not lead to an inference of consent since the evidence established that defendant could not have reasonably believed that the victim consented to the sodomy and intercourse at issue based on defendant brandishing a gun and threatening to shoot the victim's friend and the victim if the victim did not comply with defendant's demands for sex. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248, 2008 Ga. App. LEXIS 718 (2008) (decided under former O.C.G.A. § 24-2-3).

Procedure

Defense must notify court of need for in camera hearing. — Before a trial court can be faulted for refusing an in camera hearing as provided for by former O.C.G.A. § 24-2-3, the court must be placed on notice as to the intent of the defense to seek to introduce such evidence, and the defense must specifically notify the court of the need for an in camera hearing for its offer of proof. Tucker v. State, 173 Ga. App. 742, 327 S.E.2d 852, 1985 Ga. App. LEXIS 2672 (1985) (decided under former O.C.G.A. § 24-2-3); Evans v. State, 180 Ga. App. 1, 348 S.E.2d 561, 1986 Ga. App. LEXIS 2070 (1986) (decided under former O.C.G.A. § 24-2-3).

Defendant was not entitled to an in camera hearing on defendant's offer of proof of the victim's past sexual behavior when the defendant later testified before the jury that the defendant had consensual sex with the victim and the defendant never made a proffer of anticipated testimony of an independent witness who would testify that the witness saw the consensual sex. Nelson v. State, 210 Ga. App. 249, 435 S.E.2d 750, 1993 Ga. App. LEXIS 1125 (1993) (decided under former O.C.G.A. § 24-2-3).

Victim may not appeal finding of admissibility. — Since the victim is not the defendant, the court does not consider any prejudice to her that admission of sexual history evidence may allow as against its probative value; nor is she provided any right of appeal against a finding of admissibility. Once the pertinence of a woman's lack of chastity, and hence its admissibility, is determined at the in camera inspection, this character trait may be proved. Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547, 1981 Ga. App. LEXIS 2848 (1981) (decided under Ga. L. 1976, p. 741, § 1).

Retrial

Reprosecution not barred when evidence inappropriately introduced. — Defendant's introduction of evidence that was prohibited by the former rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and federal double jeopardy provisions did not bar reprosecution. Banks v. State, 230 Ga. App. 258, 495 S.E.2d 877 (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in denying a defendant's plea in bar of former jeopardy with regard to kidnapping, rape, and other charges for alleged crimes committed against the defendant's estranged wife as defense counsel violated the former Rape Shield Statute, former O.C.G.A. § 24-2-3, in questioning the defendant's spouse as to how often the spouse had engaged in sexual intercourse after the alleged rape, which entitled the state to a mistrial. The defendant did not have the right to force the state either to endure a prejudiced trial or forego prosecution entirely. Birdsong v. State, 298 Ga. App. 322, 680 S.E.2d 159, 2009 Ga. App. LEXIS 675

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(2009) (decided under former O.C.G.A. § 24-2-3).

Retrial not barred by double jeopardy clause. — Trial judge did not abuse the judge's discretion in determining that declaration of a mistrial was required because prejudicial and inadmissible matter injected by the defense in violation of former O.C.G.A. § 24-2-3 made it impossible for an impartial verdict to be reached, and retrial of defendant was not barred by the double jeopardy clause of the Fifth Amendment. Abdi v. State, 249 Ga. 827, 294 S.E.2d 506, 1982 Ga. LEXIS 1200 (1982) (decided under former O.C.G.A. § 24-2-3).

Declaration of a mistrial by the trial judge, on the judge's own motion, in a rape prosecution, following the cross-examination of the alleged victim, which culminated in a question by defense counsel concerning the past sexual behavior of the witness, a violation of former O.C.G.A. § 24-2-3 that was "highly improper" and prejudicial, was proper and did not bar a second trial of the defendant for the alleged offense. Abdi v. Georgia, 744 F.2d 1500, 1984 U.S. App. LEXIS 17335 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164, 1985 U.S. LEXIS 260 (1985) (decided under former O.C.G.A. § 24-2-3).

Given the nature of the question, which violated the Rape Shield Statute, defense counsel's suggestion that the victim told the defendant that the victim was not a virgin, the prejudice to the state's case, and the trial court's careful consideration of the law, facts, and possible alternatives, the trial court did not abuse the court's broad discretion in declaring a mistrial based on defense counsel's improper questioning of the witness, and the defendant's subsequent plea in bar of former jeopardy was properly denied. Chisholm v. State, 355 Ga. App. 19, 842 S.E.2d 327, 2020 Ga. App. LEXIS 247 (2020).

Evidence of victim's character irrelevant. — With regard to a defendant's conviction for child molestation as well as the trial court's denial of the defendant's motion for a new trial, the trial court did not err by limiting the defendant's cross-examination of the victim by refusing to allow the defendant to cross-examine the 11-year-old victim regarding an alleged Internet profile page that listed the victim's age as 17 years old and having an occupation as a cheerleader for a professional sports team. The victim's age was not at issue in the case nor was the fact that the victim had previously stated that the victim was a cheerleader for a professional sports team, thus, the trial court properly ruled that the defendant was merely attempting to run around the prohibition on the admission of prior bad acts and impeach the victim about an immaterial issue. Daniel v. State, 296 Ga. App. 513, 675 S.E.2d 472, 2009 Ga. App. LEXIS 148 (2009), cert. denied, No. S09C1192, 2009 Ga. LEXIS 326 (Ga. June 8, 2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of nonchastity of victim inadmissible in trial of child molestation charge. — To the extent that the alleged evidence, sought to be introduced by the defendant, concerning the general reputation and character of the victim, dealt with the victim's reputation for nonchastity, it was inadmissible at trial in a prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67, 1981 Ga. App. LEXIS 1852 (1981) ((decided under former Code 1933, § 38-202).

Evidence of nonchastity of victim inadmissible. — When the defendant was charged with rape and aggravated sodomy, the Rape Shield Statute barred defense counsel's question about the victim's nonchastity because it related to the victim's past sexual behavior, and it did not fall within the single statutory exception as it did not directly involve the participation of the accused. Chisholm v. State, 355 Ga. App. 19, 842 S.E.2d 327, 2020 Ga. App. LEXIS 247 (2020).

Whether or not the victim was a prostitute was not relevant to the determination of who killed the victim. Bryant v. State, 249 Ga. 242, 290 S.E.2d 75, 1982 Ga. LEXIS 1125 (1982) (decided under former O.C.G.A. § 24-2-2).

School disciplinary record of victim inadmissible. — Trial court did not err in granting the state's motion in limine, which sought to prevent the defendant from introducing the victim's school

records in an attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in the prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67, 1981 Ga. App. LEXIS 1852 (1981) (decided under former Code 1933, § 38-202).

Victim's bomb threat irrelevant. — Because making a bomb threat did not unambiguously reflect on a child victim's credibility, honesty, or imagination, was not related to the victim's testimony, and was not material to the issues on trial, the trial court did not abuse the court's discretion in refusing to allow the defense to introduce the evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Bentley v. State, 277 Ga. App. 483, 627 S.E.2d 61, 2006 Ga. App. LEXIS 72 (2006), cert. denied, No. S06C1050, 2006 Ga. LEXIS 435 (Ga. June 12, 2006) (decided under former O.C.G.A. § 24-2-2).

Victim's involvement in charitable civic organization inadmissible. — In a rape prosecution, while the prosecutor should not have been allowed to question the victim about the victim's involvement with a civic organization that helped mentally ill children, the admission of such irrelevant material did not warrant a mistrial. Brown v. State, 260 Ga. App. 77, 579 S.E.2d 87, 2003 Ga. App. LEXIS 317 (2003), cert. denied, No. S03C0934, 2003 Ga. LEXIS 565 (Ga. June 9, 2003) (decided under former O.C.G.A. § 24-2-2).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 356 et seq.

Am. Jur. Proof of Facts.

Alleged Victim's Commission of Prior Acts of and Reputation for Violence, 15 POF2d 167.

C.J.S.

32 C.J.S., Evidence, §§ 559 et seq., 767 et seq.

ALR.

Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 A.L.R. 8; 68 A.L.R. 1068.

Cross-examination as to sexual morality for purpose of affecting credibility of witness, 65 A.L.R. 410.

Admissibility in rape cases of evidence of previous unchastity, or reputation for unchastity, of prosecutrix, 140 A.L.R. 364.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or an incompetent to testify because of age or other reason, 157 A.L.R. 1359.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 A.L.R.2d 1083.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity, 35 A.L.R.3d 1452.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 A.L.R.3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 A.L.R.3d 897.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 A.L.R.3d 1300.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 A.L.R.4th 283.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

Admissibility in civil case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 12 A.L.R. Fed.3d 6.

Admissibility in criminal case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 15 A.L.R. Fed.3d 1.

24-4-413. Evidence of similar transaction crimes in sexual assault cases.

(a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term "offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(2) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(3) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

History.

Code 1981, § 24-4-413, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Affirmative defense to certain sexual crimes, § 16-3-6.

Rape generally, § 16-6-1.

Similar crimes in sexual-assault cases, Fed. R. Evid. 413.

Law reviews.

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202 and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Exceptions to the general rule have been liberally extended in cases of sexual crimes. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App. LEXIS 2204 (1981) (decided under former Code 1933, § 38-202); Neal v. State, 159 Ga. App. 450, 283 S.E.2d 671, 1981 Ga. App. LEXIS 2642 (1981) (decided under former Code 1933, § 38-202).

Proof of crimes involving moral turpitude is admissible to impeach a witness who places the witness's character in issue through testimony given by the witness on direct examination. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707, 1991 Ga. App. LEXIS 630 (1991), cert. denied, No. S91C1164, 1991 Ga. LEXIS 727 (Ga. June 20, 1991) (decided under former O.C.G.A. § 24-2-2).

Two conditions imposed on admission of evidence of independent crimes. — Two conditions precedent to the admission of evidence relating to defendant's prior act of exposing oneself are met when first, the witness positively identified defendant as the perpetrator of the crime; second, there was sufficient similarity between the former incident and the latter incident that proof of the former tends to prove the latter. Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703, 1981 Ga. App. LEXIS 2014 (1981), overruled in part, State v. Adamczyk, 162 Ga. App. 288, 290 S.E.2d 149, 1982 Ga. App. LEXIS 2140 (1982) (decided under former Code 1933, § 38-202).

Three affirmative showings required for admission of similar offenses. — In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony, but the state must still make three affirmative showings: a proper purpose for the use of the evidence; sufficient proof that the defendant did, in fact, commit the independent act; and sufficient similarity or connection between the two incidents so that proof of the former tends to prove the latter. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197, 2003 Ga. App. LEXIS 594 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the state's motion to introduce other acts evidence in the state's prosecution against the defendant on the charge of rape because, although the trial court did not expressly evaluate in the court's order whether the other acts evidence was relevant to any specific matter at trial — a threshold inquiry — or that the evidence satisfied the prerequisites for admission, the trial court properly focused the court's analysis on whether the other acts evidence (assuming that it was relevant and admissible) should be excluded on the ground that the evidence's probative value was substantially outweighed by the danger of unfair prejudice, and it was not improper for the trial court to frame the court's analysis in that way. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

Similar acts or omissions on other and different occasions. — Trial court erred in admitting defendant's statement to an investigating officer that defendant had not been alone with the eight-year-old molestation victim in the room where the victim alleged the molestation occurred since defendant had learned defendant's

lesson when the defendant lost the defendant's spouse after the defendant ran off with a 15-year-old girl from defendant's church and got her pregnant since the statement was an improper reference to defendant's character; however, admission of the statement was not reversible error since it was highly-probable that defendant would have been convicted even absent the statement being admitted given the direct and circumstantial evidence against the defendant. Lowther v. State, 263 Ga. App. 282, 587 S.E.2d 335, 2003 Ga. App. LEXIS 1185 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse its discretion admitting other acts of child molestation evidence as the other alleged acts of molestation in Kentucky were relevant for purposes of showing intent or motive and there was no showing that the trial court improperly found that the probative value of the evidence outweighed the danger of unfair prejudice. Kuprian v. State, 359 Ga. App. 692, 859 S.E.2d 843, 2021 Ga. App. LEXIS 270 (2021).

Trial court did not err admitting evidence of a prior alleged rape as although the defendant was not prosecuted for alleged rape, evidence the state proffered was enough to enable the jury to find by a preponderance of evidence that the defendant committed crime because the evidence bore on the defendant's propensity to engage in non-consensual sex. State v. Berrien, 364 Ga. App. 217, 874 S.E.2d 430, 2022 Ga. App. LEXIS 285 (2022).

Trial court did not err by admitting evidence of defendant's 1988 convictions for rape and aggravated sodomy because it was relevant to show defendant's intent. Because defendant attacked the victims' credibility, the State was able to use the evidence to bolster their credibility by showing that their circumstances were not unique. The trial court gave the jury a limiting instruction and the State tendered a certified copy of defendant's 1988 convictions at trial. Brooks v. State, 365 Ga. App. 711, 880 S.E.2d 226, 2022 Ga. App. LEXIS 497 (2022).

Propensity to engage in non-consensual sex. — Trial court did not err admitting evidence of prior alleged rape as although the defendant was not prosecuted for alleged rape, the evidence the state proffered was enough to enable the jury to find by a preponderance of the evidence that the defendant committed the crime because the evidence bore on defendant's propensity to engage in non-consensual sex. State v. Berrien, 364 Ga. App. 217, 874 S.E.2d 430, 2022 Ga. App. LEXIS 285 (2022).

Admission of similar transaction proper. — In a prosecution for the crimes of kidnapping, aggravated sexual battery, sexual battery, and attempted rape, admission of similar transaction evidence was upheld as: (1) the defendant had sufficient notice of the state's intent to present that evidence; (2) the prior bad acts were sufficiently similar to the charged acts; (3) such was properly admitted for the purposes of showing identity, intent, bent of mind, and course of conduct; (4) both prior victims positively identified the defendant as their assailant; and (5) the evidence showed that the defendant had a modus operandi of luring young women who were strangers to him into his car, driving to isolated areas, making them expose their breasts and genital areas, masturbating, intimidating them with talk of even more violent sexual assault or death, and then returning them to the area of the first encounter. Watley v. State, 281 Ga. App. 244, 635 S.E.2d 857, 2006 Ga. App. LEXIS 1063 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting the evidence of 11-year-old and 15-year-old similar transactions because both similar transactions and the instant crimes involved defendant committing sexual acts against children with the second similar transaction and the instant crimes having defendant in a position of authority over the victims; thus, the similarity to the present crimes and their probative value to show unique bent of mind made those crimes admissible. Arbegast v. State, 332 Ga. App. 414, 773 S.E.2d 283, 2015 Ga. App. LEXIS 318 (2015).

Testimony regarding another sexual assault was admissible on any matter to which it was relevant and, thus, trial counsel's failure to request a limiting instruction did not support a claim of inef-

fective assistance. Cook v. State, 338 Ga. App. 489, 790 S.E.2d 283, 2016 Ga. App. LEXIS 477 (2016).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11, 2017 Ga. App. LEXIS 176 (2017).

Trial court correctly held that O.C.G.A. § 24-4-413(a) governed the admissibility of the other acts evidence because the defendant was accused of an offense of sexual assault and the other acts evidence concerned the defendant's commission of another offense of sexual assault. Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264, 2017 Ga. App. LEXIS 266 (2017), cert. denied, No. S17C1877, 2017 Ga. LEXIS 1021 (Ga. Dec. 11, 2017), cert. denied, 138 S. Ct. 1582, 200 L. Ed. 2d 768, 2018 U.S. LEXIS 2291 (2018).

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103, 2017 Ga. App. LEXIS 390 (2017).

Trial court did not err in admitting, pursuant to O.C.G.A. §§ 24-4-413 and 24-4-414, evidence of the defendant's sexual behavior toward another student as a jury could have determined that the defendant acted with the intent to arouse the defendant's sexual desires, especially given that while driving the student home from a music lesson, the defendant said the defendant was taking the student to the defendant's house to "make whoopee," a clear reference to sex. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740, 2017 Ga. App. LEXIS 527 (2017), cert. denied, No. S18C0502, 2018 Ga. LEXIS 371 (Ga. May 21, 2018), overruled in part, McElrath v. State, 308 Ga. 104, 839 S.E.2d 573, 2020 Ga. LEXIS 127 (2020).

When the defendant was convicted of two counts of aggravated sodomy and one count each of family violence aggravated assault, family violence battery, terroristic threats, and family violence simple battery against a live-in girlfriend, evidence of prior sexual assaults was properly admitted because the evidence was relevant to show the defendant's intent, which was put in issue when the defendant entered a plea of not guilty; the prior sexual assaults were sufficiently similar to the charged sexual assaults; the state was able to use the evidence to bolster the victim's credibility by demonstrating that the victim's circumstances were not unique; and any risk of unfair prejudice was mitigated by the trial court's limiting instruction. Benning v. State, 344 Ga. App. 397, 810 S.E.2d 310, 2018 Ga. App. LEXIS 37 (2018).

Trial court did not abuse the court's discretion in admitting testimony regarding the appellant's prior acts of sexual assault because that evidence was relevant to the appellant's intent, identity, and propensity and three other family members testified that the appellant engaged in the same conduct of rubbing their genitals and inserting the defendant's finger into their vaginas when the witnesses were the same age as the victim, which testimony was relevant to show the appellant's propensity and that it was the appellant who molested the victim. Dixon v. State, 350 Ga. App. 211, 828 S.E.2d 427, 2019 Ga. App. LEXIS 274 (2019).

Because the defendant was on trial for rape, the defendant's prior instances of rape, sexual battery, and aggravated assault with intent to rape were properly before the jury under O.C.G.A. § 24-4-413 and, as the evidence was admissible under Rule 413, the challenge to the evidence under O.C.G.A. § 24-4-404(b) failed. Riley v. State, 356 Ga. App. 606, 848 S.E.2d 474, 2020 Ga. App. LEXIS 496 (2020).

Trial court did not abuse the court's discretion in admitting evidence of a previous sexual assault because the jury could have concluded by a preponderance of the evidence that the defendant, who ultimately pled guilty to a lesser offense, committed the prior acts described by the victim. Johnson v. State, 364 Ga. App. 44, 873 S.E.2d 704, 2022 Ga. App. LEXIS 251 (2022).

Trial court did not err in admitting other act evidence because evidence of the defendant's prior offense of rape was relevant to prove the defendant's lustful disposition and disprove the defendant's claim that the victim had fabricated the victim's version of the events. Williams v. State, 366 Ga. App. 114, 881 S.E.2d 1, 2022 Ga. App. LEXIS 531 (2022).

Trial court did not err by admitting evidence of defendant's alleged prior sexual abuse of his daughter because the facts underlying the sexual abuse of the daughter were strikingly similar to the facts underlying the charges that he sexually abused the victim, the eight years between the incidents were not unduly remote, and the defense that the victim was not credible increased the state's need for the evidence. Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173, 2023 Ga. App. LEXIS 18 (2023).

Trial court abused its discretion by ruling that evidence of prior acts of sexual assault were inadmissible in a rape case because the introduction of that evidence was not unfairly prejudicial as the prejudice stemmed from a proper use of the evidence to prove the defendant's propensity to engage in non-consensual sex with an unconscious or semi-conscious partner; and the probative value of the evidence was substantial as the defendant argued that the victim consented. State v. Ippisch, 366 Ga. App. 501, 883 S.E.2d 162, 2023 Ga. App. LEXIS 17 (2023).

Admission of prior incident of statutory rape. — In a defendant's prosecution for statutory rape and child molestation of a 14-year-old girl in her parents' trailer while the parents were home, evidence of a similar incident in the same trailer park involving another trailer and another 14-year-old girl was admissible under O.C.G.A. § 24-4-413 to show the defendant's knowledge, motive, preparation, and intent. Steele v. State, 337 Ga. App. 562, 788 S.E.2d 145, 2016 Ga. App. LEXIS 369 (2016).

State of feeling between defendant and victim. — Trial court did not err in admitting evidence of a previous difficulty between a defendant and victim which illustrated the state of feeling between them. 113 Ga. App. 436, 148 S.E.2d 333 (decided under former Code 1933, § 38-202); Jones v. State, 246 Ga. 109, 269 S.E.2d 6, 1980 Ga. LEXIS 980 (1980) (decided under former Code 1933, § 38-202).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent in the defendant's trial for public indecency and sexual battery as in each of the similar transactions, defendant approached a woman previously unknown to the defendant in a public place, attempted to talk to the woman, and then engaged in sexually inappropriate behavior; in the sexual battery incidents and one similar transaction, the defendant either bit or licked the victims on their buttocks while the victims were shopping and in the public indecency incident and two of the similar transactions, the defendant exposed self. Harmon v. State, 281 Ga. App. 35, 635 S.E.2d 348, 2006 Ga. App. LEXIS 997 (2006), cert. dismissed, No. S07C0386, 2007 Ga. LEXIS 137 (Ga. Feb. 5, 2007) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the victim and had not raped her. Bell v. State,

311 Ga. App. 289, 715 S.E.2d 684, 2011 Ga. App. LEXIS 595 (2011) (decided under former O.C.G.A. § 24-2-2).

Conviction of sex offense admissible in failure to register as offender trial. — Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence because the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to register as a sex offender under O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar transaction evidence. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181, 2006 Ga. App. LEXIS 1303 (2006) (decided under former O.C.G.A. § 24-2-2).

Admission of prior conviction for indecent exposure. — In a sexual battery case, it was proper to admit similar transaction evidence of a prior conviction for indecent exposure. Although the present incident involved the defendant groping the victim's breast, during both incidents, the defendant commented on the victim's appearance, asked the victim to look at the defendant, and began masturbating in the victim's presence; the proof of the prior incident tended to establish the charged offense and was also relevant to rebut the defendant's claim that it was the victim who had exposed the victim's breasts to the defendant by showing the defendant's course of conduct, bent of mind, and scheme. Romo v. State, 288 Ga. App. 237, 653 S.E.2d 832, 2007 Ga. App. LEXIS 1177 (2007) (decided under former O.C.G.A. § 24-2-2).

Eleven-year lapse does not render prior similar offense inadmissible. — Eleven-year lapse of time between defendant's similar prior sex offense and the one on trial did not itself render evidence of the prior offense inadmissible. It was one of the more important factors in considering admissibility; once it crossed that threshold, it thereafter affected the weight and credibility of the testimony. Hill v. State, 183 Ga. App. 404, 359 S.E.2d 190, 1987 Ga. App. LEXIS 2014 (1987) (decided under former O.C.G.A. § 24-2-2).

Testimony from other rape victims. — In a rape prosecution, similar transaction testimony from the defendant's prior rape victims was properly admitted, as the testimony was probative of the defendant's course of conduct, intent, modus operandi, and lustful disposition, and corroborated the victim's testimony that the defendant claimed to have previously raped persons that "nobody would believe." Sanders v. State, 297 Ga. App. 897, 678 S.E.2d 579, 2009 Ga. App. LEXIS 580 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior rape admissible. — Trial court acted within the court's discretion in admitting evidence of a prior rape because the state did not seek to introduce evidence of the prior rape to raise an improper inference concerning the defendant's character but rather to show the defendant's intent, bent of mind, and course of conduct, all of which were proper purposes; the prior and present rapes also were sufficiently similar because in both rapes, the defendant sexually attacked a young Spanish-speaking woman after the defendant had been drinking alcohol, the defendant threatened both victims, and the two attacks occurred only a few months apart. Alvarez v. State, 309 Ga. App. 462, 710 S.E.2d 583, 2011 Ga. App. LEXIS 340 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence inadmissible due to lack of proof of foreign conviction. — Trial court erred in admitting evidence of the defendant's prior convictions because the state failed to prove that the allegations for which the defendant was convicted of, aggravated criminal sexual abuse in Illinois, constituted an offense under O.C.G.A. § 24-4-413 or O.C.G.A. § 24-4-414 as the state failed to prove the age of the victim in that case. King v. State, 346 Ga. App. 362, 816 S.E.2d 390, 2018 Ga. App. LEXIS 386 (2018).

Admission of irrelevant evidence of affair did not require mistrial. — During a trial for felony murder while in the commission of cruelty to a child, evidence that a defendant's romantic partner did not know that the defendant was married was irrelevant; although the defendant's objection to the admission of the evidence was improperly overruled, the defendant's motion for a mistrial was properly denied

because a mistrial was not mandated. Scott v. State, 281 Ga. 373, 637 S.E.2d 652, 2006 Ga. LEXIS 965 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting similar transaction testimony concerning defendant's use of keys to gain entry into the apartments of women, ostensibly for maintenance purposes, as the trial court's finding that the evidence was admissible to establish motive, intent, and course of conduct was not clearly erroneous. Oliver v. State, 276 Ga. 665, 581 S.E.2d 538, 2003 Ga. LEXIS 545 (2003) (decided under former O.C.G.A. § 24-2-2).

Admission of evidence of a prior attempted rape of a neighbor in defendant's rape trial involving a different victim was not an abuse of discretion since the evidence was admitted to show defendant's lustful disposition, to evince defendant's propensity to sexually assault women defendant knew, and to corroborate the victim's testimony of no consent; a finding that the probative value of the evidence outweighed the prejudicial effect of the evidence was implicit in the trial court's decision to admit the evidence. Rowe v. State, 263 Ga. App. 367, 587 S.E.2d 781, 2003 Ga. App. LEXIS 1149 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in finding an earlier transaction sufficiently similar to the one for which a defendant was on trial and in admitting the evidence as to the prior transaction to show course of conduct, intent, and modus operandi, as, while some aspects of the earlier crime differed from the one for which the defendant was on trial: (1) the victims in both instances were young women who were strangers to the defendant; (2) both incidents occurred at night, at or near a bar; (3) the defendant approached the women from behind, brandished a weapon, threatened to kill the victims, and caused the victims physical harm; (4) both times the defendant was dressed in camouflage pants and a dark shirt; and (5) while the prior incident occurred more than 15 years earlier, the defendant had been out of jail for just over a year after serving the defendant's sentence for the similar transaction and, thus, the lapse of time was not a significant factor. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729, 2006 Ga. App. LEXIS 1217 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (Ga. Jan. 22, 2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Similar transaction evidence of crimes against a rape victim was properly admitted for identification purposes in the defendant's trial for assault because the witness testimony, DNA evidence, and the discovery of the rape victim's possessions in the defendant's car tied the defendant to the sexual assaults and because the assailant in both cases hid the assailant's face with a dark-colored raincoat and used the same gun. Lampkin v. State, 277 Ga. App. 237, 626 S.E.2d 199, 2006 Ga. App. LEXIS 47 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence to show a modus operandi as a modus operandi was similar to "course of conduct" and the state sought to admit the similar transaction for the purpose of showing course of conduct, intent, motive, and bent of mind; while the earlier crime included a sexual assault and the crimes for which the defendant was being tried did not, the addition of a sexual component to the earlier crime did not subtract from the notable similarities. The trial court's statement that "the only reason that there (was) not a sexual content to this crime (was), well, we don't know what would have happened, and certainly the event was abruptly halted, so the ruling (stood)" was made out of the presence of the jury and could not have affected the verdict. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729, 2006 Ga. App. LEXIS 1217 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (Ga. Jan. 22, 2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Differences between the state's proffer of similar transaction evidence and a wit-

ness's testimony at trial were insignificant and affected neither the admissibility of the similar transaction evidence, nor the outcome of the trial, in that: (1) the state proffered that the victims were walking behind a bar, but the witness testified that the victims had passed a bar and were near a restaurant; (2) the state proffered that the defendant showed the victims a gun, but the witness testified that the witness saw the gun but not that the defendant showed the gun to the witness; and (3) the state proffered that the defendant forced both victims to remove all of their clothes, but the witness testified that the witness had to remove some of the witness's clothes. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729, 2006 Ga. App. LEXIS 1217 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (Ga. Jan. 22, 2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-2-2).

Trial court did not commit plain error by charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413 because the charge was not erroneous as such evidence was admissible as relevant. Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583, 2016 Ga. App. LEXIS 240, overruled in part, Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391, 2016 Ga. App. LEXIS 460 (2016).

Trial court did not err in admitting evidence of the defendant's prior sexual assault conviction despite the lapse of 15 years and the difference in the victim's gender. Fossier v. State, 362 Ga. App. 184, 867 S.E.2d 545, 2021 Ga. App. LEXIS 585 (2021).

Trial court did not abuse its discretion in admitting a witness's testimony about the defendant's prior sexual assault of the witness as, although not overwhelming, the state provided evidence that it was the defendant who assaulted the witness because the witness described how the witness met the defendant, who was a teacher at the time, and that the defendant eventually coerced the witness, who was 14 years old at the time, into having sex with the defendant repeatedly. Moss v. State, 366 Ga. App. 33, 879 S.E.2d 821, 2022 Ga. App. LEXIS 485 (2022).

Similar transaction evidence admissible despite passage of 15 years. — Trial court did not abuse the court's discretion by admitting evidence of a past statutory rape because, although somewhat dissimilar and occurring 15 years earlier, the defendant's stated intent to attack the victim's credibility created a need for the state to use the evidence and the court gave a limiting instruction to the jury. McAllister v. State, 351 Ga. App. 76, 830 S.E.2d 443, 2019 Ga. App. LEXIS 385 (2019), cert. denied, No. S19C1489, 2020 Ga. LEXIS 115 (Ga. Feb. 10, 2020).

Prior attempts by accused concerning same victim. — Testimony concerning a prior effort by an accused to commit the same crime upon the victim for which the accused is now charged is a long recognized exception to the general rule that evidence of prior crimes is inadmissible. Baker v. State, 245 Ga. 657, 266 S.E.2d 477, 1980 Ga. LEXIS 883 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480, 1980 Ga. App. LEXIS 2317 (1980) (decided under former Code 1933, § 38-202).

Admission of prior child molestation plea proper. — In a trial for rape, aggravated sodomy, and aggravated assault with attempt to commit rape, the trial court properly admitted as similar transaction evidence the defendant's prior guilty plea to a charge of child molestation; as both crimes involved forcing sexual acts upon teenage girls, a certified copy of the prior conviction sufficed to show similarity. Washington v. State, 286 Ga. App. 268, 648 S.E.2d 761, 2007 Ga. App. LEXIS 763 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant making victim participate in online sexual performance. — Trial court did not err in denying the defendant's motion in limine to exclude evidence that the defendant made the victim participate in online sexual performances because the evidence was relevant to the defendant's intent, identity, and propensity to commit the crimes against the victim and the proba-

tive value of the evidence was great because the evidence provided a narrative of how the victim's abuse began, how the grooming process began, and why the victim delayed disclosure. Hamby v. State, 358 Ga. App. 105, 853 S.E.2d 874, 2021 Ga. App. LEXIS 11 (2021).

Character evidence was admissible in the following case. — See Dalton v. Jackson, 66 Ga. App. 625, 18 S.E.2d 791, 1942 Ga. App. LEXIS 251 (1942) (character in civil action for rape) (decided under former Code 1933, § 38-202).

Evidence of other conduct or crimes was admissible in the following cases. — See McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749, 1940 Ga. App. LEXIS 590 (1940) (sexual offenses) (decided under former Code 1933, § 38-202); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, 1943 Ga. LEXIS 318, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468, 1943 U.S. LEXIS 227 (1943); Warren v. State, 95 Ga. App. 79, 97 S.E.2d 194, 1957 Ga. App. LEXIS 719 (1957); (prior rape of same victim in assault with intent to rape case) (decided under former Code 1933, § 38-202); Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92, 1979 Ga. App. LEXIS 1960 (1979); (sexual offenses) (decided under former Code 1933, § 38-202); Allen v. State, 152 Ga. App. 481, 263 S.E.2d 259, 1979 Ga. App. LEXIS 2970 (1979). (prior rape of victim by same defendant in rape case) (decided under former Code 1933, § 38-202).

Evidence of other conduct or crimes was inadmissible in the following case. — See Scott v. State, 46 Ga. App. 213, 167 S.E. 210, 1932 Ga. App. LEXIS 113 (1932) (rape) (decided under former Penal Code 1910, § 1019).

Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, 2016 Ga. App. LEXIS 80 (2016), cert. denied, No. S16C1038, 2016 Ga. LEXIS 551 (Ga. Sept. 6, 2016).

Limiting instruction. — Trial court did not err by refusing to provide the jury with a limiting instruction regarding the defendant's prior bad acts because it was not statutorily required to do so. Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173, 2023 Ga. App. LEXIS 18 (2023).

RESEARCH REFERENCES

ALR.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 A.L.R.3d 967.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 A.L.R.4th 330.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

24-4-414. Evidence of similar transaction crimes in child molestation cases.

(a) In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described under this Code section.

(d) As used in this Code section, the term "offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(2) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(3) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

History.
Code 1981, § 24-4-414, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Similar crimes in child-molestation cases, Fed. R. Evid. 414.

Law reviews.
For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202 and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Notice was sufficient. — Defendant failed to demonstrate that the state's notice of the state's intent to present evidence of similar transactions, provided under the old evidence code which was in effect at the time, was insufficient to satisfy the requirements under the new evidence code. Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498, 2017 Ga. App. LEXIS 150 (2017).

Purpose of admission of similar sexual offenses. — Evidence of similar or connected sexual offenses against children is admissible in child molestation cases to corroborate the testimony of the victim as well as to show the lustful disposition of the defendant. Sullivan v. State, 162 Ga. App. 297, 291 S.E.2d 127, 1982 Ga. App. LEXIS 2147 (1982) (decided under former O.C.G.A. § 24-2-2).

Absolutely identical mode of operation required. — Since three prior incidents and the current child molestation charges against defendant all involved defendant going to locations frequented by children and exposing defendant's genitals to the children, the prior incidents were sufficiently similar to be admitted as similar transaction evidence in defendant's trial for child molestation; the fact that the prior incidents, unlike the current ones, did not involve touching the child victims did not mean that the prior incidents were not sufficiently similar to the current ones to be admitted, as there was no requirement that the prior crime or transaction had to be absolutely identical in every respect, and, in any event, the sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts perpetrated upon the children, was of sufficient similarity to make the evidence admissible. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197, 2003 Ga. App. LEXIS 594 (2003) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior bad acts. — Trial court did not err by denying the defendant's request for a continuance after allowing the state to present evidence of prior bad acts, specifically the defendant's relationship with the victim's mother that began when the victim was 14 years old, because the state moved to allow such evidence prior to trial and, thus, there was no surprise to the defendant. Aguilar v. State, 340 Ga. App. 522, 798 S.E.2d 60, 2017 Ga. App. LEXIS 94 (2017).

Evidence inadmissible due to lack of proof of foreign conviction. — Trial court erred in admitting evidence of the defendant's prior convictions because the state failed to prove that the allegations for which the defendant was convicted of, aggravated criminal sexual abuse in Illinois, constituted an offense under O.C.G.A. § 24-4-413 or O.C.G.A. § 24-4-414 as the state failed to prove the age of the victim in that case. King v. State, 346 Ga. App. 362, 816 S.E.2d 390, 2018 Ga. App. LEXIS 386 (2018).

Agreement between parents and molester on reporting. — Despite the defendant's claim that the trial court erroneously admitted improper character evidence from the victims' parents when the parents both testified that the defendant agreed to obtain counseling in exchange for the parents' agreement not to report the incidents of molestation to law enforcement, the evidence was properly admitted as: (1) the defendant cited no case law supporting a finding that amounted to improper character evidence; and (2) the testimony was admissible to explain why the victims and their parents did not immediately report the matter to police. Head v. State, 285 Ga. App. 471, 646 S.E.2d 699, 2007 Ga. App. LEXIS 550 (2007) (decided under former O.C.G.A. § 24-2-2).

Defendant's good character not put in issue. — Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and

the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good character into issue. Kurtz v. State, 287 Ga. App. 823, 652 S.E.2d 858, 2007 Ga. App. LEXIS 1110 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of relative's "touching" did not put defendant's character in issue. — Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. Robinson v. State, 275 Ga. App. 537, 621 S.E.2d 770, 2005 Ga. App. LEXIS 1029 (2005), cert. dismissed, No. S06C0267, 2006 Ga. LEXIS 178 (Ga. Feb. 27, 2006) (decided under former O.C.G.A. § 24-2-2).

Defendant's character was not erroneously put into issue by the admission of testimony of defendant's niece as to an incident during which defendant, while in the water at the beach and attempting to teach the witness how to float on her stomach, touched the witness in the area of her vagina because the evidence was admissible to show lustful disposition and to corroborate the testimony of the victim as to the acts charged. Evans v. State, 180 Ga. App. 1, 348 S.E.2d 561, 1986 Ga. App. LEXIS 2070 (1986) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant making victim participate in online sexual performance. — Trial court did not err in denying the defendant's motion in limine to exclude evidence that the defendant made the victim participate in online sexual performances because the evidence was relevant to the defendant's intent, identity, and propensity to commit the crimes against the victim and the probative value of the evidence was great because the evidence provided a narrative of how the victim's abuse began, how the grooming process began, and why the victim delayed disclosure. Hamby v. State, 358 Ga. App. 105, 853 S.E.2d 874, 2021 Ga. App. LEXIS 11 (2021).

Specific acts to prove character. — In a prosecution for child molestation, the court properly refused to allow the defendant to present witness evidence of defendant's experience in caring for young girls since character witnesses for a defendant are not permitted to testify about specific instances of conduct by the defendant during direct examination. Shelnutt v. State, 234 Ga. App. 655, 506 S.E.2d 643 (decided under former O.C.G.A. § 24-2-2).

Jury charge on prior difficulties proper. — Evidence supported the trial court's charge on the law regarding prior difficulties between the defendant and the victim because the defendant was charged with child molestation for placing his penis on or about the victim's vagina with criminal attempt to commit rape, and with false imprisonment for illegally detaining the victim, but the victim also testified to various other instances of the defendant touching her breasts and vagina, all of which constituted evidence of prior difficulties; by giving the charge, the trial court was not commenting on the evidence. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205, 2011 Ga. App. LEXIS 96 (2011), cert. denied, No. S11C0922, 2011 Ga. LEXIS 455 (Ga. May 31, 2011) (decided under former O.C.G.A. § 24-2-2).

Conviction of sex offense admissible in failure to register as offender trial. — Defendant's motion to sever the failure to register as a sex offender counts under O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence

General Consideration (Cont'd)

of the conduct underlying the defendant's conviction of a sex offense that was admissible as a similar transaction. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181, 2006 Ga. App. LEXIS 1303 (2006) (decided under former O.C.G.A. § 24-2-2).

Prior difficulty with witness properly admitted. — In the defendant's criminal case, the trial court did not err in admitting into evidence pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404, 24-4-405, 24-4-413, and 24-4-414) a prior difficulty the defendant previously had with one of the witnesses in the case; the evidence at issue was the defendant's performance of sexual acts on a juvenile victim prior to the acts that were alleged in the indictment, and this was relevant to show the defendant's motive, intent, and bent of mind in committing the acts against the victim for which the defendant was indicted. Clark v. State, 282 Ga. App. 248, 638 S.E.2d 397, 2006 Ga. App. LEXIS 1358 (2006) (decided under former O.C.G.A. § 24-2-2).

Testimony from other rape victims. — When the defendant was accused of touching the "private part" of a 12-year-old girl, it was proper to admit evidence of a 22-year-old woman's rape. Both victims were females with whom the defendant had a previous good relationship and over whom he had authority, and both incidents occurred in the middle of the night when the victims were not fully alert or fully capable of resisting; a mere difference in the victims' ages would not render a prior transaction inadmissible. Walley v. State, 298 Ga. App. 483, 680 S.E.2d 550, 2009 Ga. App. LEXIS 714 (2009), cert. denied, No. S09C1728, 2009 Ga. LEXIS 603 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-2-2).

Logical connection between crimes. — In a prosecution for child molestation, aggravated child molestation, and statutory rape allegedly committed by the defendant against three of the defendant's children, testimony from one of the defendant's other sons concerning similar transactions committed against that son was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children. McCoy v. State, 278 Ga. App. 492, 629 S.E.2d 493, 2006 Ga. App. LEXIS 351 (2006) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Similar transaction evidence of crimes against a rape victim was properly admitted for identification purposes in the defendant's trial for assault because the witness testimony, DNA evidence, and the discovery of the rape victim's possessions in the defendant's car tied the defendant to the sexual assaults and because the assailant in both cases hid the assailant's face with a dark-colored raincoat and used the same gun. Lampkin v. State, 277 Ga. App. 237, 626 S.E.2d 199, 2006 Ga. App. LEXIS 47 (2006) (decided under former O.C.G.A. § 24-2-2).

When the defendant was charged with malice murder, felony murder, and cruelty to children, it was proper to admit similar transaction evidence about the defendant's violent acts toward the defendant's elementary-school-aged siblings and about the defendant's wife-beating; the evidence at issue dealt with the defendant's violent behavior toward family members residing in the same home, even those significantly younger than the defendant. Collum v. State, 281 Ga. 719, 642 S.E.2d 640, 2007 Ga. LEXIS 229 (2007) (decided under former O.C.G.A. § 24-2-2).

When there was evidence that the defendant performed an oral act on the vagina of the ten-year-old victim while she was sleeping in a camper, it was proper to admit evidence of an incident 14 years before when the defendant had taken a four-year-old into a bedroom and performed a similar oral act on her vagina; the lapse of 14 years did not make the evidence inadmissible, and the incidents were sufficiently similar. Boileau v. State, 285 Ga. App. 221, 645 S.E.2d 577, 2007 Ga. App. LEXIS 421 (2007) (decided under former O.C.G.A. § 24-2-2).

In a sexual battery case involving a 13-year-old victim, the trial court properly admitted evidence of a similar transaction regarding a 12-year-old girl. The trial court found that both incidents involved girls of a similar age who developed some sort of romantic relationship with the de-

fendant and that the incidents occurred at the same residence and at about the same time. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795, 2008 Ga. App. LEXIS 338 (2008), overruled in part, Watson v. State, 297 Ga. 718, 777 S.E.2d 677, 2015 Ga. LEXIS 663 (2015) (decided under former O.C.G.A. § 24-2-2).

In defendant's prosecution for, inter alia, aggravated child molestation, evidence that the defendant previously engaged in a similar pattern of grooming a nine-year-old victim by, inter alia, giving the victim expensive presents before eventually molesting the victim was properly admitted to show bent of mind, common scheme or plan, and modus operandi; any objection to that victim's recantation of the accusation at the time because of fear for the victim's mother only went to the weight and credibility of the victim's testimony rather than the testimony's admissibility. Cannon v. State, 296 Ga. App. 687, 675 S.E.2d 560, 2009 Ga. App. LEXIS 310 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in allowing similar transaction evidence because a jury could determine that the defendant took the actions in the similar transaction with the intent to arouse the defendant's sexual desires, especially given that the defendant asked that victim if the victim felt like the defendant would molest the victim. Dority v. State, 335 Ga. App. 83, 780 S.E.2d 129, 2015 Ga. App. LEXIS 761 (2015), cert. denied, No. S16C0897, 2016 Ga. LEXIS 487 (Ga. Sept. 6, 2016).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11, 2017 Ga. App. LEXIS 176 (2017).

Trial court abused the court's discretion by excluding prior acts of child molestation allegedly committed by the defendant because such evidence was admissible under O.C.G.A. § 24-4-414(a), and nothing in the record supported the extraordinary remedy of exclusion as unduly prejudicial under O.C.G.A. § 24-4-403, particularly given the statutory presumption of admissibility and the close similarities between the crimes at issue. State v. McPherson, 341 Ga. App. 871, 800 S.E.2d 389, 2017 Ga. App. LEXIS 198 (2017), cert. denied, No. S17C1910, 2017 Ga. LEXIS 1014 (Ga. Dec. 11, 2017).

Trial court did not err in admitting, pursuant to O.C.G.A. §§ 24-4-413 and 24-4-414, evidence of the defendant's sexual behavior toward another student as a jury could have determined that the defendant acted with the intent to arouse the defendant's sexual desires, especially given that while driving the student home from a music lesson, the defendant said the defendant was taking the student to the defendant's house to "make whoopee," a clear reference to sex. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740, 2017 Ga. App. LEXIS 527 (2017), cert. denied, No. S18C0502, 2018 Ga. LEXIS 371 (Ga. May 21, 2018), overruled in part, McElrath v. State, 308 Ga. 104, 839 S.E.2d 573, 2020 Ga. LEXIS 127 (2020).

Trial court did not abuse the court's discretion in admitting evidence regarding the defendant's prior acts of child molestation because the evidence was relevant to show the defendant's intent, identity, and propensity to commit the crimes; and both of the prior incidents that the state sought to admit were relevant to show the defendant's lustful disposition with respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Maner v. State, 358 Ga. App. 21, 852 S.E.2d 867, 2020 Ga. App. LEXIS 684 (2020).

When the defendant was convicted of incest and child molestation, the trial court did not err by admitting other acts evidence because attempted enticement of a child for indecent purposes could be accomplished when the defendant engaged in sexually explicit communications with a person the defendant believed to be under the age of 16 and arranged to meet

General Consideration (Cont'd)

the purported child; and the fact the defendant had attempted to meet another purported teenage victim to have sexual intercourse was highly probative of the defendant's motive. Hughes v. State, 365 Ga. App. 448, 878 S.E.2d 791, 2022 Ga. App. LEXIS 453 (2022).

Testimony of victim's sibling about unprosecuted offense in child molestation case permitted. — Trial court did not err in allowing similar acts testimony by the victim's half-sister in an aggravated sexual battery and child molestation trial. Although the half-sister did not allege penetration by the defendant, she explained that she awoke after he pulled at her shorts, and she described how the defendant fled across the room in much the same way that the victim testified that the defendant fled from her room when she stirred; furthermore, the fact that the half-sister did not speak out about the abuse prior to the victim's outcry did not warrant a determination that the trial court abused the court's discretion by allowing the half-sister's testimony. Hilliard v. State, 298 Ga. App. 473, 680 S.E.2d 541, 2009 Ga. App. LEXIS 716 (2009) (decided under former O.C.G.A. § 24-2-2).

Display of indecent notes. — Evidence that the defendant displayed indecent notes, including an indecent image on the defendant's phone depicting oral sex, to an 11-year-old child for sexual gratification was admissible for purposes of showing the defendant's lustful interest in minor girls of approximately the same age as the victim. Holzheuser v. State, 351 Ga. App. 286, 828 S.E.2d 664, 2019 Ga. App. LEXIS 430 (2019), cert. denied, 308 Ga. 401, 841 S.E.2d 735, 2020 Ga. LEXIS 246 (2020).

"Williams" requirement satisfied. — Evidence of a prior sexual assault was properly admitted in defendant's child molestation trial as similar transaction evidence even though the trial court failed to make a determination as to the proper purposes for which the evidence was offered or as to defendant's identity as perpetrator of the independent act; the error was harmless as the evidence was sufficient for the trial court to have concluded that the Williams (Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) requirements were satisfied. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869, 2005 Ga. App. LEXIS 466 (2005) (decided under former O.C.G.A. § 24-2-2).

Parents knowing each other did not impact admissibility. — Similar transaction evidence was properly admitted in a prosecution for enticing a minor for indecent purposes and statutory rape because, in each case, the defendant obtained permission from the mothers of girls he knew well to take the girls for a specific purpose, diverted to an apartment, carried the girls to his bedroom, partially disrobed them, attempted to or did perform various sex acts, gave them a food treat, then returned them to their mothers with a fictitious explanation; the similar transaction evidence was not tainted, even though the victims' mothers knew one another. Jackson v. State, 274 Ga. App. 26, 619 S.E.2d 294, 2005 Ga. App. LEXIS 659 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant's sexual acts at age 12 not admitted. — During a defendant's trial for aggravated child molestation and related charges, evidence of the defendant's sexual misconduct against two younger children at the age of 12 was improperly admitted and was more prejudicial than probative because: (1) there was no logical connection between the charged offenses and the prior misconduct as no pattern of continuous conduct or periods of incarceration between the incidents were shown; (2) the defendant was a child when the previous events occurred and an adult at the time of the charged events; and (3) no sexual misconduct was alleged to have occurred in the intervening years. Maynard v. State, 282 Ga. App. 598, 639 S.E.2d 389, 2006 Ga. App. LEXIS 1483 (2006) (decided under former O.C.G.A. § 24-2-2).

Evidence admitted to show bent of mind and course of conduct. — In a prosecution for aggravated sexual battery and aggravated child molestation involving a 12-year-old child, evidence that the defendant had sexual intercourse with a 15-year-old child shortly before committing the charged crimes was properly ad-

mitted as the evidence was relevant to show bent of mind, course of conduct, and to corroborate the victim's testimony; the prejudicial effect of the evidence did not outweigh the probative value. Martin v. State, 294 Ga. App. 117, 668 S.E.2d 549, 2008 Ga. App. LEXIS 1122 (2008) (decided under former O.C.G.A. § 24-2-2).

Sex crimes against children require unique bent of mind. — Three prior acts of child molestation were admissible in defendant's trial for child molestation and sexual battery of an 11-year-old female victim, although one victim was a male, one was four years younger, and the acts committed were different. The sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon the children, was of sufficient similarity to make the evidence admissible because sex crimes against children require a unique bent of mind. Gunn v. State, 300 Ga. App. 229, 684 S.E.2d 380, 2009 Ga. App. LEXIS 1134 (2009) (decided under former O.C.G.A. § 24-2-2).

Prior offense admissible to show intent and motive. — Trial court did not abuse the court's discretion by admitting evidence related to a prior offense of child molestation because it was admissible for a relevant purpose, the defendant's intent and motive. Wilson v. State, 354 Ga. App. 64, 840 S.E.2d 601, 2020 Ga. App. LEXIS 120 (2020), aff'd, 312 Ga. 174, 860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Evidence of similar sexual offenses against young adult in child molestation trial. — Evidence of a prior sexual assault was sufficiently similar for purposes of the admission of similar transaction evidence in defendant's child molestation trial, despite a difference in the victim's ages, because in the prior assault the victim was 23 years old and in the charged assault the victim was 14 years old as there was sufficient similarity between the two acts; in both cases: (1) the events occurred in defendant's trailer home; (2) defendant initiated unwanted sexual attacks; (3) defendant put defendant's hands down the panties of the victim; (4) defendant masturbated and ejaculated on the victims; and (5) defendant unsuccessfully attempted penetration. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869, 2005 Ga. App. LEXIS 466 (2005) (decided under former O.C.G.A. § 24-2-2).

Internet chat room transcript admissable. — Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262, 2005 Ga. App. LEXIS 763 (2005), cert. denied, No. S05C1921, 2005 Ga. LEXIS 789 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence against adult in child molestation case. — Trial court did not abuse the court's discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852, 2011 Ga. App. LEXIS 985 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's nonchastity excluded. — When the trial court refused to allow evidence as to whether defendant consented to intercourse with the victim in the sexual molestation case under O.C.G.A. § 16-6-4(a) and evidence that the defendant bragged about it to others after the fact, the trial court did not err;

General Consideration (Cont'd)

evidence as to the victim's nonchastity was inadmissible as irrelevant under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) as was evidence of the victim's preoccupation with sex. Slack v. State, 265 Ga. App. 306, 593 S.E.2d 664, 2004 Ga. App. LEXIS 1 (2004) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was inadmissible in the following case. — See Spinks v. State, 92 Ga. App. 878, 90 S.E.2d 590, 1955 Ga. App. LEXIS 734 (1955) (sodomy in child molesting case) (decided under former Code 1933, § 38-202).

Halloween mask admitted as going to state of mind. — Halloween mask was properly admitted in a trial for child molestation, aggravated child molestation, and aggravated sexual battery because the mask was relevant to the victim's state of mind as the victim testified that the defendant wore a Halloween mask on the night of the incident. Ward v. State, 274 Ga. App. 511, 618 S.E.2d 154, 2005 Ga. App. LEXIS 791 (2005), cert. denied, No. S05C1975, 2005 Ga. LEXIS 880 (Ga. Nov. 18, 2005) (decided under former O.C.G.A. § 24-2-1).

Differences in victim's ages. — During the defendant's trial for child molestation and statutory rape, the trial court did not err in admitting similar transaction testimony regarding the defendant's unwanted sexual advances toward his girlfriend's younger sister because the difference in the victims' ages did not make the similar transaction inadmissible; it is the totality of the similar facts surrounding the crimes that are properly considered in a similar transaction analysis. Gresham v. State, 303 Ga. App. 682, 695 S.E.2d 73, 2010 Ga. App. LEXIS 391 (2010) (decided under former O.C.G.A. § 24-2-2).

Failure of counsel to object to similar transaction evidence. — In a child molestation prosecution, since evidence of the defendant's uncharged molestation of the victim was admissible without notice or a hearing, defense counsel was not ineffective for not objecting to such evidence. Stillwell v. State, 294 Ga. App. 805, 670 S.E.2d 452, 2008 Ga. App. LEXIS 1206 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in the court's jury instruction on the other acts of child molestation evidence introduced at trial because the trial court authorized the jury to consider the evidence for any relevant purpose and intent, including lustful disposition; and the instruction did not constitute plain error. Maner v. State, 358 Ga. App. 21, 852 S.E.2d 867, 2020 Ga. App. LEXIS 684 (2020).

Other sexual offense relevant for sentencing. — Trial court properly refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the court found the defendant's conviction for sexual exploitation of children was a relevant similar transaction and the phrase relevant similar transaction under § 17-10-6.2(c)(1)(C) included a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence was considered. Nix v. State, 354 Ga. App. 47, 839 S.E.2d 687, 2020 Ga. App. LEXIS 55 (2020), cert. denied, No. S20C1171, 2020 Ga. LEXIS 887 (Ga. Nov. 2, 2020).

Other Crimes

Evidence of similar prior offense held admissible. — Defendant was charged with raping a mentally retarded 27-year-old. Evidence that two years earlier the defendant was convicted of taking indecent liberties with an eight- and an 11-year-old child was properly admitted as the evidence was probative to show the defendant's lustful disposition toward persons of limited mental capacity, and the evidence's relevance outweighed any prejudice. Kent v. State, 294 Ga. App. 134, 668 S.E.2d 442, 2008 Ga. App. LEXIS 1009 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent

child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103, 2017 Ga. App. LEXIS 390 (2017).

Trial court did not abuse the court's discretion in admitting the defendant's prior conviction for sexual battery of a minor as a lesser offense to child molestation because a certified copy of the conviction was admitted. Chitwood v. State, 352 Ga. App. 218, 834 S.E.2d 334, 2019 Ga. App. LEXIS 551 (2019).

Trial court did not abuse the court's discretion in admitting the evidence that the defendant had engaged in sexual intercourse with two other victims who were around the same age as the 14-year-old victim as the defendant put the defendant's intent at issue in the case, and the probative value of the extrinsic acts evidence was not substantially outweighed by the prejudicial effect of the evidence. Boyd v. State, 351 Ga. App. 469, 829 S.E.2d 163, 2019 Ga. App. LEXIS 265 (2019).

Trial court did not abuse the court's discretion in admitting the two prior acts of child molestation against the defendant especially given the strong presumption in favor of admissibility; the defendant's prior acts against two other women when they were young girls were relevant and probative regarding the defendant's intent and propensity to commit the charged crimes against the victim as there was no showing either on direct or cross-examination that the witnesses' memories were at issue. Sturgis v. State, 356 Ga. App. 219, 842 S.E.2d 82, 2020 Ga. App. LEXIS 240 (2020).

In a child molestation case, since the jury could have found by a preponderance of the evidence that the defendant committed prior acts of child molestation, the prior acts evidence was admissible. Frady v. State, 359 Ga. App. 255, 857 S.E.2d 260, 2021 Ga. App. LEXIS 173 (2021).

Trial court did not abuse its discretion in admitting the other acts evidence because the evidence was clearly relevant to the defendant's intent and propensity for child molestation, the other acts occurred close in time to the underlying offenses, and, like the underlying offenses, occurred while the other acts victim was sitting on the defendant's lap. Ary v. State, 359 Ga. App. 563, 859 S.E.2d 535, 2021 Ga. App. LEXIS 239 (2021).

Trial court did not abuse its discretion admitting other acts of child molestation evidence as the other alleged acts of molestation in Kentucky were relevant for purposes of showing intent or motive and there was no showing that the trial court improperly found that the probative value of the evidence outweighed the danger of unfair prejudice. Kuprian v. State, 359 Ga. App. 692, 859 S.E.2d 843, 2021 Ga. App. LEXIS 270 (2021).

Trial court did not abuse its discretion in admitting evidence of the defendant's prior acts, as it was relevant to show the defendant's propensity to commit the crimes and there was sufficient similarity between the prior acts against the prior victim and the alleged offenses. Green v. State, 359 Ga. App. 845, 860 S.E.2d 140, 2021 Ga. App. LEXIS 296 (2021).

Trial court did not err by admitting evidence of prior acts the defendant committed against other female victims because it showed that the defendant had the propensity, as well as the motive and intent, to engage in child molestation, the evidence was relevant for the purpose of showing the defendant's actions were intentional, and the prior acts were sufficiently similar in that they involved touching of vaginas, buttocks and breasts. Ramirez-Ortiz v. State, 361 Ga. App. 577, 865 S.E.2d 206, 2021 Ga. App. LEXIS 532 (2021).

Evidence of defendant's prior actions against a victim showed that defendant had the propensity, as well as the motive and intent, to engage in offenses of child molestation, and therefore the prior offenses evidence met the relevancy requirement of O.C.G.A. § 24-4-414(a). Ramirez-Ortiz v. State, 361 Ga. App. 577, 865 S.E.2d 206, 2021 Ga. App. LEXIS 532 (2021).

Trial court did not err by admitting evidence of defendant's alleged prior sexual abuse of his daughter because the facts underlying the sexual abuse of the daughter were strikingly similar to the facts underlying the charges that he sexually abused the victim, the eight years

Other Crimes (Cont'd)

between the incidents were not unduly remote, and the defense that the victim was not credible increased the state's need for the evidence. Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173, 2023 Ga. App. LEXIS 18 (2023).

Evidence was sufficient for O.C.G.A. § 24-4-414 purposes to show enticement in that the defendant lured the victim to take a driving lesson so he could attempt to groom the victim for child molestation by showing the victim photos of women's underwear and trying to lure the victim into giving the defendant the victim's own underwear. Whipkey v. State, 367 Ga. App. 73, 885 S.E.2d 57, 2023 Ga. App. LEXIS 115 (2023).

Discretion abused in determining prior acts admissible. — In a child molestation case, the trial court abused the court's discretion in determining whether prior acts evidence was admissible under O.C.G.A. § 24-4-403 because the trial court's assessment of mini-trial risk was not tailored to prior acts evidence presented by the state at the hearing on the motion. State v. Berman, 367 Ga. App. 447, 2023 Ga. App. LEXIS 167 (2023).

Similar transaction evidence admissible despite passage of 15 years. — Trial court did not abuse the court's discretion by admitting evidence of a past statutory rape because, although somewhat dissimilar and occurring 15 years earlier, the defendant's stated intent to attack the victim's credibility created a need for the state to use the evidence and the court gave a limiting instruction to the jury. McAllister v. State, 351 Ga. App. 76, 830 S.E.2d 443, 2019 Ga. App. LEXIS 385 (2019), cert. denied, No. S19C1489, 2020 Ga. LEXIS 115 (Ga. Feb. 10, 2020).

Prior sexual assaults admitted. — Trial court did not abuse the court's discretion in admitting testimony regarding the appellant's prior acts of sexual assault because that evidence was relevant to the appellant's intent, identity, and propensity and three other family members testified that the appellant engaged in the same conduct of rubbing their genitals and inserting the defendant's finger into their vaginas when the witnesses were the same age as the victim, which testimony was relevant to show the appellant's propensity and that it was the appellant who molested the victim. Dixon v. State, 350 Ga. App. 211, 828 S.E.2d 427, 2019 Ga. App. LEXIS 274 (2019).

Nolo contendere plea impacting admissibility. — Evidence of defendant's prior sexual battery of a juvenile was properly admitted in defendant's trial for child molestation and attempted child molestation of a nine-year-old girl to show defendant's lustful disposition toward molesting young girls because several years earlier defendant had pled nolo contendere to charges arising out of defendant touching the breast of a 16-year-old girl and placing her hand on his genitals. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83, 2005 Ga. App. LEXIS 1371 (2005), cert. denied, No. S06C0784, 2006 Ga. LEXIS 302 (Ga. May 8, 2006) (decided under former O.C.G.A. § 24-2-2).

In a case in which the defendant was charged with computer pornography and attempted child molestation, the trial court erred by relying solely upon the defendant's Wisconsin nolo contendere plea to possession of child pornography as a prior bad act because it did not require the state to present evidence of the prior act by testimony or otherwise. Yeamans v. State, 366 Ga. App. 780, 884 S.E.2d 380, 2023 Ga. App. LEXIS 80 (2023).

Solicitation of sodomy conviction admitted. — Evidence of the defendant's prior conviction for solicitation of sodomy was properly admitted as a similar transaction in the defendant's trial for child molestation and sexual battery against a child since the victims of the current child molestation and the defendant's prior offense were both young girls whom the defendant knew, and in both instances, while the defendant was alone with the girls, the defendant placed the defendant's hands on their vaginal areas. Attaway v. State, 279 Ga. App. 781, 632 S.E.2d 397, 2006 Ga. App. LEXIS 574 (2006) (decided under former O.C.G.A. § 24-2-2).

Admission of prior aggravated molestation. — During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the

similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward molesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. Jackson v. State, 309 Ga. App. 450, 710 S.E.2d 649, 2011 Ga. App. LEXIS 362 (2011) (decided under former O.C.G.A. § 24-2-2).

Use of certified copies of prior convictions. — Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672, 2011 Ga. App. LEXIS 466 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar or connected sexual offenses against children. — Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585, 2011 Ga. App. LEXIS 1081 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting evidence that the defendant committed prior acts of child molestation as the circumstances were similar, the age of the victim during the abuse overlapped with the age of the victim in the instant case, and the manner of abuse was the same, making the prior offense highly probative with regard to the defendant's intent. Eubanks v. State, 332 Ga. App. 568, 774 S.E.2d 146, 2015 Ga. App. LEXIS 359 (2015).

Trial court did not plainly err by admitting evidence of defendant's alleged prior offenses of child molestation under O.C.G.A. § 24-4-414 because the trial court was authorized to conclude that defendant's prior acts constituted crimes, as evidence that defendant knew right from wrong at the time of the prior acts was sufficient to rebut the presumption of defendant's incapacity to commit a crime based on defendant's young age at the time of the prior acts under O.C.G.A. § 16-3-1 and in Adams v. State, 288 Ga. 695, 707 S.E.2d 359 (2011).Wilson v. State, 312 Ga. 174, 860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Defendant's prior offenses of child molestation were relevant because they showed that he had the propensity, as well as the motive and intent, to engage in offenses of child molestation. Wilson v. State, 312 Ga. 174, 860 S.E.2d 485, 2021 Ga. LEXIS 481 (2021).

Where the defendant was convicted of four counts of child molestation and two counts of enticing a child for indecent purposes, the trial court did not err in allowing into evidence 13 images of child pornography that were recovered from the defendant's computer as the images demonstrated that the defendant had a sexual interest in boys around the age of the victims in the current case. Hutcheson v. State, 361 Ga. App. 890, 864 S.E.2d 106, 2021 Ga. App. LEXIS 401 (2021).

Use of defendant's juvenile record proper. — In choosing to have a witness

Other Crimes (Cont'd)

testify as to a defendant's good character, the defendant opened the door for the state to introduce all evidence bearing on the defendant's character, including a juvenile adjudication; the defendant's claim that the trial court erred in permitting the prosecution to cross-examine the defendant's character witness regarding the defendant's prior juvenile adjudication for child molestation because a certified copy of the juvenile adjudication was not tendered was without merit. Redman v. State, 281 Ga. App. 605, 636 S.E.2d 680, 2006 Ga. App. LEXIS 1099 (2006), cert. denied, No. S07C0189, 2006 Ga. LEXIS 1002 (Ga. Nov. 20, 2006) (decided under former O.C.G.A. § 24-2-2).

Character not put in issue in child molestation cases. — When the minor victim testified that she had not initially told her mother about the defendant's sexual offenses because she feared that the defendant, who had been arrested for battery of the mother and who had hit the mother, would harm the victim and her mother, evidence that the defendant had hit the mother and that the defendant had been arrested for assault and battery of the mother did not improperly put the defendant's character into issue; it was properly admitted to explain the victim's delay in reporting the crime. Borders v. State, 285 Ga. App. 337, 646 S.E.2d 319, 2007 Ga. App. LEXIS 513 (2007), cert. denied, No. S07C1374, 2007 Ga. LEXIS 640 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-2-2).

Evidence of domestic violence. — Admission of testimony from the mother of a child molestation victim describing a defendant's incidents of violence toward her was not erroneous admission of character evidence because it explained the mother's three-month delay in reporting the incident. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155, 2010 Ga. App. LEXIS 546 (2010), cert. dismissed, No. S10C2046, 2011 Ga. LEXIS 85 (Ga. Jan. 24, 2011) (decided under former O.C.G.A. § 24-2-2).

Admission of drug crimes involving minors. — Trial court did not abuse the court's discretion in admitting evidence in defendant's trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory rape that defendant pleaded guilty to possession of marijuana and multiple counts of contributing to the delinquency of a minor after defendant was discovered smoking marijuana with a 13-year-old girl. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200, 1992 Ga. LEXIS 211 (1992) (child abuse and child molestation) (decided under former O.C.G.A. § 24-2-2); Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887, 2005 Ga. App. LEXIS 337 (2005), cert. denied, No. S05C1261, 2005 Ga. LEXIS 614 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-2-2).

Time Lapse

Eleven-year lapse does not render prior similar offense inadmissible. — Trial court did not abuse the court's discretion in admitting defendant's conviction for criminal attempt, second-degree sexual assault, in which the victim was over 25 years old, but was developmentally disabled and mildly retarded; this evidence was admissible in defendant's trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory rape to show course of conduct, bent of mind, lustful disposition, and modus operandi and as tending to corroborate the child victims' testimony; the conviction, which occurred almost 11 years earlier, was not too remote to be admissible. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887, 2005 Ga. App. LEXIS 337 (2005), cert. denied, No. S05C1261, 2005 Ga. LEXIS 614 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-2-2).

Time lapse between offenses goes to credibility. — Evidence that defendant had perpetrated similar sexual offenses against children of the same age and gender using a similar method of operation was properly admitted because the requisite similarity between the independent offenses and the crimes charged was clearly established; a time lapse of about eight years went to the weight and credibility of the evidence. Hogan v. State, 272 Ga. App. 19, 611 S.E.2d 689, 2005 Ga. App. LEXIS 201 (2005) (decided under former O.C.G.A. § 24-2-2).

In a child molestation case involving relations of the defendant, the trial court did not err in introducing evidence of similar transactions involving other child relations that happened 16 to 29 years before the trial on the present charges; the lapse of time between these offenses went to the weight and credibility of the testimony, not to the admissibility of the offenses. Boynton v. State, 287 Ga. App. 778, 653 S.E.2d 110, 2007 Ga. App. LEXIS 1091 (2007) (decided under former O.C.G.A. § 24-2-2).

Time lapse still showed bent of mind or lustful disposition. — Testimony that an older granddaughter was molested 25 years ago was not so remote as to be inadmissible in the defendant's trial for the child molestation of a 15-year-old granddaughter; similar transaction evidence, including the older granddaughter's testimony and evidence involving the molestation of the defendant's five-year-old great-granddaughter, was admissible to show the defendant's bent of mind or lustful disposition. Delk v. State, 274 Ga. App. 261, 619 S.E.2d 310, 2005 Ga. App. LEXIS 657 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting the evidence of 11-year-old and 15-year-old similar transactions because both similar transactions and the instant crimes involved defendant committing sexual acts against children with the second similar transaction and the instant crimes having defendant in a position of authority over the victims; thus, the similarity to the present crimes and their probative value to show unique bent of mind made them admissible. Arbegast v. State, 332 Ga. App. 414, 773 S.E.2d 283, 2015 Ga. App. LEXIS 318 (2015).

RESEARCH REFERENCES

ALR.

Necessity of Expert Testimony on Grooming Behavior Involving Sexual Conduct with Child, 53 A.L.R.7th 3.

24-4-415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.

(a) In a civil or administrative proceeding in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or an offense of child molestation, evidence of that party's commission of another offense of sexual assault or another offense of child molestation shall be admissible and may be considered as provided in Code Sections 24-4-413 and 24-4-414.

(b) A party who intends to offer evidence under this Code section shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term:

(1) "Offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(B) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(C) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

(2) "Offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(B) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(C) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

History.

Code 1981, § 24-4-415, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Evidence of similar acts in civil cases concerning sexual assault or child molestation, Fed. R. Evid. 415.

Law reviews.

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202, and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Evidence of similar acts in negligence cases. — Allegation that the defendant in a personal injury suit was aware that other persons had slipped and fallen under substantially the same circumstances was not subject to special demurrer as immaterial and irrelevant matter. Belk-Matthews Co. of Macon v. Thompson, 94 Ga. App. 331, 94 S.E.2d 516, 1956 Ga. App. LEXIS 537 (1956)

(decided under former Code 1933, § 38-202).

Evidence of prior consensual adulterous relationship not admitted. — Evidence of a dentist's prior consensual adulterous relationship was properly excluded from the evidence as the evidence was irrelevant to a former employee's claim against the dentist for assault and battery and would only have served to impugn the general character of the dentist. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285, 2008 Ga. App. LEXIS 766 (2008) (decided under former O.C.G.A. § 24-2-2).

RESEARCH REFERENCES

ALR.

Visitation or Custody of Child Allegedly Conceived by Sexual Assault, 54 A.L.R.7th Art. 7.

24-4-416. Statements of sympathy in medical malpractice cases.

(a) As used in this Code section, the term "health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity composed of such health care providers.

(b) In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

History.

Code 1981, § 24-4-416, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-37.1 are included in the annotations for this Code section.

Application and illustrations. — Neither former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408) nor former O.C.G.A. § 24-3-37.1 prevented admitting a letter from the defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that the manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F.

Supp. 2d 1338, 2008 U.S. Dist. LEXIS 12921 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-37.1).

Evidence properly excluded. — In a medical negligence action, the trial court properly excluded statements of regret made by the doctor sued pursuant to the plain meaning of former O.C.G.A. § 24-3-37.1(c), despite the suing patient's claim that such should have been admitted as statements against interest and under the res gestae exception to the hearsay rule; moreover, retroactive application was not improper as the Georgia General Assembly intended that the law be applied to cases pending at the time the law was passed. Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600, 2008 Ga. App. LEXIS 139 (2008) (decided under former O.C.G.A. § 24-3-37.1).

RESEARCH REFERENCES

ALR.

Admissibility in action for malpractice, of evidence as to reputation of physician or surgeon for skill and care, 48 A.L.R. 249.

24-4-417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391.

(a) In a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when:

(1) The accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident;

(2) The accused refused in the current case to provide an adequate breath sample for the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident; or

(3) The identity of the driver is in dispute in the current case and such evidence is relevant to prove identity.

(b) In a criminal proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

History.
Code 1981, § 24-4-417, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Character evidence, Fed. R. Evid. 404.

Law reviews.
For annual survey on evidence law, see 68 Mercer L. Rev. 121 (2016).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Statements as to defendant's drinking habits. — Prosecution's characterization of defendant as an "experienced drinker" because defendant had testified that defendant was not rendered intoxicated by .21% blood alcohol did not place defendant's character in issue. Rielli v. State, 174 Ga. App. 220, 330 S.E.2d 104, 1985 Ga. App. LEXIS 1786 (1985) (decided under former O.C.G.A. § 24-2-2).

Prior DUI convictions admissible. — Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior DUI convictions, after the defendant refused to undergo sobriety testing, stating that it was the defendant's third DUI. Hammond v. State, 334 Ga. App. 781, 780 S.E.2d 440, 2015 Ga. App. LEXIS 723 (2015).

Defendant's conviction for driving under the influence (DUI) and other crimes was affirmed because the defendant's prior DUI conviction was properly admitted since the conviction was relevant to the issue of the defendant's knowledge of the consequences of both consenting to and refusing the tests, and its probative value outweighed any prejudice. Kim v. State, 337 Ga. App. 155, 786 S.E.2d 532, 2016 Ga. App. LEXIS 281 (2016).

Trial court did not err in admitting the defendant's prior driving under the influence (DUI) conviction because the trial court did not abuse the court's discretion in finding that the prior DUI was relevant to prove knowledge; and proof of the defendant's prior DUI conviction could strengthen the inference that the factfinder could draw from the defendant's refusal to take the state-administered test in the current DUI prosecution, that had the defendant done so, it would have shown the presence of alcohol. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245, 2017 Ga. App. LEXIS 68 (2017), cert. denied, No. S17C1278, 2017 Ga. LEXIS 678 (Ga. Aug. 14, 2017).

Evidence of the defendant's prior driving under the influence (DUI) conviction was admissible because, based on the presence of the word "shall," the supreme court concluded that this rule contained a presumption in favor of the admission of such evidence; proof of the defendant's prior DUI could allow the factfinder to infer that the defendant had an awareness that the defendant's ingestion of an intoxicant impaired the defendant's ability to drive safely; and such awareness might help to explain the defendant's refusal to submit to the portable breath test. Gibbs v. State, 341 Ga. App. 316, 800 S.E.2d 385, 2017 Ga. App. LEXIS 190 (2017), cert. denied, No. S17C1673, 2017 Ga. LEXIS 865 (Ga. Oct. 2, 2017).

In the defendant's DUI case, in which the defendant refused to submit to a blood test, the defendant's December 2011 DUI was properly admitted to prove the defendant's knowledge and intent, pursuant to O.C.G.A. § 24-4-417(a)(1). Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851, 2017 Ga. App. LEXIS 306 (2017), overruled in part, McClure v. State, 306 Ga. 856, 834 S.E.2d 96, 2019 Ga. LEXIS 643 (2019).

Eight-year lapse between a prior conviction for DUI and the charges at issue did not presumptively lessen the probative value of the prior act, but was a factor to be considered when balancing the probative value of the evidence against the potentially prejudicial impact of the evidence, and the trial court was authorized to find that the probative value was not substantially outweighed by the prejudicial impact of the evidence. Miller v. State, 343 Ga. App. 197, 806 S.E.2d 648, 2017 Ga. App. LEXIS 467 (2017).

Defendant failed to show that the trial court abused the court's discretion in admitting evidence of a prior driving under the influence (DUI) incident because the state proffered the deputy's testimony about the June 2011 driving incident for the purpose of proving that the defendant had acquired knowledge of the testing procedures used by the state to secure a DUI conviction and had developed a similar plan to refuse consent in the present case as part of an effort to avoid a DUI conviction; and, in light of the state's proffer, the defendant's prior DUI incident was relevant for proving knowledge and plan. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87, 2017 Ga. App. LEXIS 589 (2017), aff'd, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

Defendant failed to show that the trial court abused the court's discretion in admitting evidence of a prior driving under the influence (DUI) incident because, by choosing the word "commission" rather than "conviction" in this rule, the General Assembly intended for a prior DUI incident to be admissible when there was evidence that the DUI was committed by the criminal defendant, even if the defendant was not convicted of that offense. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87, 2017 Ga. App. LEXIS 589 (2017), aff'd, 306 Ga. 1, 829 S.E.2d 126, 2019 Ga. LEXIS 383 (2019).

Evidence of alcohol use. — In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol and with an open container in the car was admissible as circumstantial evidence of defendant's bent of mind and course of conduct on the night in question. McCullough v. State, 230 Ga. App. 98, 495 S.E.2d 338 (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting evidence of a prior accident involving an incident of driving under the influence to show bent of mind and course of conduct; probative value of the prior incident was not outweighed by the prejudicial effect of the evidence. Harris v. State, 272 Ga. App. 366, 612 S.E.2d 557, 2005 Ga. App. LEXIS 289 (2005), cert. denied, No. S05C1208, 2005 Ga. LEXIS 620 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-2-2).

Defendant's three prior driving under the influence (DUI) convictions were properly admitted in defendant's DUI trial as similar transaction evidence to show bent of mind and course of conduct as in each of the previous cases, defendant was arrested for DUI while driving late at night and consented to a breath test that showed that defendant was well over the legal limit; an almost 15-year lapse of time after one previous conviction went to the weight of the evidence. Moody v. State, 273 Ga. App. 670, 615 S.E.2d 803, 2005 Ga. App. LEXIS 590 (2005) (decided under former O.C.G.A. § 24-2-2).

Failure to consider admissibility. — In an action for, inter alia, DUI, the trial court properly concluded that evidence of the defendant's refusal to submit to a state-administered breath test was inadmissible, but then improperly failed to analyze whether evidence of the existence of the arrest and other circumstances were otherwise admissible pursuant to O.C.G.A. § 24-4-417. State v. Johnson, 354 Ga. App. 447, 841 S.E.2d 91, 2020 Ga. App. LEXIS 185 (2020).

Proof of other crime required. — In a prosecution for vehicular homicide and driving under the influence (DUI), the trial court properly allowed evidence regarding the defendant's prior DUI, as the defendant had pled guilty to that offense, the blood test results appeared on the uniform traffic citation, a certified copy of the accusation and plea was entered into evidence, and an officer testified that the defendant was the person arrested on that charge. Hurston v. State, 278 Ga. App. 472, 629 S.E.2d 18, 2006 Ga. App. LEXIS 245 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting similar transaction evidence regarding a previous incident when defendant, while intoxicated, drove through a chain link fence and overturned a car as the evidence was relevant to defendant's bent of mind to get behind the

wheel of a vehicle when it was less safe for defendant to do so, especially since defendant claimed in the present case that defendant had not been driving when the van defendant was in struck a guardrail, and the evidence showed that defendant smelled of alcohol. Lanning v. State, 261 Ga. App. 480, 583 S.E.2d 160, 2003 Ga. App. LEXIS 665 (2003) (decided under former O.C.G.A. § 24-2-2).

Use of prior DUI conviction. — Trial court erred in limiting the state's use of evidence of the defendant's prior DUI conviction to the state's rebuttal case because O.C.G.A. § 24-4-417(a)(1) permitted the state to introduce such evidence in the state's case in chief. State v. Tittle, 335 Ga. App. 588, 782 S.E.2d 487, 2016 Ga. App. LEXIS 39 (2016).

RESEARCH REFERENCES

ALR.

Driving While Intoxicated: Duty of Law Enforcement Officer to Advise Suspect of Their Rights Under Implied Consent Law, Including Offers of Test Alternatives, 51 A.L.R.7th 2.

24-4-418. Admissibility of criminal gang activity; disclosure.

(a) In a criminal proceeding in which the accused is accused of conducting or participating in criminal gang activity in violation of Code Section 16-15-4, evidence of the accused's commission of criminal gang activity, as such term is defined in Code Section 16-15-3, shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

History.

Code 1981, § 24-4-418, enacted by Ga. L. 2016, p. 811, § 6/HB 874.

JUDICIAL DECISIONS

Improper definition of criminal gang activity.— Trial court's pre-trial ruling pursuant to O.C.G.A. §§ 16-15-4 and 24-4-418 (Rule 418), excluding two alleged prior acts of criminal gang activity committed by the defendant, was reversed because the trial court's order confused the definition of criminal gang activity and the elements of proof of the crime of participation in criminal street gang activity, thus, improperly requiring the state to prove elements under O.C.G.A. § 16-15-4, even though that was not the standard. State v. McKinney, 366 Ga. App. 251, 881 S.E.2d 699, 2022 Ga. App. LEXIS 545 (2022).

No abuse of discretion in admitting evidence of alleged gang membership. — Trial court did not abuse the court's discretion by admitting evidence of

the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573, 2017 Ga. LEXIS 890 (2017).

Bifurcation of trial was not necessary. — Bifurcation was not necessary since evidence of the defendant's gang affiliation would have been admissible in a separate trial for murder and for the charged offenses other than violations of the Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., as there was no requirement that the state charge a defendant with violating the prohibition of participation in criminal street gang activity in order to admit otherwise relevant evidence of gang activity. Bullard v. State, 307 Ga. 482, 837 S.E.2d 348, 2019 Ga. LEXIS 843 (2019).

24-4-419. Admissibility of criminal history record information.

(a) As used in this Code section, the term "criminal history record information" shall have the same meaning as set forth in Code Section 35-3-30.

(b) In a civil proceeding against an employer, its employees, or its agents based on the conduct of an employee or former employee, criminal history record information shall not be admissible if:

(1) The nature of such criminal history record information is not relevant to the facts underlying such proceeding or the veracity of the witness;

(2) Prior to the act giving rise to such proceedings, criminal history record information was restricted or sealed as provided in Code Section 35-3-37, or a pardon for such conduct was granted; or

(3) Such criminal history information is for an arrest or charge that did not result in a conviction.

History.

Code 1981, § 24-4-419, enacted by Ga. L. 2020, p. 753, § 3-1/SB 288.

Effective date.

This Code section became effective January 1, 2021.

Law reviews.

For article with annual survey on labor and employment law, see 73 Mercer L. Rev. 137 (2021).

CHAPTER 5

PRIVILEGES

Sec.		Sec.	
24-5-501.	Certain communications privileged.	24-5-507.	Grant of immunity; contempt.
24-5-502.	Communications to clergy privileged.	24-5-508.	Qualified privilege for news gathering or dissemination.
24-5-503.	Husband and wife as witnesses for and against each other in criminal proceedings.	24-5-509.	Communications between victim of family violence or sexual assault and agents providing services to such victim; termination of privilege.
24-5-504.	Law enforcement officer or nonsworn employee of law enforcement agency testimony.	24-5-510.	Privileged communications between law enforcement officers and peer counselors.
24-5-505.	Party or witness privilege.		
24-5-506.	Privilege against self-incrimination; testimony of accused in criminal case.		

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-5-501. Certain communications privileged.

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

(1) Communications between husband and wife;

(2) Communications between attorney and client;

(3) Communications among grand jurors;

(4) Secrets of state;

(5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in

psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-29.

(b) As used in this Code section, the term:

(1) "Psychotherapy" means the employment of psychotherapeutic techniques.

(2) "Psychotherapeutic techniques" shall have the same meaning as provided in Code Section 43-10A-3.

History.

Code 1981, § 24-5-501, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2014, p. 136, § 2-1/HB 291.

Cross references.

Duty of attorney to maintain confidence of clients, § 15-19-4.

Protection of communications between victim assistance personnel and victims, § 17-17-9.1.

Compelling of spouses to testify in proceedings relating to enforcement of duty of support, § 19-11-69.

Privilege of testimony given before medical peer review organization, § 31-7-133.

Treatment of clinical records, §§ 37-3-166, 37-4-125.

Maintenance, confidentiality, and release of clinical records; disclosure of confidential or privileged patient information, § 37-7-166.

Disciplining of official or employee of Department of Offender Rehabilitation for violating confidence of inmate supplying information regarding abuses and wrongdoing in the penal system, § 42-5-36.

Confidentiality of communications between accountant and client, § 43-3-32.

Confidentiality of communications between psychologist and client, § 43-39-16.

Law reviews.

For comment, "The Government's Privilege to Withhold the Identity of Informers, as Applied to Decoys," see 20 Ga. B.J. 562 (1958).

For comment criticizing exclusion from attorney-client privilege of fact and terms of employment in In re Wasserman, 198 F. Supp. 564 (D.D.C. 1961), see 13 Mercer L. Rev. 434 (1962).

For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966).

For comment on Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971), see 21 J. of Pub. L. 251 (1972).

For comment, "Privileged Communications Between Psychiatrist and Patient in Georgia — Termination of the Privilege Upon Death of the Patient," see 9 Ga. St. B.J. 550 (1973).

For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978).

For note, "Conflicts of Interest in the Liability Insurance Setting," see 13 Ga. L. Rev. 973 (1979).

For note, "Wills and the Attorney-Client Privilege," see 14 Ga. L. Rev. 325 (1980).

For article on the expansion of the attorney-client privilege in Georgia, see 17 Ga. St. B.J. 150 (1981).

For article, "Inadvertent Disclosure of Privileged Material," see 18 Ga. St. B.J. 166 (1982).

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

For annual survey of legal ethics, see 38 Mercer L. Rev. 269 (1986).

For article, "The Attorney-Client Privilege: The Common Law and Georgia's Uncommon Statutes," see 5 Ga. St. U.L. Rev. 27 (1988).

For note, "Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege," see 24 Ga. L. Rev. 1115 (1990).

For article, "The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims," see 5 Ga. St. B.J. 40 (1999).

For note, "Role of Jaffee v. Redmond's 'Course of Diagnosis or Treatment' Condition in Preventing Abuse of the Psychotherapist-Patient Privilege," see 35 Ga. L. Rev. 345 (2000).

For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001).

For article, "The Absolute Privilege Between Patient and Psychiatrist in Civil Cases," see 6 Ga. St. B.J. 14 (2001).

For article, "Lawyers as 'Tattletales': A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information," see 20 Ga. St. U.L. Rev. 617 (2004).

For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

For note, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

For comment, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

For annual survey of tort laws, see 67 Mercer L. Rev. 237 (2015).

For article, "Toward a Parent-Inclusive Attorney-Client Privilege," see 53 Ga. L. Rev. 991 (2019).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3854, former Code 1882, § 3854, former Ga. L. 1887, p. 30, § 1, former Civil Code 1895, §§ 5198, 5271, former Penal Code 1895, § 1011, former Civil Code 1910, §§ 4544, 4554, 5785, 5786, 5860, 5877, former Penal Code 1910, § 1037, former Code 1933, §§ 38-418, 38-419, 38-1102, 38-1205, 38-1605, 38-1711, and former O.C.G.A. §§ 24-9-21, 24-9-24, 24-9-25, and 24-9-27 are included in the annotations for this Code section.

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between an attorney and the client in order that the attorney may act with full understanding of the matters in which the attorney is employed. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785, 1981 Ga. App. LEXIS 1881 (1981) (decided under former Code 1933, § 38-419).

Privilege is absolute, and if a matter is privileged it is not discoverable. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, § 38-418).

Protected communications. — Georgia law has an exceedingly strict view as to what are privileged communications; not only "communications" but "admissions" are privileged; what is protected is not merely words, but "disclosures made in confidence." Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, 1992 Ga. App. LEXIS 1307 (1992), cert. denied, No. S93C0170, 1993 Ga. LEXIS 43 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-21).

Who may invoke privilege. — Court did not err in allowing the impeachment of a witness through the testimony of the witness's attorney, nor was defense counsel ineffective in failing to challenge the state's calling the attorney to testify; the rules of former O.C.G.A. § 24-9-24 may not be invoked by strangers to the attorney-client relationship. Womack v. State, 260 Ga. 305, 393 S.E.2d 232, 1990 Ga. LEXIS 258 (1990) (decided under former O.C.G.A. § 24-9-24).

Privileged communications admissible for limited purpose. — Scope of exclusion of former Code 1933, § 38-413 was the content of the communications, whereas documents sought to be admitted for the limited purpose of comparison of the handwritings were admissible as evidence, as was authorized by former Code 1933, §§ 38-708 and 38-709. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492, 1976 Ga. App. LEXIS 2032 (1976) (decided under former Code 1933, § 38-418).

Separating privileged from nonprivileged information. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-418).

Former statute did not simply proscribe the channel through which the evidence reached the jury, but made the evidence itself inadmissible. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

Waiver of privilege. — Confidential communication, whether orally made or by letter, is privileged, but such privilege may be waived. McCord v. McCord, 140 Ga. 170, 78 S.E. 833, 1913 Ga. LEXIS 67 (1913) (decided under former Civil Code 1910, § 5785).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. Southern Guar. Ins. Co. v. Ash, 192 Ga.

App. 24, 383 S.E.2d 579, 1989 Ga. App. LEXIS 894 (1989) (decided under former O.C.G.A. § 24-9-27).

Disclosure by newspaper reporter. — Newspaper reporter cannot claim an exemption from answering material questions on the ground that the reporter promised not to divulge the name of the informant. Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781, 1911 Ga. LEXIS 420 (1911) (decided under former Civil Code 1910, §§ 4544, 4554, 5877).

Admissions as to property value were not advice. — Admissions and other evidence in requested documents as to the value of the property in question were not the advice of a professional adviser and could not be considered part of a privileged consultation simply because that evidence was included in a loan application. Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687, 1993 Ga. App. LEXIS 277 (1993), overruled in part, General Motors, LLC v. Buchanan, 313 Ga. 811, 874 S.E.2d 52, 2022 Ga. LEXIS 163 (2022) (decided under former O.C.G.A. § 24-9-27).

Communications Between Husband and Wife

1. In General

General description of privilege between spouses. — Meaning of this provision simply is that neither of the married pair shall be permitted to testify as a witness concerning such communications or to furnish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. Knight v. State, 114 Ga. 48, 39 S.E. 928, 1901 Ga. LEXIS 748 (1901) (decided under former Civil Code 1895, § 5198); Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11, 1930 Ga. LEXIS 455 (1930) (decided under former Civil Code 1910, § 5785); Gorman v. State, 183 Ga. 307, 188 S.E. 455, 1936 Ga. LEXIS 223 (1936) (decided under former Code 1933, § 38-418); R. & J. Dick Co. v. Bass, 295 F. Supp. 758, 1968 U.S. Dist. LEXIS 7687 (N.D. Ga. 1968) (decided under former Code 1933, § 38-418); Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

Rule modified by former statute. — Former Code 1933, § 38-1604, which provided that a spouse shall be competent, although not compellable, to testify against the other spouse, modified former Code 1933, § 38-418. Hubbard v. State, 145 Ga. App. 714, 244 S.E.2d 639, 1978 Ga. App. LEXIS 2100 (1978) (decided under former Code 1933, § 38-418); Chancey v. State, 256 Ga. 415, 349 S.E.2d 717, 1986 Ga. LEXIS 920 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527, 1987 U.S. LEXIS 1854 (1987).

"Confidential communications" between spouses defined. — "Confidential communications" are those when one spouse derives knowledge from the other by virtue of the special confidence of the husband-wife relationship. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251, 1983 Ga. LEXIS 1029 (1983) (decided under former O.C.G.A. § 24-9-21).

Every spoken word between a husband and wife is not confidential; if the communication is an impersonal one not made in reliance on the marital relationship, the communication is not confidential, and no policy reason bars its admissibility. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251, 1983 Ga. LEXIS 1029 (1983) (decided under former O.C.G.A. § 24-9-21).

Nonprivileged communications generally. — Nonprivileged communications relate to husband-wife conversations through third parties or in the presence of third parties, when the communication constitutes a ground of action by one spouse against the other, or when the conversation was of an impersonal nature spoken or performed without the special confidence one spouse reposes in the other in the marital relation. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

Privilege belongs to communicator and is perpetual. — Since the privilege belongs to the communicator, the privilege cannot be waived by the administrator nor by the surviving spouse since communica-

In General (Cont'd)

tions between husband and wife survive death and are protected forever. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

Waiver of privilege. — Spouse may waive his or her privilege by voluntarily taking the stand and testifying. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (decided under former O.C.G.A. § 24-9-21).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. Geter v. State, 300 Ga. App. 396, 685 S.E.2d 342, 2009 Ga. App. LEXIS 1173 (2009) (decided under former O.C.G.A. § 24-9-21).

Bank statement addressed to wife did not constitute "communication" between husband and wife. Leventhal v. Seiter, 208 Ga. App. 158, 430 S.E.2d 378, 1993 Ga. App. LEXIS 475 (1993), cert. denied, No. S93C1066, 1993 Ga. LEXIS 769 (Ga. July 1, 1993) (decided under former O.C.G.A. § 24-9-21).

Husband and wife communication must be confidential to be privileged. — Paragraph (1) of former O.C.G.A. § 24-9-21 provided that communications between a husband and wife were inadmissible on grounds of public policy; however, for this exclusion to apply, the communications must be confidential. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251, 1983 Ga. LEXIS 1029 (1983) (decided under former O.C.G.A. § 24-9-21).

Indifference of one spouse to presence of the other. — When the act is done solely for the sake of doing the act, the indications being that the husband is indifferent to the presence of the wife, there is no communication. In such cases the privilege should not be allowed to deprive the court of the evidence. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

No evidence establishing element of confidentiality. — Though the rule establishes the wife as an incompetent witness for or against the husband in regard to any information derived from his confidence in her, when there is nothing to indicate that the knowledge was derived from any special confidence which one spouse reposed in the other, or that there was any occasion for the one spouse to make to the other any confidential communication concerning the matter, the knowledge gained is not privileged. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

Testimony as to injury of husband. — Wife of the injured party is not incompetent to testify as to the nature of the injury received by him and its effect upon his physical condition when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569, 1905 Ga. LEXIS 597 (1905) (decided under former Civil Code 1895, § 5198).

Wife's statements in a summary judgment affidavit as to the reasons her husband did not want to buy property were protected by the marital communications privilege. Century 21 Pinetree Properties, Inc. v. Cason, 220 Ga. App. 355, 469 S.E.2d 458 (decided under former O.C.G.A. § 24-9-21).

Rule was applied to exclude evidence in the following cases. — See Keaton v. McGwier, 24 Ga. 217, 1858 Ga. LEXIS 187 (1858) (testimony that might discredit spouse's testimony) (decided under former Civil Code 1910, § 5785); McKie v. State, 165 Ga. 210, 140 S.E. 625, 1927 Ga. LEXIS 359 (1927) (letters written by wife to husband) (decided under

former Civil Code 1910, § 5785); Gorman v. State, 183 Ga. 307, 188 S.E. 455, 1936 Ga. LEXIS 223 (1936) (facts that might discredit spouse's testimony) (decided under former Code 1933, § 38-418); Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 1976 Ga. App. LEXIS 1891 (1976) (decided under former Code 1933, § 38-418).

No common law marriage found. — When there was evidence to support the trial court's finding that the defendant and the witness did not have a common law marriage, there was no error in allowing the witness to testify. Abrams v. State, 272 Ga. 63, 525 S.E.2d 86, 2000 Ga. LEXIS 23 (2000), overruled in part, Baugh v. State, 276 Ga. 736, 585 S.E.2d 616, 2003 Ga. LEXIS 632 (2003) (decided under former O.C.G.A. § 24-9-21).

No valid marriage proven. — Jailhouse conversations between the defendant and a boyfriend or fiance were properly admitted despite a claim of marital privilege because there was sufficient evidence to support the trial court's implicit finding that no legal marriage existed; it was defendant's burden to prove a valid marriage, and the defendant failed to do so. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357, 2016 Ga. App. LEXIS 370 (2016), cert. denied, No. S17C0059, 2017 Ga. LEXIS 287 (Ga. Apr. 17, 2017).

Time of objection to testimony between spouses. — Objection to testimony on the ground that the testimony was in the nature of confidential communications between husband and wife, and therefore to be excluded under the provisions of the former statute, came too late when urged for the first time in the brief of counsel for the plaintiff in error in the reviewing court. Holloway v. Hoard, 140 Ga. 380, 78 S.E. 928, 1913 Ga. LEXIS 140 (1913) (decided under former Civil Code 1910, § 5785); Maxwell v. Maxwell, 177 Ga. 483, 170 S.E. 362, 1933 Ga. LEXIS 334 (1933) (decided under former Civil Code 1910, § 5785).

E-mail communication not subject to marital privilege. — An e-mail from the defendant to the defendant's husband was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under former O.C.G.A. § 24-9-23(b) (see now O.C.G.A. § 24-5-503) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old stepdaughter. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207, 2008 Ga. LEXIS 620 (2008) (decided under former O.C.G.A. § 24-9-21).

2. Third Parties

No protection for financial documents prepared by third party. — Although communications between a husband and a wife are confidential and privileged, such protections do not apply to financial documents either prepared or seen by third parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77, 2006 Ga. App. LEXIS 367 (2006) (decided under former O.C.G.A. § 24-9-21).

Third person overhearing communication between married couple. — Former statute was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the conversation. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider. Knight v. State, 114 Ga. 48, 39 S.E. 928, 1901 Ga. LEXIS 748 (1901) (decided under former Civil Code 1895, § 5198); see also Ford v. State, 124 Ga. 793, 53 S.E. 335, 1906 Ga. LEXIS 621 (1906) (decided under former Civil Code 1895, § 5198); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346, 1924 Ga. LEXIS 331 (1924) (decided under former Civil Code 1910, § 5785); Sims v. State, 36 Ga. App. 266, 136 S.E. 460, 1927 Ga. App. LEXIS 4 (1927) (decided under former Civil Code 1910, § 5785).

Presence of third party. — Wife can testify as to what was said by the husband to some other person in the presence of the wife. R. & J. Dick Co. v. Bass, 295 F. Supp. 758, 1968 U.S. Dist. LEXIS 7687 (N.D.

Third Parties (Cont'd)

Ga. 1968) (decided under former Code 1933, § 38-418).

Testimony of third party as to communications. — Former O.C.G.A. § 24-9-21 did not prohibit testimony about communications between spouses by someone who overheard the communication. Helton v. State, 217 Ga. App. 691, 458 S.E.2d 872, 1995 Ga. App. LEXIS 572 (1995) (decided under former O.C.G.A. § 24-9-21).

3. Criminal Cases

Calling wife as defense witness did not waive husband's privilege. — Defendant was entitled to have the testimony of his wife excluded based upon his marital privilege as provided by former O.C.G.A. § 24-9-21 as proper objection was made at trial. Although under certain circumstances the marital privilege may be waived by the communicator, the act of calling his wife as a defense witness did not, in and of itself, waive his privilege regarding protected confidential communications as the direct examination did not in any way touch on the privileged matters or open the door thereto. White v. State, 211 Ga. App. 694, 440 S.E.2d 68, 1994 Ga. App. LEXIS 18 (1994) (decided under former O.C.G.A. § 24-9-21).

Testimony as to child molestation by ex-spouse. — With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-wife, the mother of the victim, concerning a prior bad act on the ground that the testimony violated the marital privilege, because the defendant was not on trial for the prior act; therefore, the ex-wife was competent, although not compellable, to testify concerning the prior act, and thus since the ex-wife did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-wife on the basis of marital privilege. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300, 2007 Ga. App. LEXIS 1024 (2007) (decided under former O.C.G.A. § 24-9-21).

No privilege for mere acts or gestures. — Husband, who took a container of crack cocaine from an evidence file cabinet in the district attorney's office while his wife was present in the room, could not invoke the husband-wife privilege, when there was no clear proof that his acts or gestures were as much a communication as would have been his words to her describing the act. Brown v. State, 199 Ga. App. 188, 404 S.E.2d 469, 1991 Ga. App. LEXIS 415 (1991), cert. denied, No. S91C0963, 1991 Ga. LEXIS 683 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-9-21).

Announcement of victim's name as witness. — Knowing that the victim was going to invoke the marital privilege, defendant was not entitled to a mistrial because the defendant did not timely object to the announcement of the defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation by the state of an "unwarranted negative inference" against the defendant. Carter v. State, 275 Ga. App. 483, 621 S.E.2d 503, 2005 Ga. App. LEXIS 1003 (2005) (decided under former O.C.G.A. § 24-9-21).

Communications Between Attorney and Client

1. In General

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between attorney and client in order that the former may act with full understanding of the matters in which the attorney is employed. Marriott Corp. v. American Academy of Psychotherapists,

Inc., 157 Ga. App. 497, 277 S.E.2d 785, 1981 Ga. App. LEXIS 1881 (1981) (decided under former O.C.G.A. § 24-9-21).

Privilege is absolute, and if a matter is privileged it is not discoverable. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, § 38-419).

A narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is "the object of all legal investigation." Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441, 2000 Ga. LEXIS 855 (2000) (decided under former O.C.G.A. § 24-9-21).

Court should confine the attorney-client privilege to its narrowest permissible limits under the former statute of its creation in order to permit liberal discovery. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, §§ 38-418 and 38-419).

Rule modified by former statute. See Chancey v. State, 256 Ga. 415, 349 S.E.2d 717, 1986 Ga. LEXIS 920 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527, 1987 U.S. LEXIS 1854 (1987) (decided under former O.C.G.A. § 24-9-21).

Mere fact of employment between attorney and client is not protected from disclosure. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-418).

Former statute not restrictive. — It was not the intention of the former statute to restrict the admission of evidence, but to enlarge the rule for the admission of evidence. Strickland v. Wynn, 51 Ga. 600, 1874 Ga. LEXIS 207 (1874) (decided under former Code 1873, § 3854).

Rule set forth in the former statute cannot be invoked by strangers to relationship. O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100, 1897 Ga. LEXIS 523 (1897) (decided under former Civil Code 1895, § 5271); Neal v. Dover, 217 Ga. 545, 123 S.E.2d 760, 1962 Ga. LEXIS 319 (1962) (decided under former Code 1933, § 38-1605); Cleary v. Burlington Indus., Inc., 193 Ga. App. 81, 387 S.E.2d 36, 1989 Ga. App. LEXIS 1265 (1989) (decided under former O.C.G.A. § 24-9-25).

Communications not intended to be confidential. — Communications made by a client to an attorney for the purpose of being imparted by the attorney to others do not fall within the inhibition of the former statute. Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308, 1924 Ga. LEXIS 32 (1924) (decided under former Civil Code 1910, § 5860).

Under former O.C.G.A. § 24-9-25, in general, an attorney may not be compelled to testify against a client to any matter or thing, the knowledge of which the attorney may have acquired by virtue of the individual's employment as an attorney; this rule, however, does not prohibit an attorney from testifying about matters that occurred in the presence of the opposing party because such communications were not intended to be confidential. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245, 2003 Ga. App. LEXIS 1465 (2003) (decided under former O.C.G.A. § 24-9-25).

Client's request that identity be kept confidential. — Because a client's identity is not covered by the attorney-client privilege, the trial court correctly declined to permit an attorney to use the privilege to justify the attorney's refusal to reveal the identity of a client who requested that the client's identity be kept confidential. Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441, 2000 Ga. LEXIS 855 (2000) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Privilege waived when client files legal malpractice claim. — Appellate court should have affirmed the trial court's ruling that the clients were not entitled to a protective order based on attorney-client privilege because when the clients sued their former attorneys for legal malpractice, the implied waiver of the attorney-client privilege extended to the client's communications with other attorneys who represented the client with respect to the same underlying transac-

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tion or litigation. Hill, Kertscher & Wharton, LLP v. Moody, 308 Ga. 74, 839 S.E.2d 535, 2020 Ga. LEXIS 129 (2020).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324, 2000 U.S. Dist. LEXIS 4473 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-21).

No privilege in joint representation. — If two or more persons jointly consult or retain an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties. Peterson v. Baumwell, 202 Ga. App. 283, 414 S.E.2d 278, 1991 Ga. App. LEXIS 1736 (1991), cert. denied, No. S92C0452, 1992 Ga. LEXIS 195 (Ga. Feb. 10, 1992) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

If, by consenting to joint representation, the parties waived the attorney-client privilege as to communications affecting the interest of the other, then such communications should be discoverable by each one of the parties against the other. The fact that there is present in this litigation a third party who will gain access to these communications does not change the fact of the initial waiver. Peterson v. Baumwell, 202 Ga. App. 283, 414 S.E.2d 278, 1991 Ga. App. LEXIS 1736 (1991), cert. denied, No. S92C0452, 1992 Ga. LEXIS 195 (Ga. Feb. 10, 1992) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

Terms of attorney's contract do not come within the statutory privilege. Bank of Lumpkin v. Farmers State Bank, 161 Ga. 801, 132 S.E. 221, 1926 Ga. LEXIS 336 (1926) (decided under former Civil Code 1910, § 5785).

Facts attending execution of contract. — These provisions had no application to competency of an attorney as a witness with respect to essential facts attending execution of a contract in the preparation and as to the attestation of which the attorney rendered professional service. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462, 1949 Ga. LEXIS 437 (1949) (decided under former Code 1933, § 38-418); Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560, 1966 Ga. LEXIS 605 (1966) (decided under former Code 1933, § 38-418).

Relation of attorney and client does not exist between prosecutor and prosecuting witness for the state and, therefore, communications had between such witness and the prosecutor are not confidential, and on the trial of the defendant are admissible in evidence to prove contradictory statements. Vernon v. State, 49 Ga. App. 187, 174 S.E. 548, 1934 Ga. App. LEXIS 320 (1934) (decided under former Code 1933, § 38-418).

Penalties for breaching confidence. — There are no statutory criminal penalties visited upon an attorney who in violation of the attorney's ethical relation to the attorney's client divulges a confidential communication. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-418).

Disqualification without consideration of former statute error. — Trial court order disqualifying an attorney from acting as counsel for a party on the ground that the party was a necessary witness at trial was overruled since the trial court did not consider the applicability of former O.C.G.A. § 24-9-25 in the context of the evidence adduced at the disqualification hearing. Southern Shipping Co. v. Oceans Int'l Corp., 174 Ga. App. 91, 329 S.E.2d 263, 1985 Ga. App. LEXIS 1755 (1985) (decided under former O.C.G.A. § 24-9-25).

Attorney may not be called to testify as to client's competency. — It is not legally permissible for the state to call defendant's counsel as a witness for the purpose of extracting facts and counsel's opinion as to the client's competency, which is gained from the attorney's participation in the attorney-client relationship with the defendant. Almond v. State, 180 Ga. App. 475, 349 S.E.2d 482, 1986 Ga. App. LEXIS 2736 (1986) (decided under former O.C.G.A. § 24-9-25).

2. When Privilege Attaches

Prior statements. — Mere fact that at some later time statements are transmitted to an attorney for use in preparing a defense to litigation that may have arisen out of the occurrence to which the statements referred does not render the statements communications to the attorney or bring the statements within the privileged category. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, § 38-419).

Acquisition of knowledge during and by reason of relationship. — To make an attorney incompetent to testify to a fact, knowledge of the fact must have been acquired by the attorney both during the relationship of client and attorney and by reason of that relationship. Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109, 1931 Ga. App. LEXIS 531 (1931) (decided under former Civil Code 1910, § 5860).

Matters communicated to attorney by source other than client. — Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of the attorney's client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575, 1973 Ga. App. LEXIS 1347 (1973) (decided under former Code 1933, § 38-418).

Offspring acquired no attorney-client privilege resulting from deceased parent's relationship. — Trial court did not err in admitting testimony of an attorney who represented the testator as the daughter could not invoke the attorney-client privilege to prevent that testimony since the daughter was a stranger to that attorney-client relationship. White v. Regions Bank, 275 Ga. 38, 561 S.E.2d 806, 2002 Ga. LEXIS 251 (2002) (decided under former O.C.G.A. § 24-9-25).

Placing material with attorney does not invoke privilege. — One cannot render privileged that which is otherwise not privileged merely by placing it in the hands of an attorney. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, § 38-418).

When an attorney speaks with a defendant as a family friend, not as a legal advisor, and tells the defendant that the attorney does not represent the defendant and to contact an attorney if the defendant needs legal advice, no attorney-client relationship exists. Spence v. State, 252 Ga. 338, 313 S.E.2d 475, 1984 Ga. LEXIS 665 (1984) (decided under former O.C.G.A. § 24-9-24).

3. By Reason of Anticipated Employment

Former statute created no "privilege as attorney" giving an attorney at law the right to refuse to answer pertinent questions asked for the purpose of proving that the attorney was not employed by a designated person to institute a given proceeding. Alger v. Turner, 105 Ga. 178, 31 S.E. 423, 1898 Ga. LEXIS 475 (1898) (decided under former Civil Code 1895, § 5271).

Objection should state unqualifiedly that the attorney represented the party to whom the testimony related. Brannan v. Mobley, 169 Ga. 243, 150 S.E. 76, 1929 Ga. LEXIS 325 (1929) (decided under former Civil Code 1910, § 5860).

Communication in anticipation of employment. — Attorney was neither compellable nor competent to testify to any matter or thing, knowledge of which the attorney may have acquired by reason of the anticipated employment of the person as attorney by one seeking the attorney's professional aid and advice, whether, as a matter of fact, the attorney so consulted was or was not afterwards employed to undertake the service concerning which the confidential communication sought to be introduced in evidence was made. Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420, 1935 Ga. App. LEXIS 257 (1935) (decided under former Code 1933, § 38-419).

Testimony of an attorney to the effect that on a visit to the mother of the defendant, made in anticipation of employment as attorney for the defendant, the mother delivered a pistol and watch to the witness, with instructions to deliver them to

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a named police officer, was not inadmissible in evidence upon the ground that it was confidential communication between an attorney and a client. Riley v. State, 180 Ga. 869, 181 S.E. 154, 1935 Ga. LEXIS 589 (1935) (decided under former Code 1933, § 38-419).

Rule applied regardless of eventual employment. — Confidential communications, made to an attorney not actually employed at the time, but which were made in anticipation of employing the attorney, come within the rule protecting privileged communications, and this was true whether as a matter of fact the attorney so consulted was or was not afterwards employed to undertake the services concerning which the confidential communications ought to be introduced in evidence were made. Young v. State, 65 Ga. 525, 1880 Ga. LEXIS 246 (1880) (decided under former Code 1873, § 3854); Peek & Sullivan v. Boone, 90 Ga. 767, 17 S.E. 66, 1892 Ga. LEXIS 244 (1892) (decided under former Ga. L. 1887, p. 30, § 1); see also Haywood v. State, 114 Ga. 111, 39 S.E. 948, 1901 Ga. LEXIS 590 (1901).

Termination of relationship. — Law had no application as to communication made by a former client to the attorney after the relationship of attorney and client ceased to exist. Philman v. Marshall, 103 Ga. 82, 29 S.E. 598, 1897 Ga. LEXIS 360 (1897) (decided under former Civil Code 1895, § 5271).

Privilege continues after client's death. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560, 1966 Ga. LEXIS 605 (1966) (decided under former Code 1933, § 38-1605).

While a civil action arising out of the patient's suicide may be authorized under Georgia law and application of the protections afforded psychiatrist-patient communications by O.C.G.A. § 24-5-501(a) may pose a hardship to the patient's parents in the investigation of potential claims against the doctor, neither of those factors authorized the trial court to require the production of privileged communications contrary to § 24-5-501(a). Cooksey v. Landry, 295 Ga. 430, 761 S.E.2d 61, 2014 Ga. LEXIS 546 (2014).

4. Facts in Connection with Employment

Mere fact of employment between an attorney and a client was not protected from disclosure. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-419).

An attorney may testify with respect to essential facts attending execution of a contract in preparation and as to attestation of which the attorney rendered professional service. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462, 1949 Ga. LEXIS 437 (1949) (decided under former Code 1933, § 38-419).

Attorney at law who witnesses a contract as a subscribing witness, and who was employed to prepare the contract, is competent, in a trial involving the mental capacity of the maker thereof to execute a valid contract, to testify as a witness concerning the maker's mental condition, and as to facts showing the latter's knowledge or ignorance of the contents of the paper, and as to all other pertinent facts attending signing and attestation of the instrument. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560, 1966 Ga. LEXIS 605 (1966) (decided under former Code 1933, § 38-419).

Client accusing attorney of failure to inform. — When there was no claim of misconduct or incompetent representation, a habeas corpus petitioner cannot claim that the petitioner was not informed of the sentence consequences of a guilty plea, and then invoke the attorney-client privilege to prevent the attorney from testifying. Bailey v. Baker, 232 Ga. 84, 205 S.E.2d 278, 1974 Ga. LEXIS 873 (1974) (decided under former Code 1933, § 38-419).

Client accusing attorney of previous misconduct. — When accused in statement to jury charged that the attorney who represented the accused in a previous prosecution for murder entered a plea of guilty over the accused's protests of innocence, the accused waived the accused's right to have their transactions considered as privileged, and the attorney was competent to give testimony to show that the attorney did not act basely in the transaction as the attorney's one-time cli-

ent claimed. Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820, 1944 Ga. App. LEXIS 115 (1944) (decided under former Code 1933, § 38-419).

5. Communications

Rule has broad scope, and is not confined merely to communicated matters, but extends to items as to which the attorney has acquired the attorney's knowledge by the attorney's own observation when this observation was the result of the attorney's professional employment. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582, 1934 Ga. LEXIS 376 (1934) (decided under former Code 1933, § 38-419).

Rule is not confined to matters relating to litigation, but extends to all cases when the attorney is consulted by a client in the line of the attorney's profession. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582, 1934 Ga. LEXIS 376 (1934) (decided under former Code 1933, § 38-419).

Conversations not with attorney. — When it appears from a transcript that none of the conversations about which a witness was questioned was had with an attorney, the attorney-client privilege was not applicable. Bridges v. State, 242 Ga. 251, 248 S.E.2d 647, 1978 Ga. LEXIS 1163 (1978) (decided under former Code 1933, § 38-419).

Communications made for purpose of being imparted by the attorney to others are not privileged. Riley v. State, 180 Ga. 869, 181 S.E. 154, 1935 Ga. LEXIS 589 (1935) (decided under former Code 1933, § 38-419).

Placing material with attorney invokes no privilege. — It is axiomatic that one cannot render privileged that which is otherwise not privileged merely by placing it in the hands of one's attorney. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965).

Photographs not "communications." — In a prosecution for sexual offenses, photographs given by the defendant to his attorney depicting sexual activity between defendant's wife and a 13-year-old girl were not "communications," but were admissible as evidence of a similar crime. Johnson v. State, 222 Ga. App. 722, 475 S.E.2d 918 (decided under former O.C.G.A. § 24-9-24).

6. Work Product

Work product rule. — Under the work product rule, the attorney-client privilege protects correspondence between defendant's claims examiners and counsel, letters between inside and outside counsel, correspondence between defendant's employees and insurance carrier, and handwritten notes by inside counsel; but not plaintiff's medical records, statements by plaintiff, or correspondence between defendant's agent and third parties. Shipes v. BIC Corp., 154 F.R.D. 301, 1994 U.S. Dist. LEXIS 3133 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Test to determine whether a document constitutes work product is whether it was prepared by the party or the party's representative because of the prospect of litigation. Shipes v. BIC Corp., 154 F.R.D. 301, 1994 U.S. Dist. LEXIS 3133 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Privilege extends to attorney's work product. — Once the attorney-client relationship obtains as to a particular matter, the attorney may have investigations made or statements taken under the attorney's direct instruction and supervision, and these may be deemed a part of what the attorney has done, and thus a part of the attorney's work product, which may not be discovered absent a showing of necessity. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, § 38-418).

Mixture of privileged and nonprivileged matter. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-419).

Information obtained for preparing bankruptcy schedules gained during

Work Product (Cont'd)

intake interview questioning was protected by the attorney-client privilege. In re Stoutamire, 201 B.R. 592, 1996 Bankr. LEXIS 1226 (Bankr. S.D. Ga. 1996) (decided under former O.C.G.A. § 24-9-24).

E-mails within attorney-client privilege. — Appellants produced no evidence showing that the appellees waived their attorney-client privilege. The disclosure of e-mails during document production by counsel did not preclude later objection to their use by the appellees. Waiver of the attorney-client privilege occurs in very limited circumstances. Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652, 2010 Ga. App. LEXIS 1147 (2010) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

Letters. — Letter from the plaintiff in a case to plaintiff's attorney, and from the attorney delivered to defendant's counsel, is not admissible. Southern Ry. v. White, 108 Ga. 201, 33 S.E. 952, 1899 Ga. LEXIS 215 (1899) (decided under former Civil Code 1895, § 5271).

Inadvertent disclosure to defense counsel of a letter from the plaintiff to the plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324, 2000 U.S. Dist. LEXIS 4473 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-24).

Letters between a private investigator and defendant's attorneys. — With regard to a defendant's conviction for malice murder, the trial court did not err by allowing the introduction of one letter by a private investigator and two letters by the defendant's attorneys in violation of the attorney-client privilege since the three letters did not involve any communications between the defendant and the defendant's attorneys. Rather, they were all communications between the private investigator and the attorneys, and the letters did not contain confidential information and, instead, concerned only the fact of the investigator's employment and the attorneys' claims that the investigator's services in the divorce case between the defendant and an estranged spouse fell under the attorney-client privilege. Davis v. State, 285 Ga. 343, 676 S.E.2d 215, 2009 Ga. LEXIS 147, cert. denied, 558 U.S. 879, 130 S. Ct. 287, 175 L. Ed. 2d 135, 2009 U.S. LEXIS 6105 (2009) (decided under former O.C.G.A. § 24-9-24).

Wills. — Under the mandate of the former statute, the trial court errs in allowing decedent's attorney to testify as to confidential communications arising out of preparation of an unexecuted will for the decedent in an action for specific performance of an alleged oral contract to make a will. DeLoach v. Myers, 215 Ga. 255, 109 S.E.2d 777, 1959 Ga. LEXIS 446 (1959).

In an action against the estate of decedent's wife for breach of a contract to make a will, the decedent's nephew and decedent's secretary were barred from giving testimony regarding communications by the decedent to the nephew when the nephew was acting in the nephew's capacity as an attorney for the decedent. Spence v. Hamm, 226 Ga. App. 357, 487 S.E.2d 9 (decided under former O.C.G.A. § 24-9-25).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324, 2000 U.S. Dist. LEXIS 4473 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-25).

Production of medical records. — Medical records in defendant's claim files are subject to neither the work product privilege nor the doctor patient privilege and should be produced for plaintiff's review. Shipes v. BIC Corp., 154 F.R.D. 301, 1994 U.S. Dist. LEXIS 3133 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Certain documents in an insurer's claim file were protected under the attorney-client privilege of former O.C.G.A. § 24-9-24 because the documents related to retaining an attorney to defend the insured and were related to the attorney's representation of the insured, along with the attorney's mental impressions that were protected under the work product doctrine. Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663, 2008 U.S. Dist. LEXIS 12531 (N.D. Ga. 2008) (decided under former O.C.G.A. § 24-9-24).

Testimony of investigator hired by attorney. — In a proceeding on a motion

to quash a subpoena requiring a private investigator to appear before a grand jury and produce evidence acquired by the investigator during employment in the defendant's divorce proceeding, there was no violation of the defendant's procedural rights because the investigator's in camera testimony authorized the court to find that the subject communications from the defendant were made after the investigator ceased acting as an agent or employee of the attorney, and that the communications fell within the crime-fraud exception to the attorney-client privilege. In re Fulton County Grand Jury Proceedings, 244 Ga. App. 380, 535 S.E.2d 340, 2000 Ga. App. LEXIS 718 (2000), cert. denied, No. S00C1681, 2000 Ga. LEXIS 783 (Ga. Oct. 20, 2000) (decided under former O.C.G.A. § 24-9-24).

Attorney-client privilege did not cover the identity of documents a party reviewed to prepare for a deposition. McKinnon v. Smock, 264 Ga. 375, 445 S.E.2d 526, 1994 Ga. LEXIS 485 (1994) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

Service performed as a favor. — When an attorney who prepared a deed was not employed to do so, but prepared the deed merely as a "friendly act" for the grantor, such attorney was not incompetent to testify as to statements made by the grantor at the time. Lifsey v. Mims, 193 Ga. 780, 20 S.E.2d 32, 1942 Ga. LEXIS 474 (1942) (decided under former Code 1933, § 38-1605).

7. Third Parties

Presence of third party. — When the communication made by a client to an attorney is in the presence of the other party to a contract, and it comes within the attorney's knowledge, such communication is not embraced in the rule which prohibits that it may be given in evidence by the attorney when called on so to do. Griffin v. Williams, 179 Ga. 175, 175 S.E. 449, 1934 Ga. LEXIS 246 (1934) (decided under former Code 1933, §§ 38-418 and 38-419).

Defendant's act of delivering to his wife a statement for her to read, rewrite, sign and have notarized prior to his giving it to his attorney was a waiver of the attorney-client privilege as to such document. Osborn v. State, 233 Ga. App. 257, 504 S.E.2d 74 (decided under former O.C.G.A. § 24-9-24).

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were admissible and not privileged under former O.C.G.A. § 24-9-24 because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629, 2011 Ga. LEXIS 861 (2011) (decided under former O.C.G.A. § 24-9-24).

An eavesdropper or a wiretapper is not incompetent to testify to the communications one overhears. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582, 1934 Ga. LEXIS 376 (1934) (decided under former Code 1933, § 38-419).

Documents obtained from third parties. — Attorney client privilege does not apply to documents obtained by the attorney from a third party, or even documents which a party filters through its attorney. Shipes v. BIC Corp., 154 F.R.D. 301, 1994 U.S. Dist. LEXIS 3133 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Presence of opposite party. — When a client makes to an attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged. Stone v. Minter, 111 Ga. 45, 36 S.E. 321, 1900 Ga. LEXIS 480 (1900) (decided under former Civil Code 1895, § 5271).

Use of agent to transmit communication. — When legal advice of any kind is sought from a duly accredited professional legal advisor in the advisor's capacity as such, the communications relevant to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by the client, the legal advisor, or the agent of either confidentially used to transmit the communication, unless the client waives the protection; and clearly, therefore, since the client has used a confidential agent of transmission, which, under the circumstances, it was reasonably necessary for the client to do, the client will be

Third Parties (Cont'd)

protected against betrayal of this confidence by such agent to the same extent as against betrayal of confidence by the client's attorney. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582, 1934 Ga. LEXIS 376 (1934) (decided under former Code 1933, § 38-419).

Inapplicable to defendant-requested communications to third parties. — Former O.C.G.A. § 24-9-25 was not implicated as to testimony relating to information the defendant instructs defense counsel to convey to third persons. Shelton v. State, 206 Ga. App. 579, 426 S.E.2d 69, 1992 Ga. App. LEXIS 1704 (1992) (decided under former O.C.G.A. § 24-9-25).

Clerk or amanuensis of attorney cannot testify as to confidential communications in clerk's presence between the attorney and client. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582, 1934 Ga. LEXIS 376 (1934) (decided under former Code 1933, § 38-419).

Attorney-client relationship extends to the network of employees acting under the direction of the attorney. In re Stoutamire, 201 B.R. 592, 1996 Bankr. LEXIS 1226 (Bankr. S.D. Ga. 1996) (decided under former O.C.G.A. § 24-9-24).

Paralegal's testimony in eviction proceeding. — Trial court did not err by admitting the testimony of a paralegal with a tenant's former attorney's office as, assuming the attorney-client privilege applied to paralegals, the paralegal testified about meetings and other communications the paralegal had with the housing authority on the tenant's behalf, not about any private communications the paralegal had with the tenant. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245, 2003 Ga. App. LEXIS 1465 (2003) (decided under former O.C.G.A. § 24-9-25).

8. Testimony by Attorneys

In general. — Attorney at law was not incompetent to testify to facts which did not come to the attorney's knowledge by reason of the relationship or contemplated relationship of attorney and client between oneself and another. Harkless v. Smith, 115 Ga. 350, 41 S.E. 634, 1902 Ga. LEXIS 409 (1902) (decided under former Civil Code 1895, § 5271).

Attorney is both competent and compellable to testify, for or against a client, as to any matter or thing, knowledge of which the attorney may have acquired in any other manner than by virtue of the attorney's relationship as attorney, or by reason of the attorney's anticipated employment as attorney. Bracewell v. State, 21 Ga. App. 133, 94 S.E. 91, 1917 Ga. App. LEXIS 473 (1917) (decided under former Civil Code 1910, § 5860).

Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of a client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575, 1973 Ga. App. LEXIS 1347 (1973) (decided under former Code 1933, § 38-1605).

Attorney's involvement in disclosure irrelevant. — Privilege bars communications regardless of whether the communications were voluntarily produced by the attorney to be used against the client, or were surreptitiously or otherwise taken from the possession of the attorney. McKie v. State, 165 Ga. 210, 140 S.E. 625, 1927 Ga. LEXIS 359 (1927) (decided under former Civil Code 1910, § 5786).

Attorney is not incompetent to testify as to mental condition of a deceased client, based upon the attorney's observations while representing the client in litigation. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560, 1966 Ga. LEXIS 605 (1966) (decided under former Code 1933, § 38-1605).

Compelling attorney to produce title papers. — Court has no power to compel the counsel of one of the parties to disclose on oath, in spite of one's claim of privilege, that one has in court one of the client's title papers, and to produce the papers to be used in the suit as evidence for the opposite party, especially if notice to produce has not been previously given. Dover v. Harrell, 58 Ga. 572, 1877 Ga. LEXIS 172 (1877) (decided under former Code 1873, § 3854).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. Egana v. HSBC Mortg. Corp., 294 Ga. App. 456, 669 S.E.2d 159, 2008 Ga. App. LEXIS 1079 (2008) (decided under former O.C.G.A. § 24-9-25).

Attorney competency to testify on execution of wills. — Former statute had no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a will in preparation and as to attestation of which the attorney rendered professional services. O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100, 1897 Ga. LEXIS 523 (1897) (decided under former Civil Code 1895, § 5271); Waters v. Wells, 155 Ga. 439, 117 S.E. 322, 1923 Ga. LEXIS 90 (1923) (decided under former Civil Code 1910, § 5860); Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485, 1944 Ga. LEXIS 326 (1944) (decided under former Code 1933, § 38-1605).

Facts attending execution of will. — Former statute had no application to the competency of an attorney as a witness with respect to essential facts attending execution of a will. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485, 1944 Ga. LEXIS 326 (1944) (decided under former Code 1933, § 38-418).

Attorney withholding name of client. — Attorney who delivered an anonymous campaign contribution on behalf of a client in violation of O.C.G.A. § 21-5-30(e) was improperly held in contempt for failing to disclose the client's name to the State Ethics Commission; the attorney invoked the self-incrimination privilege and the trial court found the attorney in contempt without first determining whether the commission's proposed questions might have been incriminating. Begner v. State Ethics Comm'n, 250 Ga. App. 327, 552 S.E.2d 431, 2001 Ga. App. LEXIS 754 (2001) (decided under former O.C.G.A. § 24-9-27).

9. Corporations as Clients

Corporation can avail itself of the attorney-client privilege. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785, 1981 Ga. App. LEXIS 1881 (1981) (decided under former Code 1933, §§ 38-418 and 38-419).

Burden is upon a corporation seeking to invoke the attorney-client privilege to establish that corporate counsel's advice was privileged legal advice and thus not subject to discovery. Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 383 S.E.2d 579, 1989 Ga. App. LEXIS 894 (1989) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 383 S.E.2d 579, 1989 Ga. App. LEXIS 894 (1989) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

Attorney-client privilege was applicable to a corporate employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of the employee's corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication was within the scope of the employee's corporate duties; and (5) the communication was not disseminated beyond those persons who, because of the corporate structure, need to know its contents; moreover, the corporation had the burden of showing that the communication in issue met all of the above requirements. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785, 1981 Ga. App. LEXIS 1881 (1981) (decided

Corporations as Clients (Cont'd)

under former Code 1933, §§ 38-418, 38-419).

Communications between attorney and client are excluded from consideration of public policy and the privilege applied to communications to the officers and employees of a corporate client as well as to individual clients. Associated Grocers Coop. v. Trust Co., 158 Ga. App. 115, 279 S.E.2d 248, 1981 Ga. App. LEXIS 2099 (1981) (decided under former Code 1933, § 38-419).

Letters between attorney and agent of corporation. — Letters written between the attorney and the agent of a corporation, which was the attorney's client, containing confidential communications between the two, should not have been forced to be produced for use in evidence against the client. Fire Ass'n v. Fleming, 78 Ga. 733, 3 S.E. 420, 1887 Ga. LEXIS 62 (1887) (decided under former Code 1882, § 3854).

Disclosure of reasons for suit in individual capacity. — An action was originally commenced against an individual, the sole shareholder of a corporation, instead of the corporation itself, the proper party. In a later action for abuse of process, the trial court properly allowed evidence to show that the defendant (the original plaintiff) was unwilling to allow the defendant's original attorney to divulge the reasons why the present plaintiff had been sued in an individual capacity, and to draw any reasonable inferences from this taking of the attorney-client privilege. Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298, 1988 Ga. App. LEXIS 616 (1988) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

10. Criminal Matters

Crime-fraud exception to privilege. — Under the crime-fraud exception to the attorney-client privilege, the privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto. In re Fulton County Grand Jury Proceedings, 244 Ga. App. 380, 535 S.E.2d 340, 2000 Ga. App. LEXIS 718 (2000), cert. denied, No. S00C1681, 2000 Ga. LEXIS 783 (Ga. Oct. 20, 2000) (decided under former O.C.G.A. § 24-9-24).

Privilege not to be used to carry out crimes. — Privileged communication may be a shield of defense as to crimes already committed, but the privilege cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds, or perjuries. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785, 1981 Ga. App. LEXIS 1881 (1981) (decided under former Code 1933, §§ 38-418 and 38-419).

Communication of criminal plans. — As to violations of law or commissions of fraud, the protection extends only to communications after the act or transaction is finished, and does not cover communications respecting proposed infractions of the law in commission of a crime or perpetration of a fraud. Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420, 1935 Ga. App. LEXIS 257 (1935) (decided under former Code 1933, § 38-419).

Testimony sought fell within attorney-client privilege. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. Pihlman v. State, 292 Ga. App. 612, 664 S.E.2d 904, 2008 Ga. App. LEXIS 826 (2008), cert. denied, No. S08C1954, 2008 Ga. LEXIS 977 (Ga. Nov. 3, 2008) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

When no request is made by accused or the accused's counsel to confer privately without the presence of the marshal, the mere existence of such right would not affect the validity of the conviction, since there must be denial of such right by the trial judge before the accused may complain. Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, 1944 Ga. LEXIS 372,

cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626, 1944 U.S. LEXIS 72 (1944) (decided under former Code 1933, §§ 38-418 and 38-419).

Testimony of coconspirator's lawyer barred in criminal proceeding. — Criminal defendant's request to call defendant's coconspirator's counsel to rebut the coconspirator's testimony that the coconspirator had not been offered any "deal" by the state in exchange for the coconspirator's testimony was properly denied because the testimony the defendant sought to elicit came within the attorney-client privilege. Avery v. State, 244 Ga. App. 177, 534 S.E.2d 897, 2000 Ga. App. LEXIS 658 (2000) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Attorney revealing location of victim's body to court. — While the state is likely correct that defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney. Offering such testimony is a dangerous practice, and one the Supreme Court disapproves. Williams v. State, 258 Ga. 281, 368 S.E.2d 742, 1988 Ga. LEXIS 276 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606, 1989 U.S. LEXIS 3313 (1989) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

School records when mental capacity raised as defense. — Pre-trial discovery of defendant's school records was permissible and not in error because the defendant, on trial for murder, raised the issue of mental retardation and put the defendant's mental capacity at issue, thus causing the affirmative defense of privilege to be waived. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, 2005 Ga. LEXIS 168, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214, 2005 U.S. LEXIS 6520 (2005) (decided under former O.C.G.A. § 24-9-21).

Admission of certain letters did not violate privilege. — Admission of three letters from attorneys to the defendant in a malice murder trial did not violate the attorney-client privilege: the first letter was not privileged as the letter merely showed employment of an attorney; the second letter simply forwarded a letter noting the enclosure of a final payment for a real estate transaction; and the third letter was a follow-up letter asking the defendant if there was a mortgage or another indebtedness on the property and whether the defendant had a deed. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718, 2007 Ga. LEXIS 718 (2007) (decided under former O.C.G.A. § 24-9-24).

Knowledge of plea deal. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when by testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. Pihlman v. State, 292 Ga. App. 612, 664 S.E.2d 904, 2008 Ga. App. LEXIS 826 (2008), cert. denied, No. S08C1954, 2008 Ga. LEXIS 977 (Ga. Nov. 3, 2008) (decided under former O.C.G.A. § 24-9-25).

Statement ceases to be privileged when renounced by criminal defendant. — When the defendant in a murder trial testified, without objection, at the defendant's previous trial that the defendant lied to the defendant's attorney by telling the attorney that someone at the scene of the shooting handed the defendant the murder weapon, the defendant's testimony caused the information to cease to be a privileged communication, and proof of the statement at the defendant's later trial became permissible. Felts v. State, 244 Ga. 503, 260 S.E.2d 887, 1979 Ga. LEXIS 1309 (1979) (decided under former Code 1933, § 38-418).

Habeas proceeding. — Habeas petitioner who asserted a claim of ineffective assistance of counsel made a limited waiver of the attorney-client privilege and work product doctrine and the state was entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380, 2000 Ga. LEXIS 484

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(2000), overruled in part, Duke v. State, 306 Ga. 171, 829 S.E.2d 348, 2019 Ga. LEXIS 406 (2019) (decided under former O.C.G.A. § 24-9-21).

Habeas petitioner who asserted a claim of ineffective assistance of counsel made a limited waiver of the attorney-client privilege and work product doctrine; thus, the state was entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380, 2000 Ga. LEXIS 484 (2000), overruled in part, Duke v. State, 306 Ga. 171, 829 S.E.2d 348, 2019 Ga. LEXIS 406 (2019) (decided under former O.C.G.A. §§ 24-9-24, 24-9-25).

11. Application in Other Specific Actions

Actions by client against attorney. — Rule as to privilege has no application if the client, in an action against the attorney, charges negligence, malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of the attorney. Daughtry v. Cobb, 189 Ga. 113, 5 S.E.2d 352, 1939 Ga. LEXIS 659 (1939) (decided under former Code 1933, § 38-1605).

Testimony pertaining to attorney fees is not a matter the knowledge of which the lawyer obtains from the client, and it is not necessary that the attorney be listed as a witness in the pre-trial order in order to testify as to such fees. Halpern v. Lacy Inv. Corp, 259 Ga. 264, 379 S.E.2d 519, 1989 Ga. LEXIS 252 (1989) (decided under former O.C.G.A. § 24-9-25).

No disqualification in adversarial bankruptcy action after former representation in arbitration proceeding. — Bankruptcy court denied a trustee's motion to disqualify an attorney who represented a church that was sued in an adversary proceeding; although the attorney represented the church during an arbitration proceeding that led to a settlement agreement, and the trustee claimed that the attorney was a potential witness who had information relevant to the claim that the church breached the settlement agreement, the court noted that former O.C.G.A. § 24-9-25 protected the attorney from being called to testify about information the attorney obtained while performing legal services for the church, and that evidence regarding nonprivileged matters was attainable from other sources, and the court found that allowing the attorney to represent the church would not be a violation of Ga. St. Bar R. 4-102:3.7. Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), No. 05-91725, No. 06-6253, 2007 Bankr. LEXIS 2160 (Bankr. N.D. Ga. May 29, 2007) (decided under former O.C.G.A. § 24-9-25).

Consider statute in disqualifying attorneys. — When there was no evidence showing the attorneys acquired knowledge regarding the surety's denial of a general contractor's claim in a capacity other than as surety's attorneys, and when it was unclear from the trial court's order whether the trial court considered former O.C.G.A. § 24-9-25 applicable to the decision to disqualify the attorneys, and the former statute being directly relevant to the issue of disqualification, the trial court's order disqualifying the surety's counsel was reversed and the case remanded for a determination of whether the attorneys could even be competent witnesses in the case. Amwest Sur. Ins. Co. v. Interstate Constr. Co., 212 Ga. App. 590, 442 S.E.2d 772, 1994 Ga. App. LEXIS 373 (1994) (decided under former O.C.G.A. § 24-9-25).

Incompetency does not relate solely to admissions made by the client. Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165, 1894 Ga. LEXIS 379 (1894) (decided under Ga. L. 1887, p. 30, § 1).

Testimony of client as to advice given to the client by counsel is incompetent, and on timely motion should be excluded. Braxley v. State, 17 Ga. App. 196, 86 S.E. 425, 1915 Ga. App. LEXIS 308 (1915) (decided under former Penal Code 1910, § 1037).

Whether a law firm may claim privilege to legal advice regarding duties to a current client from in-house counsel depends on whether there is a conflict of interest between firm counsel's duty to the law

firm and firm counsel's duty to the outside client. This question is largely a factual one, to be decided by the trial court. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 730 S.E.2d 608, 2012 Ga. App. LEXIS 681 (2012), vacated, 293 Ga. 419, 746 S.E.2d 98, 2013 Ga. LEXIS 614 (2013), vacated, 323 Ga. App. 757, 748 S.E.2d 131, 2013 Ga. App. LEXIS 738 (2013) (decided under former O.C.G.A. §§ 24-9-24, 24-9-25, and 24-9-27).

Declaring book to be original. — Allowing defendant to state, under oath, that the book which defendant proposed to offer in evidence was the defendant's original book of entry was not such testimony or evidence in relation to the cause of action in issue or on trial as was contemplated by former statute. Strickland v. Wynn, 51 Ga. 600, 1874 Ga. LEXIS 207 (1874) (decided under former Code 1873, § 3854).

Contracts. — Former statute had no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a contract in preparation and as to attestation of which the attorney rendered professional service. In such a matter the attorney was not testifying "for or against his client." Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560, 1966 Ga. LEXIS 605 (1966) (decided under former Code 1933, § 38-1605).

Evidence of employment of attorney. — It was competent to show the fact of an attorney's employment, either by the client or the attorney, and evidence confined to this fact was not objectionable on the ground that it involved confidential relations. Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308, 1924 Ga. LEXIS 32 (1924) (decided under former Civil Code 1910, § 5860).

Insurance carried by client. — Rule applies with reference to the attorney's knowledge concerning insurance which the client may have carried. Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715, 1966 Ga. App. LEXIS 913 (1966) (decided under former Code 1933, § 38-1605).

Attorney's knowledge of contents of insurance policy. — When knowledge of an attorney of the contents of an insurance policy was acquired while acting in the attorney's professional capacity under employment to collect the policy, and by reason of that relationship, the attorney was an incompetent witness to testify to those facts, it was error to admit this evidence. Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165, 1894 Ga. LEXIS 379 (1894) (decided under Ga. L. 1887, p. 30, § 1).

No privilege between principal and agent. — Communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302, 1994 Ga. App. LEXIS 797 (1994), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-21).

Communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302, 1994 Ga. App. LEXIS 797 (1994), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-24).

Confidential informants. — Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. Leonard v. State, 228 Ga. App. 792, 492 S.E.2d 747 (decided under former O.C.G.A. § 24-9-21).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's identity was properly denied; while the defendant argued that the CI was a witness to whether or not the defendant

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consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. Little v. State, 280 Ga. App. 60, 633 S.E.2d 403, 2006 Ga. App. LEXIS 749 (2006) (decided under former O.C.G.A. § 24-9-21).

Pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-27 (see now O.C.G.A. §§ 24-5-501 and 24-5-505), the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446, 2012 Ga. App. LEXIS 207 (2012) (decided under former O.C.G.A. § 24-9-21).

Identity of confidential informant. — In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. Turner v. State, 247 Ga. App. 775, 544 S.E.2d 765, 2001 Ga. App. LEXIS 120 (2001) (decided under former O.C.G.A. § 24-9-21).

No privilege between applicant and employer. — Communications between an applicant for a job and the prospective employer, or between an applicant for unemployment insurance and the State Department of Labor, are not privileged communications for purposes of the former statute. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492, 1976 Ga. App. LEXIS 2032 (1976) (decided under former Code 1933, § 38-418).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the Full Faith and Credit Clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. Williams v. GMC, 147 F.R.D. 270, 1993 U.S. Dist. LEXIS 3241 (S.D. Ga. 1993) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Attorney attacking judgment. — Attorney of record who represented a plaintiff in bringing suit and taking judgment will not be heard to urge, in the attorney's own behalf, the invalidity of the judgment for want of process. Kennedy v. Redwine, 59 Ga. 327, 1877 Ga. LEXIS 265 (1877) (decided under former Code 1873, § 3854).

Attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm when: (1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege applies. St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 746 S.E.2d 98, 2013 Ga. LEXIS 614 (2013).

Communications with Grand Jurors

Privilege not waived by testifying before grand jury. — Civil plaintiff's counsel did not waive the work product privilege by testifying before a grand jury regarding information allegedly covered by the privilege and therefore did not render oneself a potential witness in the civil trial. Wrisco Indus., Inc. v. Hinely, 733 F. Supp. 106, 1990 U.S. Dist. LEXIS 3642 (N.D. Ga. 1990) (decided under former O.C.G.A. § 24-9-24).

Secrets of State

Secrets of state created no disclosure privilege. — "Secrets of state" privilege did not exempt cost estimates of the DOT from disclosure under the Open Records Act, O.C.G.A. § 50-14-1 et seq. Hardaway Co. v. Rives, 262 Ga. 631, 422 S.E.2d 854, 1992 Ga. LEXIS 984 (1992) (decided under former O.C.G.A. § 24-9-21).

Existence of "open government" does not negate existence of attorney-client privilege as to matters discussed between county officials and county attorney. Dodson v. Floyd, 529 F. Supp. 1056, 1981 U.S. Dist. LEXIS 16909 (N.D. Ga. 1981) (decided under former Code 1933, §§ 38-419 and 38-1605).

Communications Between Psychiatrist and Patient

Definition of psychiatrist. — "Psychiatrist" in former O.C.G.A. § 24-9-21 meant a person licensed to practice medicine, or reasonably believed by the patient so to be, who devoted a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including drug or alcohol addiction. Wiles v. Wiles, 264 Ga. 594, 448 S.E.2d 681, 1994 Ga. LEXIS 827 (1994) (decided under former O.C.G.A. § 24-9-21).

Nature of privilege between psychiatrist and patient. — As a matter of public policy, Georgia excludes communications between psychiatrist and patient. This privilege is absolute, although it may be waived. Without a waiver, there is no basis for the admission of testimony about communications between psychiatrist and patient. Freeman v. State, 196 Ga. App. 343, 396 S.E.2d 69, 1990 Ga. App. LEXIS 1137 (1990) (decided under former O.C.G.A. § 24-9-21).

Prerequisite relationship. — Before the privilege may be invoked, the requisite relationship of psychiatrist and patient must have existed to the extent that treatment was given or contemplated. Massey v. State, 226 Ga. 703, 177 S.E.2d 79, 1970 Ga. LEXIS 644 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248, 1971 U.S. LEXIS 2887 (1971) (decided under former Code 1933, § 38-418); Strickland v. State, 260 Ga. 28, 389 S.E.2d 230, 1990 Ga. LEXIS 102 (1990) (decided under former O.C.G.A. § 24-9-21); Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, 1992 Ga. App. LEXIS 1307 (1992), cert. denied, No. S93C0170, 1993 Ga. LEXIS 43 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-21).

When a party goes to a psychiatrist on the party's own volition for the purpose of gaining professional psychiatric assistance, this creates the requisite confidential relationship of psychiatrist and patient to claim the privilege. Kimble v. Kimble, 240 Ga. 100, 239 S.E.2d 676, 1977 Ga. LEXIS 1409 (1977) (decided under former Code 1933, § 38-418).

Existence of a "voluntary" psychiatrist-patient relationship rendered any testimony whatsoever by the psychiatrist excludable from evidence at the election of the patient. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134, 1983 Ga. App. LEXIS 2054 (1983) (decided under former O.C.G.A. § 24-9-21).

When the defendant, the father of a child, retained a psychiatrist and paid the psychiatrist's fee for the purpose of obtaining testimony for use in a contempt action for visitation rather than for the purpose of obtaining psychiatric treatment or counseling, no psychiatrist-patient relationship existed as contemplated by former O.C.G.A. § 24-9-21 and the psychiatrist was properly permitted to testify in a criminal action against the defendant. Fulbright v. State, 194 Ga. App. 827, 392 S.E.2d 298, 1990 Ga. App. LEXIS 380 (1990) (decided under former O.C.G.A. § 24-9-21).

No psychiatrist/patient relationship was created if: (1) the defendant was not seeking out psychiatric care in the usual sense of the term; and (2) no real treatment was given or contemplated. Rachals v. State, 184 Ga. App. 420, 361 S.E.2d 671, 1987 Ga. App. LEXIS 2775 (1987), aff'd, 258 Ga. 48, 364 S.E.2d 867, 1988 Ga. LEXIS 129 (1988) (decided under former O.C.G.A. § 24-9-21).

Psychiatric medical records are not absolutely privileged. Donalson v. State, 192 Ga. App. 37, 383 S.E.2d 588,

Communications Between Psychiatrist and Patient (Cont'd)

1989 Ga. App. LEXIS 913 (1989), cert. denied, 493 U.S. 1030, 110 S. Ct. 742, 107 L. Ed. 2d 760, 1990 U.S. LEXIS 113 (1990) (decided under former O.C.G.A. § 24-9-21).

Contents of a psychiatrist's records were privileged as to communications between the psychiatrist and a patient; however, the privilege did not extend to communications made to nurses or attendants, unless the nurses or attendants were acting as agents of the psychiatrist, nor did it preclude discovery of the fact and dates of treatment. Plunkett v. Ginsburg, 217 Ga. App. 20, 456 S.E.2d 595, 1995 Ga. App. LEXIS 336 (1995) (decided under former O.C.G.A. § 24-9-21).

Parent's standing to sue for violation of child's privilege. — Father had standing to file suit for unauthorized disclosure of his minor daughter's clinical records and for unauthorized release of privileged material regarding his minor daughter. Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, 1992 Ga. App. LEXIS 1307 (1992), cert. denied, No. S93C0170, 1993 Ga. LEXIS 43 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-21).

Communications with physicians generally distinguished. — Former paragraph (5) of O.C.G.A. § 24-9-21 read with former O.C.G.A. § 24-9-40 (see now O.C.G.A. § 24-12-1) reflected that the physician shield law applied to physicians generally but required physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists was protected by public policy and such communications were expressly excepted from the shield statute. Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210, 1985 Ga. App. LEXIS 2098 (1985) (decided under former O.C.G.A. § 24-9-21).

Communications absolutely privileged. — When plaintiff's decedent took an overdose of prescription drugs and subsequently died during hospitalization, prior communications between decedent as patient and decedent's psychiatrist were not discoverable as objective evidence of decedent's mental state. Dynin v. Hall, 207 Ga. App. 337, 428 S.E.2d 89, 1993 Ga. App. LEXIS 180 (1993), cert. denied, No. S93C0796, 1993 Ga. LEXIS 419 (Ga. Apr. 8, 1993) (decided under former O.C.G.A. § 24-9-21).

Communications to coordinate care were proper. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff's invasion of privacy complaint, which asserted that the defendant's letters to the other treating physicians of the plaintiff violated the plaintiff's right to privacy because the evidence established that the information in the three letters disclosed to the plaintiff's other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718, 2007 Ga. App. LEXIS 785 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-9-21).

In an action arising from the unauthorized release of plaintiff's psychiatric records by a hospital authority, under the facts of the case, and because of the strong public policy of maintaining strict compliance with the requirements governing release of psychiatric records, the trial court erred in granting summary judgment to the defendants. Sletto v. Hospital Auth., 239 Ga. App. 203, 521 S.E.2d 199 (decided under former O.C.G.A. § 24-9-21).

Court-appointed psychiatrist may testify. — Psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court, and the psychiatrist's testimony as to statements made to the psychiatrist by the defendant during the course of the psychiatrist's examination of the defendant is admissible. Massey v. State, 226 Ga. 703, 177 S.E.2d 79, 1970 Ga. LEXIS 644 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248, 1971 U.S. LEXIS 2887 (1971) (decided under former

Code 1933, § 38-418). For comment, see 21 J. of Pub. L. 251 (1972).

Privileged relationship between psychiatrist and patient did not exist in criminal cases when the defendant pled not guilty by reason of insanity, and the psychiatrist was appointed by the court to determine the issue of sanity. Kimble v. Kimble, 240 Ga. 100, 239 S.E.2d 676, 1977 Ga. LEXIS 1409 (1977) (decided under former Code 1933, § 38-418).

When a psychiatrist or psychologist was appointed by the court to conduct a preliminary examination of a criminal defendant, the psychiatrist or psychologist was a witness for the court, and the privilege concerning communications with a client did not apply. Christenson v. State, 261 Ga. 80, 402 S.E.2d 41, 1991 Ga. LEXIS 139, cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130, 1991 U.S. LEXIS 4511 (1991) (decided under former O.C.G.A. § 24-9-21).

Objective results of court-ordered examination are admissible. — When the examination of the defendant by a physician had been ordered by the court at the request of the defendant's counsel, communications between the defendant and the physician were protected, but the objective result of the examination was not so protected, and the objective result of the examination was admissible. Plummer v. State, 229 Ga. 749, 194 S.E.2d 419, 1972 Ga. LEXIS 764 (1972) (decided under former Code 1933, § 38-418).

Doctor's opinion that ward needed guardian. — In a proceeding to terminate a guardianship proceeding, even if a psychiatrist-patient relationship existed between the doctor and ward, admission of the doctor's opinion that the ward needed a guardian of the ward's estate was harmless because the testimony was cumulative of other evidence which was properly admitted. In re Vincent, 240 Ga. App. 876, 525 S.E.2d 409 (decided under former O.C.G.A. § 24-9-21).

Cross-examination after testimony about communication. — By calling the doctor as a witness and allowing the doctor to testify as to the mental condition of the accused, the defense waived the right to object to relevant cross-examination of the doctor on the ground that such matter was privileged communication between the patient and psychiatrist. Fields v. State, 221 Ga. 307, 144 S.E.2d 339, 1965 Ga. LEXIS 443 (1965) (decided under former Code 1933, § 38-418); Griggs v. State, 241 Ga. 317, 245 S.E.2d 269, 1978 Ga. LEXIS 955 (1978) (decided under former Code 1933, § 38-418).

Prosecutor's reference to the defendant's right to have psychiatrist not testify was not a violation of defendant's right against self-incrimination. Willett v. State, 223 Ga. App. 866, 479 S.E.2d 132 (decided under former O.C.G.A. § 24-9-21).

Since the defendant was not at a mental hospital for treatment nor did the record reflect that the defendant received any, the psychiatrist-patient privilege did not apply. Moody v. State, 244 Ga. 247, 260 S.E.2d 11, 1979 Ga. LEXIS 1205 (1979) (decided under former Code 1933, § 38-418).

Joint counseling statement inadmissible. — Psychiatric-patient privilege applied to statements made by her husband in joint counseling sessions even though the wife requested admission at her trial for his murder. Sims v. State, 251 Ga. 877, 311 S.E.2d 161, 1984 Ga. LEXIS 530 (1984) (decided under former O.C.G.A. § 24-9-21).

Joint treatment with other persons. — Psychiatrist-patient privilege was not diminished by the fact that the patient sought or contemplated treatment jointly with other persons, or primarily for the benefit of another person who was in treatment by the same psychiatrist. Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, 1992 Ga. App. LEXIS 1307 (1992), cert. denied, No. S93C0170, 1993 Ga. LEXIS 43 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-21).

Facts of patient treatment and dates not within privilege. — Facts that two hospitals treated the defendant as a patient and the dates of those treatments were not within the psychiatrist-patient privilege. Johnson v. State, 254 Ga. 591, 331 S.E.2d 578, 1985 Ga. LEXIS 782 (1985) (decided under former O.C.G.A. § 24-9-21).

Clinical record from psychiatric hospital producible, except for privileged communications. — When ex-husband, in a child custody proceeding,

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duly subpoenaed ex-wife's clinical record from the psychiatric hospital where she had voluntarily admitted herself, that record was producible, except for the portions containing any privileged communications. Weksler v. Weksler, 173 Ga. App. 250, 325 S.E.2d 874, 1985 Ga. App. LEXIS 1493 (1985) (decided under former O.C.G.A. § 24-9-21).

Since the mental health records of an incompetent, deaf, and speechless criminal defendant contain both privileged communications under former O.C.G.A. § 24-9-21 and O.C.G.A. § 43-39-16, and nonprivileged communications, records which contain privileged material were not to be produced in response to a request for production, but the remaining documents must be produced. Annandale at Suwanee, Inc. v. Weatherly, 194 Ga. App. 803, 392 S.E.2d 27, 1990 Ga. App. LEXIS 342 (1990) (decided under former O.C.G.A. § 24-9-21).

Trial court erred by not conducting an in camera inspection of a plaintiff's mental health records to determine whether the records contained any nonprivileged information relevant to the plaintiff's claims for damages in a civil suit. Aetna Cas. & Sur. Co. v. Ridgeview Inst., Inc., 194 Ga. App. 805, 392 S.E.2d 286, 1990 Ga. App. LEXIS 338 (1990) (decided under former O.C.G.A. § 24-9-21).

Discoverability in nonparty document production request. — Patient's failure to object within 10 days to a request for nonprivileged matter under a nonparty document production request did not amount to an affirmative waiver of privileged communications with the patient's psychiatrist. Hopson v. Kennestone Hosp., 241 Ga. App. 829, 526 S.E.2d 622, 1999 Ga. App. LEXIS 1602 (1999), aff'd, 273 Ga. 145, 538 S.E.2d 742, 2000 Ga. LEXIS 857 (2000) (decided under former O.C.G.A. § 24-9-21).

Rule that a party's failure to object to a discovery request within the time required generally will result in a waiver of the right to object does not apply to requests under O.C.G.A. § 9-11-34(c) to nonparties for the production of documents that are protected by the psychiatrist-patient privilege. Hopson v. Kennestone Hosp., 241 Ga. App. 829, 526 S.E.2d 622, 1999 Ga. App. LEXIS 1602 (1999), aff'd, 273 Ga. 145, 538 S.E.2d 742, 2000 Ga. LEXIS 857 (2000) (decided under former O.C.G.A. § 24-9-21).

In order to abrogate the psychiatrist-patient privilege, the defendant must make a showing of necessity, that is, that the evidence in question is critical to defendant's defense and that substantially similar evidence is otherwise unavailable to the defendant. Bobo v. State, 256 Ga. 357, 349 S.E.2d 690, 1986 Ga. LEXIS 869 (1986); King v. State, 273 Ga. 258, 539 S.E.2d 783, 2000 Ga. LEXIS 886 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834, 2002 U.S. LEXIS 4925 (2002), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former O.C.G.A. § 24-9-21).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of defendant's psychiatrist. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134, 1983 Ga. App. LEXIS 2054 (1983) (decided under former O.C.G.A. § 24-9-21).

Compositions written by defendant at the request of a psychiatrist were not subject to the evidentiary privilege for "communications between psychiatrist and patient" because the compositions were found in a trash can in defendant's home with no showing that the compositions were ever given to the psychiatrist. Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393, 2000 Ga. App. LEXIS 480 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717, 2002 U.S. LEXIS 30 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717, 2002 U.S. LEXIS 31 (2002) (decided under former O.C.G.A. § 24-9-21).

Privilege waived. — Trial court in civil proceeding brought by an injured police officer against an individual who suffered from a mental condition did not err in ruling that the individual lost the statutory psychiatric privilege by involuntary commitment to a state mental health

facility. Trammel v. Bradberry, 256 Ga. App. 412, 568 S.E.2d 715, 2002 Ga. App. LEXIS 711 (2002), cert. denied, No. S02C1742, 2002 Ga. LEXIS 697 (Ga. Sept. 6, 2002) (decided under former O.C.G.A. § 24-9-21).

Trial court did not abuse the court's discretion in admitting a 1980 report during the defendant's murder trial, which admitted a psychologist's testimony and materials, performed for evaluation purposes, specifically to explore the possibility of an insanity plea, rather than for professional treatment, as under Georgia law, there can be no expectation of confidentiality based on the psychologist/patient privilege when the sole purpose of the relationship is evaluation. Even if such a privilege existed as to the 1980 report, when the defendant raised the claim of mental retardation, putting the defendant's mental capacity at issue, such affirmative defense waived any privilege. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31, 2007 Ga. LEXIS 838 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, 2008 U.S. LEXIS 3194 (2008), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-21).

Other Mental Health Professionals

Communications with mental health professionals other than psychiatrists or psychologists. — When defendant's counselors were not psychiatrists nor clinical psychologists, defendant's communications with the counselors were not privileged. While it is arguable that disclosures made in confidence to mental health professionals other than psychiatrists and psychologists ought to be privileged, the legislature has not seen to make them so. Lipsey v. State, 170 Ga. App. 770, 318 S.E.2d 184, 1984 Ga. App. LEXIS 2922 (1984) (decided under former O.C.G.A. § 24-9-21).

Communication with mental health professional. — Trial court erred in requiring a plaintiff to produce any confidential communications made between the plaintiff and the plaintiff's mental-health-care providers because the plaintiff's handling of discovery, albeit troublesome, did not amount to a decisive and unequivocal waiver of the plaintiff's mental-health privilege as the law required; the plaintiff's arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression did not amount to a "decisive" and "unequivocal" waiver of the mental-health privilege, and the plaintiff's decision to answer the deposition question posed to the plaintiff (whether the plaintiff suffered from a history of depression), rather than object to the question at the time the issue of depression was raised, did not constitute an explicit waiver of the privilege. Mincey v. Ga. Dep't of Cmty. Affairs, 308 Ga. App. 740, 708 S.E.2d 644, 2011 Ga. App. LEXIS 269 (2011) (decided under former O.C.G.A. § 24-9-21).

Communication with psychologist. — Since the psychologist-patient privilege set forth in O.C.G.A. § 43-39-16 arises only when the patient voluntarily seeks treatment, the communications between a mother and a psychologist in the course of a court-ordered mental evaluation were not privileged, and there was no error in admitting evidence of that evaluation. In re L.H., 236 Ga. App. 132, 511 S.E.2d 253 (decided under former O.C.G.A. § 24-9-21).

Defendant failed to show that trial counsel's failure to object to the admission of court-appointed psychologists' statements was indicative of ineffectiveness and was not a conscious and deliberate trial strategy. Johnson v. State, 255 Ga. App. 544, 566 S.E.2d 353, 2002 Ga. App. LEXIS 684 (2002), cert. denied, No. S02C1452, 2002 Ga. LEXIS 831 (Ga. Sept. 16, 2002), overruled in part, State v. Herendeen, 279 Ga. 323, 613 S.E.2d 647, 2005 Ga. LEXIS 384 (2005) (decided under former O.C.G.A. § 24-9-21).

Communication with referred therapist for evaluation in sexual abuse case was privileged. — Although the mother had been referred to the therapist for evaluation in the sexual abuse case, the mother's communications with the therapist during therapy were privileged under former O.C.G.A. § 24-9-21; the therapist provided mental health treatment to the mother as the therapist had seen the mother for counseling for two

Other Mental Health Professionals (Cont'd)

and a half years, the mother had not missed a session, and the mother found the treatment to have been beneficial. In the Interest of I.M.G., 276 Ga. App. 598, 624 S.E.2d 236, 2005 Ga. App. LEXIS 1331 (2005) (decided under former O.C.G.A. § 24-9-21).

Psychologist-patient privilege applied to treatment records, regardless of whether that treatment was voluntary; since treatment of children had been directed by a case plan and a juvenile court, an in camera inspection of records sought in a criminal prosecution arising out of facts developed in the dependency investigation was proper, but the case was remanded for the trial court to consider in the court's examination the established parameters of the psychotherapist-patient privilege. Herendeen v. State, 268 Ga. App. 113, 601 S.E.2d 372, 2004 Ga. App. LEXIS 774 (2004), aff'd, 279 Ga. 323, 613 S.E.2d 647, 2005 Ga. LEXIS 384 (2005) (decided under former O.C.G.A. § 24-9-21).

Communication with licensed associate professional counselor via grief journal. — Widow's grief journal was privileged because the journal was created as part of a treatment plan developed by both the licensed associate professional counselor, acting as an agent for the licensed professional counselor, and the licensed professional counselor and the journal's contents were communicated to the associate professional counselor as part of the widow's therapy. Gwinnett Hosp. Sys. v. Hoover, 337 Ga. App. 87, 785 S.E.2d 918, 2016 Ga. App. LEXIS 264 (2016).

Communication with licensed clinical social worker. — When the defendant, the child's stepmother, was charged with child molestation and cruelty to children, the trial court erred in ordering a licensed clinical social worker to produce the child's privileged mental health records for in camera inspection because, to the extent that the trial court explicitly provided for the dissemination of the documents to the defendant in toto and without conducting a delineation process on whether the privileged records were material to the issues on trial, the trial court abused the court's discretion. In re Frost, 366 Ga. App. 45, 880 S.E.2d 650, 2022 Ga. App. LEXIS 529 (2022).

Cross-examination of therapist limited. — In a prosecution for child molestation, the trial court did not err by limiting the defendant's cross-examination of the child's therapist and thereby preventing the defendant from engaging in a fishing expedition to dredge up evidence of domestic problems totally unrelated to the act of molestation. Atkins v. State, 243 Ga. App. 489, 533 S.E.2d 152, 2000 Ga. App. LEXIS 453 (2000) (decided under former O.C.G.A. § 24-9-21).

Refreshing recollection of defense psychologist improperly. — Trial court erred in permitting the state, on cross-examination, to have the defense psychologist refresh the psychologist's recollection, thereby effectively impeaching the defendant, by use of a privileged and confidential communication to the defense attorney's investigator; but because the impermissibly refreshed recollection was entirely consistent with, and cumulative of, other competent evidence, the error was harmless. Revera v. State, 223 Ga. App. 450, 477 S.E.2d 849 (decided under former O.C.G.A. § 24-9-24).

Communications between Physician and Patient

Patient-physician communications. — Confidential communications excluded from testimony do not include those made by a patient to a physician. Collins v. Howard, 156 F. Supp. 322, 1957 U.S. Dist. LEXIS 2781 (D. Ga. 1957) (decided under former Code 1933, § 38-418).

Trial court did not err in admitting the testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597, 1984 Ga. App. LEXIS 2989 (1984) (decided under former O.C.G.A. § 24-9-21).

Defendant offered no evidence that the information the defendant provided in the medical questionnaire was ever imparted

to a medical professional so it could not be said that the document constituted a privileged communication within the meaning of paragraphs (5) or (6) of former O.C.G.A. § 24-9-21. Manning v. State, 231 Ga. App. 584, 499 S.E.2d 650 (decided under former O.C.G.A. § 24-9-21).

If nurse is agent of hospital rather than communicant's doctor, the doctor's privilege will not protect communications made to the nurse. Myers v. State, 251 Ga. 883, 310 S.E.2d 504, 1984 Ga. LEXIS 533 (1984) (decided under former O.C.G.A. § 24-9-21).

In the plaintiff's suit against various medical providers for their alleged negligence during the delivery of the plaintiff's daughter, because some of the documents requested by the medical providers could be both relevant and non-privileged, the trial court erred by concluding that all of the mental health documents other than the produced billing documents were privileged, and any relevant and non-privileged documents should be produced even if redactions were necessary; however, because the appellate court was unable to complete the review of the documents, the case was remanded to the trial court for an in camera review to separate privileged versus non-privileged information and provide a redacted copy. Brown v. Howard, 334 Ga. App. 182, 778 S.E.2d 810, 2015 Ga. App. LEXIS 595 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-418, and former O.C.G.A. §§ 24-9-21 and 24-9-24 are included in the annotations for this Code section.

Court order or subpoena did not abrogate privilege created by statute relating to the confidentiality of the patient-psychiatrist relationship; any response to a subpoena or court order must take these provisions into consideration. 1974 Op. Att'y Gen. No. U74-86 (decided under former Code 1933, § 38-418).

Attorneys employed by state agencies. — Although state agencies may employ persons with legal training and experience to serve as administrative legal service officers, those persons may not provide legal advice or representation to the agency, and no attorney-client relationship or privilege arises between the legal services officer and other agency officers or employees, or the agency itself. 1995 Op. Att'y Gen. No. 95-1 (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

ADVISORY OPINIONS OF THE STATE BAR

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-419 are included in the annotations for this Code section.

It is ethically proper for a lawyer to reveal the confidences or secrets of clients in any proceedings in which revelation may be necessary to defend the lawyer against charges of professional misconduct. Adv. Op. No. 80-27 (November 21, 1980) (decided under former Code 1933, § 38-419).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 272 et seq.

Am. Jur. Pleading and Practice Forms.

19A Am. Jur. Pleading and Practice Forms, Physicians, Surgeons, and Other Healers, § 163.

Am. Jur. Proof of Facts.

Interference with Attorney-Client Relationship, 19 POF2d 335.

Protected Communication Between Physician and Patient, 45 POF2d 595.

Existence of Attorney-Client Relationship, 48 POF2d 525.

Proof of Waiver of Attorney-Client Privilege, 32 POF3d 189.

Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 POF3d 1.

C.J.S.

27 C.J.S., Discovery, §§ 7, 21 et seq. 31A C.J.S., Evidence, § 475. 98 C.J.S. (Rev), Witnesses, §§ 242 et seq., 350, 355, 391, 396, 404, 438, 457, 458.

ALR.

Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client, 8 A.L.R. 1334.

Right to recover property held by public authorities as evidence for use in a criminal trial, 13 A.L.R. 1168.

Applicability and effect in suit for alienation of affections of rule excluding confidential communications between husband and wife, 36 A.L.R. 1068; 82 A.L.R. 825.

Effect of knowledge of third person acquired by overhearing or seeing communication between husband and wife upon rule as to privileged communication, 63 A.L.R. 107.

Privilege as to communications to attorney in connection with drawing of will, 64 A.L.R. 144; 66 A.L.R.2d 1302.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 A.L.R. 94.

Expression of willingness by witness that another should testify as waiver of privilege in respect of latter's testimony, 72 A.L.R. 148.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 A.L.R. 470.

Attorney's comment on opposing party's refusal to permit introduction of, or to offer, privileged testimony, or to permit privileged witness to testify, 116 A.L.R. 1170.

Attorney-client privilege as affected by wrongful or criminal character of contemplated acts or course of conduct, 125 A.L.R. 508.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Evidence: attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 A.L.R. 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 A.L.R. 553.

Right of attorney to introduce evidence, and to cross-examine, in summary proceeding against him by, or in interest of, his client, 141 A.L.R. 655.

Right to insist that opponent's claim of privilege shall be made in presence of jury, or to ask him if he is willing to waive privilege, 144 A.L.R. 1007.

Evidence: statement or report by servant or agent to master or principal, in respect of matters then or afterward involved in litigation, as a privileged communication, 146 A.L.R. 977.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 A.L.R. 219.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 A.L.R.2d 645.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 A.L.R.2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 A.L.R.2d 1389.

Discovery or inspection of trade secret, formula, or the like, 17 A.L.R.2d 383.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 A.L.R.2d 391.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 A.L.R.2d 570.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Privilege as to communications to attorney in connection with drawing of will, 66 A.L.R.2d 1302.

Waiver of attorney-client privilege by personal representative or heir of de-

ceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 A.L.R.2d 796.

Husband or wife as competent witness for or against co-offender with spouse, 90 A.L.R.2d 648.

Discovery, inspection, and copying of photographs of article or premises the condition of which gave rise to instant litigation, 95 A.L.R.2d 1061.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125; 31 A.L.R.4th 1226.

Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 A.L.R.2d 159.

Right of corporation to assert attorney-client privilege, 98 A.L.R.2d 241; 26 A.L.R.5th 628; 27 A.L.R.5th 76.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 A.L.R.3d 15.

Attorney-client privilege as affected by communications between several attorneys, 9 A.L.R.3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 A.L.R.3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 A.L.R.3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 A.L.R.3d 557.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 A.L.R.3d 906.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 A.L.R.3d 1373.

Privilege in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 A.L.R.3d 24.

Defense attorney as witness for his client in state criminal case, 52 A.L.R.3d 887.

Prosecuting attorney as a witness in criminal case, 54 A.L.R.3d 100.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 A.L.R.3d 1322.

Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 74 A.L.R.3d 1055.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 A.L.R.3d 944.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 A.L.R.3d 901.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 A.L.R.3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 A.L.R.3d 1285.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 A.L.R.4th 1104.

Communication between unmarried couple living together as privileged, 4 A.L.R.4th 422.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 A.L.R.4th 765.

Disqualification of attorney because member of his firm is or ought to be witness in case — modern cases, 5 A.L.R.4th 574.

Testimonial privilege for confidential communications between relatives other than husband and wife — state cases, 6 A.L.R.4th 544; 62 A.L.R.5th 629.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged, 9 A.L.R.4th 807.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 A.L.R.4th 1305.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 A.L.R.4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 A.L.R.4th 458.

Privilege as to communications between lay representative in judicial or administrative proceedings and client, 31 A.L.R.4th 1226.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them, 39 A.L.R.4th 480.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats, 41 A.L.R.4th 1078.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 A.L.R.4th 1134.

Attorney-client privilege: who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 A.L.R.4th 1227.

Involuntary disclosure or surrender of will prior to testator's death, 75 A.L.R.4th 1144.

Application of attorney-client privilege to electronic documents, 26 A.L.R.6th 287.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 A.L.R.5th 628.

What corporate communications are entitled to attorney-client privilege—modern cases, 27 A.L.R.5th 76.

What persons or entities may assert or waive corporation's attorney-client privilege — modern cases, 28 A.L.R.5th 1.

Waiver of evidentiary privilege by inadvertent disclosure — state law, 51 A.L.R.5th 603.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 23 A.L.R.6th 1.

Application of attorney-client privilege to electronic documents, 26 A.L.R.6th 287.

Construction and application of fiduciary duty exception to attorney-client privilege, 47 A.L.R.6th 255.

Applicability of attorney-client privilege to communications made in presence of or solely to or by nonattorney consultants, professionals, and similar contractors, 66 A.L.R.6th 83.

Applicability of attorney-client privilege to communications made in presence of or solely to or by family members or companion, confidant, or friend of attorneys or client or attesting witnesses for client's will, 67 A.L.R.6th 341.

Construction and application of self-protection or self-defense exception to attorney-client privilege, 71 A.L.R.6th 249.

Applicability of Attorney-Client Privilege to Attorney's Referral of Client to or Financial Arrangement with Medical Professional, 64 A.L.R.7th 4.

Insured-insurer communications as privileged — View that communications are privileged when they concern potential suit, 42 A.L.R.7th Art. 3.

Insured-insurer communications as privileged — View that communication must seek legal advice for attorney-client privilege to apply, 43 A.L.R.7th Art. 3.

Insured-insurer communications as privileged - generally, 43 A.L.R.7th Art. 6.

Waiver or loss of protection of state attorney "work product" Protection, 45 A.L.R.7th Art. 2.

Waiver of insured-insurer communications privilege, 48 A.L.R.7th Art. 7.

Waiver of evidentiary privilege by inadvertent disclosure — federal law, 159 A.L.R. Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 A.L.R. Fed. 243.

Clawback/"Quick Peek" procedure under Fed. R. Evid. 502(d), 39 A.L.R. Fed. 3d Art. 2.

Sufficiency of evidence to establish prima facie crime-fraud exception to attorney-client privilege, post-U.S. v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 89-1 U.S. Tax Cas. (CCH) P 9380, 27 Fed. R. Evid. Serv. 833, 63 A.F.T.R.2d 89-1483 (1989) — Federal Appellate Cases, 48 A.L.R. Fed. 3d Art. 3.

Scope of waiver or loss of protection of federal attorney "work product" protection under Fed. R. Civ. P. 26(b)(3), 48 A.L.R. Fed. 3d Art. 7.

24-5-502. Communications to clergy privileged.

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court.

History.

Code 1981, § 24-5-502, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966).

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

For note, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

For comment, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

For annual survey on domestic relations, see 69 Mercer L. Rev. 83 (2017).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-22 are included in the annotations for this Code section. The reader is advised to consult the annotations following Code

Section 24-5-501, which may also be applicable to this Code section.

Presence of more than one person. — Clerical privilege was not waived by the presence of more than one person seeking spiritual comfort or counseling. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (decided under former O.C.G.A. § 24-9-22).

Trial court did not err when the court denied the defendant's motion to suppress the confession the defendant made to the police chaplain because the trial court obviously believed the chaplain's adamant denial that the chaplain had repeated the defendant's confession to the police. The testimony revealed that the defendant confessed to the police officer in the chaplain's presence. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654, 2004 Ga. App. LEXIS 273 (2004), cert. dismissed, No. S04C1345, 2004 Ga. LEXIS 787 (Ga. Sept. 8, 2004) (decided under former O.C.G.A. § 24-9-22).

Marriage counseling meeting with pastor privileged. — Trial court did not abuse the court's discretion by excluding a recording made by the wife of a meeting with the wife, husband, and their pastor because the totality of the admitted circumstances surrounding the meeting was that it was a marriage counseling session with the parties' minister and, therefore, was properly excluded as privileged under O.C.G.A. § 24-5-502. Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693, 2016 Ga. LEXIS 430 (2016).

Pastor who had physical custody of a child for two months was allowed to testify as to the child's condition at a termination of parental rights proceeding since there was no showing that any communications or observations arose from spiritual counseling or as a profession of religious faith. Jones v. Department of Human Resources, 168 Ga. App. 915, 310 S.E.2d 753, 1983 Ga. App. LEXIS 2953 (1983) (decided under former O.C.G.A. § 24-9-22).

Pastor not acting within role as clergy. — Defendant's statements to a senior pastor were not privileged because, during their first meeting at a restaurant, the pastor was not acting within the pastor's role as clergy but was instead acting in the pastor's capacity as either an employer or supervisor of the defendant; and the defendant was not prejudiced by the admission of the defendant's statements from the second meeting based on the substantial other evidence presented. Hutcheson v. State, 361 Ga. App. 890, 864 S.E.2d 106, 2021 Ga. App. LEXIS 401 (2021).

Inapplicable to "father figure." — Defendant's conversations with a witness who had served as a father figure for the defendant throughout the defendant's life were not privileged, even though the witness had been ordained two years before the defendant committed the murder with which the defendant was charged. Morris v. State, 275 Ga. 601, 571 S.E.2d 358, 2002 Ga. LEXIS 920 (2002) (decided under former O.C.G.A. § 24-9-22).

Inapplicable to "spiritual advisor" or "psychic." — Statutory privilege does not apply to a "spiritual advisor" or "psychic." Manous v. State, 200 Ga. App. 293, 407 S.E.2d 779, 1991 Ga. App. LEXIS 954 (1991) (decided under former O.C.G.A. § 24-9-22).

Inapplicable to conversational statements to friend. — Under former O.C.G.A. § 24-9-22, every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to a clergy person were deemed privileged; however, if such communications were not made to profess religious faith, or to seek spiritual comfort or guidance, but rather were conversational statements to a friend or frequent companion, the ministerial privilege was not applicable. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263, 2003 Ga. App. LEXIS 249 (2003) (decided under former O.C.G.A. § 24-9-22).

Son's statements were not privileged. — Defendant's statements to the defendant's father, a minister, were not privileged under former O.C.G.A. § 24-9-22 as the defendant, in talking to the defendant's father, was not seeking comfort or solace of a spiritual nature, but was seeking the help of a parent and a source of secular strength to accompany the defendant to the police station. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263, 2003 Ga. App. LEXIS 249 (2003) (decided under former O.C.G.A. § 24-9-22).

Waiver of privilege. — Very general testimony by the plaintiff that a chaplain met with the plaintiff's family and offered spiritual support and comfort, and the plaintiff's deposition statement, in response to the defendants' questioning, that the plaintiff was not upset by anything the chaplain said, did not address in any way the substance of the plaintiff's conversations with the chaplain and did not amount to a waiver of the privilege. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (decided under former O.C.G.A. § 24-9-22).

Because the defendant requested the future assistance of an attorney, not immediate assistance, and because the defendant knew that the defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-5-502 and 24-8-825) was inapplicable; therefore, the defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1, 2010 Ga. LEXIS 491 (2010) (decided under former O.C.G.A. § 24-9-22).

When the defendant was convicted of malice murder, aggravated assault, and possession of a firearm during the commission of a crime in connection with the deaths of his wife and her cousin, because the defendant made no objection to the testimony of the assistant pastor when the assistant pastor's testimony regarding what the defendant had told the assistant pastor was offered, appellate review of the issue regarding the privilege between the defendant and the assistant pastor was waived. Crosdale v. State, 297 Ga. 244, 774 S.E.2d 87, 2015 Ga. LEXIS 363 (2015) (decided under former O.C.G.A. § 24-9-22).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 466 et seq.

C.J.S.

98 C.J.S. (Rev), Witnesses, § 440 et seq.

ALR.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 A.L.R. 219.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125; 31 A.L.R.4th 1226.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 A.L.R.3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual advisor extends, 71 A.L.R.3d 794.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser, 93 A.L.R.5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers, 101 A.L.R.5th 619.

24-5-503. Husband and wife as witnesses for and against each other in criminal proceedings.

(a) A husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which:

(1) The husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged;

(2) The husband or wife is charged with a crime against his or her spouse;

(3) The husband or wife is charged with causing physical damage to property belonging to the husband and wife or to their separate property; or

(4) The alleged crime against his or her current spouse occurred prior to the lawful marriage of the husband and wife.

History.

Code 1981, § 24-5-503, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 105, § 1/HB 711.

Cross references.

Competency of wife to testify against husband in proceeding against husband for abandonment of wife, § 19-10-2.

Law reviews.

For note, "Circling the Wagons: Informational Privacy and Family Testimonial Privileges," see 20 Ga. L. Rev. 173 (1985).

For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001).

For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 204 (2012).

For note, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-23 are included in the annotations for this Code section.

Privilege of refusing to testify belongs to witness and not to accused. See Morris v. State, 173 Ga. App. 663, 327 S.E.2d 792, 1985 Ga. App. LEXIS 2665 (1985) (decided under former O.C.G.A. § 24-9-23); Mapp v. State, 191 Ga. App. 622, 382 S.E.2d 618, 1989 Ga. App. LEXIS 710 (1989) (decided under former O.C.G.A. § 24-9-23); Brown v. State, 261 Ga. 66, 401 S.E.2d 492, 1991 Ga. LEXIS 65, cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240, 1991 U.S. LEXIS 5879 (1991) (decided under former O.C.G.A. § 24-9-23); Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (decided under former O.C.G.A. § 24-9-23).

Defendant had no standing to exclude a spouse's testimony at the trial because the privilege against spousal testimony was available only to the witness-spouse. Corn v. Zant, 708 F.2d 549, 1983 U.S. App. LEXIS 26742 (11th Cir. 1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375, 1984 U.S. LEXIS 282 (1984), vacated in part, 772 F.2d 681, 1985 U.S. App. LEXIS 23183 (11th Cir. 1985) (decided under former O.C.G.A. § 24-9-23); Chancey v. State, 256 Ga. 415, 349 S.E.2d 717, 1986 Ga. LEXIS 920 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527, 1987 U.S. LEXIS 1854 (1987).

Trial court did not err in allowing the defendant's spouse to testify in the defendant's trial for shooting their two adult sons to death as the privilege of refusing to testify belonged to the witness, the spouse, and not to the accused; moreover, nothing showed that the spouse's testimony was not voluntary. Biswas v. State, 255 Ga. App. 339, 565 S.E.2d 531, 2002 Ga. App. LEXIS 621 (2002), cert. denied, No. S02C1345, 2002 Ga. LEXIS 720 (Ga.

Sept. 6, 2002) (decided under former O.C.G.A. § 24-9-23).

Statements of common-law spouse admissible. — In a murder prosecution, where defendant's common-law spouse asserted privilege not to testify against the defendant, statements the spouse made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on the statement's reliability. Drane v. State, 265 Ga. 663, 461 S.E.2d 224, 1995 Ga. LEXIS 720 (1995). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (decided under former O.C.G.A. § 24-9-23).

Privilege did not depend upon stability of marriage. — Application of the privilege of refusing to testify did not depend upon the stability of the marriage, either at the time of the communication or at the time the privilege was asserted. Brown v. State, 261 Ga. 66, 401 S.E.2d 492, 1991 Ga. LEXIS 65, cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240, 1991 U.S. LEXIS 5879 (1991) (decided under former O.C.G.A. § 24-9-23).

Marital testimonial privilege could be asserted even though the marriage was entered into for the purpose of preventing the spouse's testimony. State v. Peters, 213 Ga. App. 352, 444 S.E.2d 609, 1994 Ga. App. LEXIS 579 (1994) (decided under former O.C.G.A. § 24-9-23).

Privilege may be invoked by spouse who testified at previous hearing. — Privilege not to testify may be invoked by the witness spouse even if he or she testified for or against the defendant spouse in a previous hearing. Brown v. State, 261 Ga. 66, 401 S.E.2d 492, 1991 Ga. LEXIS 65, cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240, 1991 U.S. LEXIS 5879 (1991) (decided under former O.C.G.A. § 24-9-23).

Comments on the failure of a spouse to testify constituted impermissible argument and warranted reversal. Price v. State, 175 Ga. App. 780, 334 S.E.2d 711, 1985 Ga. App. LEXIS 2832 (1985) (decided under former O.C.G.A. § 24-9-23).

No protection for documents prepared by third party. — Although communications between a husband and a wife are confidential and privileged, such protections did not apply to financial documents either prepared or seen by third parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77, 2006 Ga. App. LEXIS 367 (2006) (decided under former O.C.G.A. § 24-9-23).

In prosecution for manslaughter, marital privilege justified exclusion of suicidal statements the decedent allegedly related to the decedent's spouse on the day that the decedent was shot. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (decided under former O.C.G.A. § 24-9-23).

Subsection (b) of former O.C.G.A. § 24-9-23 applied when the victim and spouse were the same person; the victim of statutory rape could be compelled to testify even though the victim and the defendant were married at the time of the trial. Hamilton v. State, 210 Ga. App. 398, 436 S.E.2d 522, 1993 Ga. App. LEXIS 1197 (1993) (decided under former O.C.G.A. § 24-9-23).

Spouse as victim. — When the victim, defendant's wife, who had refused to testify for the state against her husband, was called by her husband, the fact that she asserted her privilege during the state's case was not conclusive because the privilege not to incriminate one's spouse at the behest of the state is different from the privilege not to testify for one's spouse and she should have been summoned to state her intentions before the presiding judge whether she would testify at the behest of her husband or reassert her privilege. Respres v. State, 244 Ga. App. 689, 536 S.E.2d 586, 2000 Ga. App. LEXIS 838 (2000) (decided under former O.C.G.A. § 24-9-23).

Knowing that the victim was going to invoke the marital privilege, the defendant was not entitled to a mistrial because the defendant did not timely object to the announcement of the defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation

by the state of an "unwarranted negative inference" against the defendant. Carter v. State, 275 Ga. App. 483, 621 S.E.2d 503, 2005 Ga. App. LEXIS 1003 (2005) (decided under former O.C.G.A. § 24-9-23).

Failure of a defendant's spouse to testify was not a legitimate subject matter of argument for counsel for the state, although such a comment did not constitute reversible error when the trial court rebuked the prosecuting attorney immediately in the presence of the jury, instructed the jury that it was not necessary for any defendant or the defendant's spouse ever to take the stand, and that the burden was always upon the state to prove a defendant's guilt beyond a reasonable doubt. Casey v. State, 167 Ga. App. 437, 306 S.E.2d 683, 1983 Ga. App. LEXIS 3329 (1983) (decided under former O.C.G.A. § 24-9-23).

State may comment generally when defendant relied upon spouse's actions for corroboration. — It did not appear that it was harmful error for the state to comment generally, without direct reference to the exercise of the spousal privilege, upon the fact that the state has no power to call a defendant's spouse who had not given direct testimony, but whose words and actions were relied upon by the defendant as being somewhat corroborative of the defendant's own exculpatory testimony. Under these circumstances, such a comment by the state would be no more than a statement informing the jury that the state's failure to call the nontestifying spouse did not necessarily signify an acceptance of or acquiescence in a portion of the defendant's exculpatory version of the events to which defendant has testified. Wynn v. State, 168 Ga. App. 132, 308 S.E.2d 392, 1983 Ga. App. LEXIS 2706 (1983) (decided under former O.C.G.A. § 24-9-23).

Severance of spouse's trial from defendant not required. — Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of the defendant's spouse because the defendant made no showing that the denial of the motion forced the defendant to choose between the defendant's right to a defense and the defendant's spousal privilege, former O.C.G.A. § 24-9-23; the defendant argued that the defendant was compelled not to testify, which was not safeguarded by former § 24-9-23 and was not a denial of due process, and there was nothing confusing about the evidence and no danger that the evidence against the spouse would be considered against the defendant. Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126, 2011 Ga. App. LEXIS 631 (2011) (decided under former O.C.G.A. § 24-9-23).

Testimony when spouse was charged with a crime against a minor child. — When defendant standing trial for child molestation argued that the prosecuting attorney improperly questioned the defendant's failure to call the defendant's spouse as a witness and that such argument constituted reversible error because the defendant could not compel the defendant's spouse to testify, there was no reversible error in the state's remarks on defendant's failure to call the spouse as a witness, since spousal immunity does not apply to proceedings in which one spouse was charged with a crime against a minor child under subsection (b) of former O.C.G.A. § 24-9-23. Sosebee v. State, 190 Ga. App. 746, 380 S.E.2d 464, 1989 Ga. App. LEXIS 411, cert. denied, 493 U.S. 933, 110 S. Ct. 323, 107 L. Ed. 2d 313, 1989 U.S. LEXIS 5002 (1989) (decided under former O.C.G.A. § 24-9-23).

Privilege created by former O.C.G.A. § 24-9-23 did not apply in proceedings in which the husband or wife was charged with a crime against the person of a minor, albeit testimony was compellable only with respect to the specific act for which the defendant was charged. Pirkle v. State, 234 Ga. App. 23, 506 S.E.2d 186 (decided under former O.C.G.A. § 24-9-23).

With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-spouse, the parent of the victim, concerning a prior bad act on the ground that the testimony violated the marital privilege, because the defendant was not on trial for the prior act; therefore, the ex-spouse was competent, although not compellable, to testify concerning the prior act, and thus since the ex-

spouse did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-spouse on the basis of marital privilege. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300, 2007 Ga. App. LEXIS 1024 (2007) (decided under former O.C.G.A. § 24-9-23).

Email from the defendant to the defendant's spouse was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under former O.C.G.A. § 24-9-23(b) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old step-daughter. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207, 2008 Ga. LEXIS 620 (2008) (decided under former O.C.G.A. § 24-9-23).

Because O.C.G.A. § 16-12-80 prohibited a person from disseminating obscene material of any description, and the definition of obscene material made no reference to a minor, distributing obscene materials was not a crime against the person of a minor child within the plain meaning of former O.C.G.A. § 24-9-23(b). Peck v. State, 300 Ga. App. 375, 685 S.E.2d 367, 2009 Ga. App. LEXIS 1171 (2009) (decided under former O.C.G.A. § 24-9-23).

Defendant's alleged violation of O.C.G.A. § 16-5-70(d), cruelty to children, was a "crime against the person of a minor child" within the meaning of former O.C.G.A. § 24-9-23(b), which provided an exception to the marital privilege against testifying in cases of crimes against the person of children, even though no physical contact was involved. Therefore, a trial court did not err in compelling defendant's spouse to testify against the defendant despite invoking the privilege. Sherman v. State, 302 Ga. App. 312, 690 S.E.2d 915, 2010 Ga. App. LEXIS 112 (2010), cert. denied, No. S10C0961, 2010 Ga. LEXIS 545 (Ga. June 28, 2010) (decided under former O.C.G.A. § 24-9-23).

Trial court did not err in ruling that the state could compel the defendant's spouse to testify even though the spouse was not a witness to the specific act charged, child molestation, because the spouse testified that the spouse did not know that the defendant had been applying ointment to the victim, and that evidence was sufficiently relevant to the molestation acts charged against the defendant so that the spouse's testimony was compellable under former O.C.G.A. § 24-9-23(b). O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490, 2010 Ga. App. LEXIS 564 (2010), cert. denied, No. S10C1747, 2010 Ga. LEXIS 858 (Ga. Nov. 1, 2010) (decided under former O.C.G.A. § 24-9-23).

Subsequent marriage of a minor victim. — Trial court did not err in concluding that the victim, who subsequently married the defendant, could be compelled to testify against the defendant with regard to the charge of sexual exploitation of children because that charge qualified as a crime against the person of a minor based upon the public policy expressed in former O.C.G.A. § 24-9-23(b), the particular pictures involved in the case, and the specific subsection of O.C.G.A. § 16-12-100 with which the defendant was charged; the pictures in the defendant's possession showed the victim personally engaged in sexually explicit conduct. Peck v. State, 300 Ga. App. 375, 685 S.E.2d 367, 2009 Ga. App. LEXIS 1171 (2009) (decided under former O.C.G.A. § 24-9-23).

No privilege when case involved a minor. — Any error in advising the defendant's wife that she could invoke the marital privilege, despite the fact that the case involved a minor, was harmless as the wife would have confirmed the defendant's erectile function diagnosis but was in no position to testify as to his ability to achieve sexual arousal and her testimony would not have negated an element of the crime. Underwood v. State, 344 Ga. App. 403, 810 S.E.2d 315, 2018 Ga. App. LEXIS 38 (2018).

Common-law marriage, when recognized, is sufficient to invoke the husband-wife privilege. However, in face of conflicting evidence as to a common-law marriage, the trial court is authorized to find that no common-law marriage exists. Jordan v. State, 267 Ga. 442, 480 S.E.2d 18 (decided under former O.C.G.A. § 24-9-23).

Factual determination by the state court that a witness was not the defen-

dant's common-law spouse was required to be deferred to by the federal courts in a habeas corpus proceeding; therefore, the testimony of this witness was not a violation of the marital privilege and did not render the defendant's trial fundamentally unfair. Holton v. Newsome, 750 F.2d 1513, 1985 U.S. App. LEXIS 27641 (11th Cir. 1985) (decided under former O.C.G.A. § 24-9-23).

There was substantial evidence in support of the trial court's finding that there was no common-law marriage between the trial witness and the defendant. Therefore, the defendant could not assert the marital privilege. Schirato v. State, 260 Ga. 170, 391 S.E.2d 116, 1990 Ga. LEXIS 180 (1990) (decided under former O.C.G.A. § 24-9-23).

In view of conflicting evidence, no common-law marriage. — Former O.C.G.A. § 24-9-23 was not applicable when, in view of the conflicting evidence as to the existence of a common-law marriage between the defendant and the state's witness, the trial court was authorized to find that no common-law marriage existed. Brown v. State, 187 Ga. App. 347, 370 S.E.2d 203, 1988 Ga. App. LEXIS 702 (1988) (decided under former O.C.G.A. § 24-9-23).

If evidence was in conflict as to existence of marriage, the trial judge may hear evidence to determine whether a marriage existed, and the judge's decision will not be disturbed on appeal if there was any evidence to support the judge's finding or the trial court may submit to the jury with appropriate instructions the question of whether or not a marriage exists. Sheffield v. State, 241 Ga. 245, 244 S.E.2d 869, 1978 Ga. LEXIS 959 (1978) (decided under former Code 1933, § 38-1604).

Jailhouse conversations between the defendant and a boyfriend or fiance were properly admitted despite a claim of marital privilege because there was sufficient evidence to support the trial court's implicit finding that no legal marriage existed; it was the defendant's burden to prove a valid marriage, and the defendant failed to do so. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357, 2016 Ga. App. LEXIS 370 (2016), cert. denied, No. S17C0059, 2017 Ga. LEXIS 287 (Ga. Apr. 17, 2017).

Waiver of privilege presumed. — When the witness voluntarily took the stand and testified, it would be presumed that the witness did so pursuant to a waiver of the witnesse's privilege. Mapp v. State, 191 Ga. App. 622, 382 S.E.2d 618, 1989 Ga. App. LEXIS 710 (1989); White v. State, 211 Ga. App. 694, 440 S.E.2d 68, 1994 Ga. App. LEXIS 18 (1994) (decided under former O.C.G.A. § 24-9-23).

Trial court was not obligated to advise the defendant's spouse of the marital privilege under former O.C.G.A. § 24-9-23(b) relating to the spouse's testimony at defendant's sentencing hearing, and as the defendant's spouse testified voluntarily, it was presumed that the spouse waived the marital privilege. Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211, 2003 Ga. App. LEXIS 914 (2003) (decided under former O.C.G.A. § 24-9-23).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. Geter v. State, 300 Ga. App. 396, 685 S.E.2d 342, 2009 Ga. App. LEXIS 1173 (2009) (decided under former O.C.G.A. § 24-9-23).

Termination upon death or divorce. — Unlike the evidentiary prohibition of former O.C.G.A. § 24-9-21(1) (see now O.C.G.A. § 24-5-501), excluding interspousal communications, the spousal privilege against compellability in former O.C.G.A. § 24-9-23 ceased when the marriage was terminated by death or divorce. Chadwick v. State, 176 Ga. App. 296, 335 S.E.2d 674, 1985 Ga. App. LEXIS 2871 (1985), aff'd, 255 Ga. 376, 339 S.E.2d 717, 1986 Ga. LEXIS 506 (1986) (decided under former O.C.G.A. § 24-9-23).

Defendant's claim that the former spouse's testimony was improperly admitted was rejected as the spouse's former O.C.G.A. § 24-9-23 privilege ceased before the trial when the marriage was terminated by divorce. Young v. State, 280 Ga. 65, 623 S.E.2d 491, 2005 Ga. LEXIS 860 (2005) (decided under former O.C.G.A. § 24-9-23).

Harmless error abandoning privilege claim. — Defendant was unable to show prejudice from trial counsel's error in abandoning the ex-husband's claim of the spousal witness privilege because the error assured the admission of what was merely cumulative evidence and was, therefore, harmless since the record showed that evidence concerning the defendant's 2003 attack on a former boyfriend was admitted in the form of testimony from not only the ex-husband but also the ex-husband's cousin as well as a contemporary police report. Morgan v. State, 354 Ga. App. 754, 841 S.E.2d 430, 2020 Ga. App. LEXIS 216 (2020).

Spouse's forced testimony not reversible error. — Even if the trial court erred in compelling the defendant's wife to testify concerning an assault of the wife as a similar transaction, such error was not reversible since there was no reasonable possibility of a different verdict; in addition to the wife's testimony, the state also presented testimony of the defendant's girlfriend, the victim of defendant's assault, a neighbor who witnessed parts of the altercation, other corroborating witnesses, as well as evidence of prior difficulties between defendant and the girlfriend. Phillips v. State, 278 Ga. App. 439, 629 S.E.2d 130, 2006 Ga. App. LEXIS 350 (2006) (decided under former O.C.G.A. § 24-9-23).

Instructions to jury. — Defendant accused of voluntary manslaughter was entitled to a new trial since the trial court failed to give curative instructions to the jury following closing remarks by the state noting the failure of the defendant's spouse to testify. Ferry v. State, 161 Ga. App. 795, 287 S.E.2d 732, 1982 Ga. App. LEXIS 2042 (1982) (decided under former O.C.G.A. § 24-9-23).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 281 et seq.

C.J.S.

98 C.J.S. (Rev), Witnesses, §§ 227 et seq., 350 et seq.

ALR.

Rule rendering husband or wife incompetent as a witness for the other in a criminal case as changed without the aid of a statute expressly abrogating it or comprehensively removing disqualification of witnesses, 93 A.L.R. 1144.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 A.L.R.2d 1389.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 A.L.R.2d 570.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 A.L.R.2d 920.

Husband or wife as competent witness for or against co-offender with spouse, 90 A.L.R.2d 648.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 A.L.R.3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 A.L.R.3d 1285.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 A.L.R.4th 1104.

Communication between unmarried couple living together as privileged, 4 A.L.R.4th 422.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 A.L.R.4th 1305.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 A.L.R.4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases, 74 A.L.R.4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 74 A.L.R.4th 277.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 A.L.R.4th 694.

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither, 119 A.L.R.5th 275.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 23 A.L.R.6th 1.

Marital privilege under Rule 501 of Federal Rules of Evidence, 46 A.L.R. Fed 735.

24-5-504. Law enforcement officer or nonsworn employee of law enforcement agency testimony.

Any law enforcement officer or nonsworn employee of a law enforcement agency testifying in his or her official capacity in any criminal proceeding shall not be compelled to reveal his or her home address. Such officer or employee may be required to divulge the business address of his or her employer, and the court may require any law enforcement officer or nonsworn employee of a law enforcement agency to answer questions as to his or her home address whenever such fact may be material to any issue in the proceeding.

History.

Code 1981, § 24-5-504, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2023, p. 87, § 3/HB 139, effective July 1, 2023.

The 2023 amendment, effective July 1, 2023, inserted "or nonsworn employee of a law enforcement agency" in the first and second sentences and inserted "or employee" at the beginning of the second sentence.

RESEARCH REFERENCES

ALR.

Right to cross-examine witness as to his place of residence, 85 A.L.R.3d 541.

24-5-505. Party or witness privilege.

(a) No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

(b) Except in proceedings in which a judgment creditor or judgment creditor's successor in interest seeks postjudgment discovery involving a judgment debtor pursuant to Code Section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his or her estate.

(c) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment.

History.

Code 1981, § 24-5-505, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews.

For comment discussing the privilege against answers tending to disgrace but not incriminate, see 18 Ga. B.J. 88 (1955).

For comment, "The Government's Privilege to Withhold the Identity of Informers, as Applied to Decoys," see 20 Ga. B.J. 562 (1958).

For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978).

For article, "Caught Between a Rock and a Hard Place: Invocation of the Privilege Against Self-Incrimination in Civil Cases," see 15 (No. 1) Ga. St. B.J. 14 (2009).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, §§ 3102, 3814, 3870, former Civil Code 1895, §§ 3947, 3957, 5288, former Civil Code 1910, §§ 4544, 4554, 5877, former Code 1933, §§ 38-1102, 38-1205, 38-1711, Ga. L. 1978, p. 2000, § 1, and former O.C.G.A. § 24-9-27 are included in the annotations for this Code section.

Public policy underlying this privilege is to protect and encourage the flow of information to law enforcement officials. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, 1977 Ga. LEXIS 940 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Form for invoking privilege. — When it is plain from the context of the questioning in general that the plaintiff was invoking the Fifth Amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. Temple v. Temple, 228 Ga. 73, 184 S.E.2d 183, 1971 Ga. LEXIS 463 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

No waiver of privilege by speaking to investigators following accident. — In a widow's wrongful death suit arising out of a vehicle accident in which defendant driver was charged, the driver did not waive the driver's Fifth Amendment privilege by speaking to insurance investigators in the accident prior to the lawsuit being brought. U-Haul Co. of Arizona v. Rutland, 348 Ga. App. 738, 824 S.E.2d 644, 2019 Ga. App. LEXIS 87 (2019).

Self-incrimination and forfeiture provisions compared. — Self-incrimination privilege involved important policy and constitutional implications not applicable to the forfeiture privilege. Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290, 1977 Ga. App. LEXIS 2511 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness protected from indirect incrimination. — Protection was not limited to cases if the question or answer had a direct tendency to incriminate the defendant or to expose the defendant to a pen-

General Consideration (Cont'd)

alty or forfeiture; the defendant was protected from answering any question which may form a link in the chain by which such cases were to be established. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611, 1974 Ga. LEXIS 660 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness must explain silence. — Witness may not stand moot, but must testify that the answer would incriminate or tend to incriminate oneself, work a forfeiture of one's estate, or tend to bring infamy or disgrace or public contempt upon the witness or any member of one's family as the case may be, otherwise one would be in contempt. Wynne v. State, 139 Ga. App. 355, 228 S.E.2d 378, 1976 Ga. App. LEXIS 1802 (1976) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Inference may be drawn when privilege invoked. — Although a person does have a right to invoke the privilege in a civil case in order to protect oneself, when the person does so, an inference against the person's interest may be drawn by the factfinder. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611, 1974 Ga. LEXIS 660 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Jefferson Ins. Co. v. Dunn, 224 Ga. App. 732, 482 S.E.2d 383, 1997 Ga. App. LEXIS 137 (1997), rev'd in part, 269 Ga. 213, 496 S.E.2d 696, 1998 Ga. LEXIS 278 (1998), vacated in part, 232 Ga. App. 513, 498 S.E.2d 373, 1998 Ga. App. LEXIS 684 (1998) (decided under former O.C.G.A. § 24-9-27).

Privilege in civil suit. — Trial court's protective order was vacated and case remanded with instructions for the trial court to reconsider the renter's invocation of a Fifth Amendment privilege as the privilege pertained to each individual discovery request because the trial court did not evaluate the privilege with respect to requests to produce and such was necessary since the privilege can, but did not automatically apply to the act of producing documents. U-Haul Co. v. Rutland, 348 Ga. App. 738, 824 S.E.2d 644 (2019).

Appeal from motion to disclose identity of informant. — State was without authority to appeal from the grant of a motion to disclose the identity of the confidential informant because it was not among the enumerated instances set forth in O.C.G.A. § 5-7-1, nor was the order dispositive of the charges against the defendant. Glenn v. State, 271 Ga. 604, 523 S.E.2d 13 (decided under former O.C.G.A. § 24-9-27).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's identity was properly denied; while the defendant argued that the CI was a witness to whether or not the defendant consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. Little v. State, 280 Ga. App. 60, 633 S.E.2d 403, 2006 Ga. App. LEXIS 749 (2006) (decided under former O.C.G.A. § 24-9-27).

Trial court did not err in refusing the defendant's request to disclose the identity of a confidential informant in order to support an entrapment defense as the defendant was unable to present an arguably persuasive case regarding the lack of a predisposition to commit the crime based specifically on: (1) a discussion with a detective about the impending drug sale; (2) the defendant's act of displaying a weapon considered to be protection against a robbery; and (3) the defendant's act of coordinating the movements of the numerous participants in the large-scale transaction the defendant was a part of. Griffiths v. State, 283 Ga. App. 176, 641 S.E.2d 169, 2006 Ga. App. LEXIS 1516 (2006), cert. denied, No. S07C0652, 2007 Ga. LEXIS 333 (Ga. Apr. 24, 2007) (decided under former O.C.G.A. § 24-9-27).

Instructions. — It was not reversible error for the court to fail or refuse to instruct a witness of the existence of a law designed for the witness's own protection and not for the protection of another person who was on trial; whatever might be its effect if the witness were personally afterward put on trial, a third person,

against whom the witness testified, cannot complain that such witness was not so instructed. Guiffrida v. State, 61 Ga. App. 595, 7 S.E.2d 34, 1940 Ga. App. LEXIS 179 (1940) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the court instructed the witness as follows: "If at any time there's any question as to whether or not you should answer a question as possibly tending to incriminate you or as holding you up for public contempt, for public ridicule, you may have a right to refuse to answer it," there was no error, since the court gave the witness fair and adequate notice of the witness's privilege against self-incrimination. Wilbanks v. Wilbanks, 220 Ga. 665, 141 S.E.2d 161, 1965 Ga. LEXIS 599 (1965) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege against self-incrimination can be waived in praesenti. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723, 1980 Ga. LEXIS 1266 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Waiver of self-incrimination by property settlement agreement. — Privilege against self-incrimination can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723, 1980 Ga. LEXIS 1266 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Notice of waiver. — When a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723, 1980 Ga. LEXIS 1266 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Waiver by a witness at a former trial of the same case will not bar the witness's right to exercise the witness's privilege. Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794, 1896 Ga. LEXIS 424 (1896) (decided under former Civil Code 1895, §§ 3947, 3957, and 5288); Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377, 1971 Ga. LEXIS 859 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Party, though introduced as a witness in party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, decline to give testimony which would tend to incriminate the party, or to bring infamy, disgrace, or public contempt upon the witness or the witness's family, notwithstanding the fact that at a previous trial of the case the witness had waived the privilege of remaining silent as to these matters. A waiver of this kind is not binding upon a witness at a trial subsequent to that at which the waiver was made. Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818, 1966 Ga. LEXIS 491 (1966) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Self-Incrimination

Interest of the court in considering a refusal on the grounds of incrimination is not that the defendant may be criminally implicated by an answer but that the defendant might conceivably be so implicated. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586, 1977 Ga. App. LEXIS 2579 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege must be honored. — Questioned party's invocation of a constitutional privilege to be free from compulsion to testify against oneself must be honored. Eason v. Berger & Co., 153 Ga. App. 126, 264 S.E.2d 579, 1980 Ga. App. LEXIS 1705 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Incriminating effect can be under state or federal law. — Witness in a state court can claim the privilege against self-incrimination as to matters which might tend to incriminate the witness under either state or federal law. Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377, 1971 Ga. LEXIS 859 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege was personal to witness. — Privilege against self-incrimination was that of the person under examination

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as a witness, and was intended for the witness's protection only. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499, 1980 Ga. LEXIS 895, vacated in part, 449 U.S. 988, 101 S. Ct. 523, 66 L. Ed. 2d 285 (1980); Riley v. State, 257 Ga. 91, 355 S.E.2d 66, 1987 Ga. LEXIS 729 (1987) (decided under former O.C.G.A. § 24-9-27).

Privilege cannot be asserted in advance of the questions actually propounded in the examination or hearing. Chastain v. State, 113 Ga. App. 601, 149 S.E.2d 195, 1966 Ga. App. LEXIS 1150 (1966) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Indiscriminate assertion of privilege prohibited. — What was impermissible was that a defendant in a civil case merely slides out of the defendant's obligations by a brash assertion that any and all questions directed to the defendant would tend to incriminate the defendant, regardless of the likelihood of such result. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586, 1977 Ga. App. LEXIS 2579 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness required to answer if evidence was material. — Witness was required to answer questions tending to bring infamy, disgrace, or public contempt upon the witness or the witness's family, if the proposed evidence was material to the issues in the case; it was only if the proposed answer had no effect on the case except to impair the witness's credibility that the witness may fall back on the privilege. Brown v. State, 242 Ga. 536, 250 S.E.2d 438, 1978 Ga. LEXIS 1279 (1978) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Notice to witness of privilege. — It was not error for the trial court to allow the state to advise a defense witness before the witness testified regarding Miranda warnings and the witness's Fifth Amendment rights when, in an earlier statement, the witness detailed how the defendant had forced the witness to have sexual intercourse with the victim on three occasions creating the possibility that the witness could be charged with felony offenses. Allen v. State, 210 Ga. App. 447, 436 S.E.2d 559, 1993 Ga. App. LEXIS 1219 (1993), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-27).

Determining the possibility of incrimination. — When a question is propounded it belongs to the court to consider and to decide whether any direct answer to the question can implicate the witness. If this be decided in the negative, then the witness may answer the question without violating the privilege which is secured to the witness by law. If a direct answer to it may incriminate the witness, then the witness must be the sole judge what the witness's answer would be. The court cannot participate with the witness in this judgment. If the question be of such a description that the answer to the question may or may not incriminate the witness, according to the purport of that answer, it must rest with the witness, who alone can tell what it would be, to answer the question or not. If in such a case the witness says, upon the witness's oath, that the witness's answer would incriminate the witness, the court can demand no other testimony of the fact. Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818, 1966 Ga. LEXIS 491 (1966) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Wynne v. State, 139 Ga. App. 355, 228 S.E.2d 378, 1976 Ga. App. LEXIS 1802 (1976) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Baker v. State, 162 Ga. App. 606, 292 S.E.2d 451, 1982 Ga. App. LEXIS 2260 (1982) (decided under former O.C.G.A. § 24-9-27); Lawrence v. State, 257 Ga. 423, 360 S.E.2d 716, 1987 Ga. LEXIS 938 (1987) (decided under former O.C.G.A. § 24-9-27).

When a court cannot say that answers to questions concerning a defendant's financial resources and dealings might not tend to incriminate the defendant in any matter, under either state or federal law, a

trial judge does not err in allowing the defendant to determine whether answers to the interrogatories might tend to incriminate the defendant. Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377, 1971 Ga. LEXIS 859 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Mere say-so of the witness did not establish a substantial, real danger of incrimination: the defendant must also show the defendant had reasonable cause to apprehend danger of incrimination from the answer, and the court must first determine whether there was a proper basis for invoking the privilege. Prince & Paul v. Don Mitchell's WLAQ, Inc., 127 Ga. App. 502, 194 S.E.2d 269, 1972 Ga. App. LEXIS 927 (1972) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

In a civil action the burden was on the reneging defendant to consider each question separately and state the defendant's general reason for any refusal to answer, at which point the trial judge may decide either that the question might be incriminating under certain circumstances (whether or not the defendant had in fact committed any crime) or whether or not the line of questions as a whole, and as a matter of law, might so tend; the discretion of neither was absolute. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586, 1977 Ga. App. LEXIS 2579 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Trial court did not engage in the required analysis for a witness asserting a Fifth Amendment privilege, but merely declared that answering the questions concerning knowledge of the court's order regarding removing a child from a father's home would not incriminate the witness; at a minimum, such knowledge would establish a link in the chain of evidence needed to prove the witness was in contempt of that order and the trial court's finding of contempt based on the witness's refusal to answer the question was improper. In re Tidwell, 279 Ga. App. 734, 632 S.E.2d 690, 2006 Ga. App. LEXIS 685 (2006) (decided under former O.C.G.A. § 24-9-27).

Compelled production of documents did not violate self-incrimination privilege. — There was no blanket right to refuse to answer questions in civil proceedings based on the self-incrimination privilege, and since there was no transcript of the hearing at which the trial court made the court's finding that the privilege was not implicated, the appellate court presumed that evidence supported the trial court's finding and order compelling discovery; further, the trial court's order compelling an employee and the husband to produce financial documents such as checks, account statements, and tax returns in a civil proceeding did not violate the self-incrimination privilege. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77, 2006 Ga. App. LEXIS 367 (2006) (decided under former O.C.G.A. § 24-9-27).

Requiring suspect to verbalize specified words for identification purposes, whether or not the words used were the same as those allegedly used during the commission of the offense, did not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state's statutes and constitution. Clark v. State, 166 Ga. App. 366, 304 S.E.2d 494, 1983 Ga. App. LEXIS 2170 (1983) (decided under former O.C.G.A. § 24-9-27).

Trial court's refusal to allow questions as to sexual relations proper. — Trial court did not err by refusing an ex-husband's questions to his former wife seeking to determine whether she engaged in sexual intercourse with her live-in lover on the grounds of self-incrimination in an ex-husband's action to modify alimony payments. Hathcock v. Hathcock, 249 Ga. 74, 287 S.E.2d 19, 1982 Ga. LEXIS 728 (1982) (decided under former O.C.G.A. § 24-9-27).

Instruction to jury necessary if party refuses to answer questions about sexual relations. — Ex-wife litigant's refusal to incriminate herself by answering questions about her sexual relations with a live-in lover required the trial court to instruct the jury about the adverse inference the jury might wish to draw from such an answer. The failure to charge the jury left the jury without instructions as to the nature and effect of the legal basis for this adverse inference, and the error was harmful since proof of

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sexual intercourse between an ex-wife and the third party was the linch-pin of the former husband's case. Hathcock v. Hathcock, 249 Ga. 74, 287 S.E.2d 19, 1982 Ga. LEXIS 728 (1982) (decided under former O.C.G.A. § 24-9-27).

Prior testimony stricken when privilege invoked. — After a female witness was asked if she did not have children and she reluctantly replied in the affirmative and was then asked if she had ever been married, there was no error on the part of the court in instructing the witness that she need not answer the question, nor in ruling out the former answer, on her declining to answer the second question. Gravett v. State, 74 Ga. 191, 1884 Ga. LEXIS 367 (1884) (decided under former Code 1882, §§ 3107, 3814, and 3870).

Party as witness. — Party, though introduced as a witness in the party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, claim the party's privilege. Bishop v. Bishop, 157 Ga. 408, 121 S.E. 305, 1924 Ga. LEXIS 61 (1924) (decided under former Civil Code 1910, §§ 4544, 4554, and 5877).

Form for invoking privilege. — When it is plain from the context of the questioning in general that the plaintiff was invoking the Fifth Amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. Temple v. Temple, 228 Ga. 73, 184 S.E.2d 183, 1971 Ga. LEXIS 463 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Forfeiture of Estate

Determining the possibility of incrimination. — When a witness testifies under oath that the witness's answer to any question asked of the witness would incriminate the witness and come within the constitutional immunities guaranteed to the witness, the court can demand no further testimony of the fact. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Extensive questioning concerning financial affairs might tend to incriminate a person as a matter of law. In the particular situation of financial affairs, only the defendant or witness can weigh the effect. Busby v. Citizens Bank, 131 Ga. App. 738, 206 S.E.2d 640, 1974 Ga. App. LEXIS 1538 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege did not cover a pledge by the defendant not to reveal information. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586, 1977 Ga. App. LEXIS 2579 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege inapplicable when earning ability alone was threatened. — Forfeiture of estate objection, if it meant merely that answering would interfere with the defendant's mode of earning a living, was not acceptable. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586, 1977 Ga. App. LEXIS 2579 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); In re Manheim, 259 Ga. 791, 387 S.E.2d 330, 1990 Ga. LEXIS 7 (1990) (decided under former O.C.G.A. § 24-9-27).

Post-judgment discovery. — Former statute did not protect a person from answering financial questions on post-judgment discovery because such answer may tend to work a forfeiture of a person's estate. Any forfeiture would not result from answering the questions or producing documents, but rather as a result of the judgment already entered. First Fed. Sav. & Loan Ass'n v. Fisher, 422 F. Supp. 1, 1976 U.S. Dist. LEXIS 15740 (N.D. Ga. 1976) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290, 1977 Ga. App. LEXIS 2511 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

State Matters

Identity of informants need not be disclosed. — Ordinarily, one who acts in the capacity of a peace officer or connected therewith will not be required by the courts to disclose the name of their informants concerning a crime for which an

accused is being tried. Anderson v. State, 72 Ga. App. 487, 34 S.E.2d 110, 1945 Ga. App. LEXIS 615 (1945) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365, 1954 Ga. LEXIS 522 (1954) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Thomas v. State, 134 Ga. App. 18, 213 S.E.2d 129, 1975 Ga. App. LEXIS 1891 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332, 1976 Ga. App. LEXIS 1825 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727, 1977 Ga. LEXIS 939 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Burnett, 249 Ga. App. 334, 548 S.E.2d 443, 2001 Ga. App. LEXIS 505 (2001) (decided under former O.C.G.A. § 24-9-27).

Disclosure of an informer's name was not required under former O.C.G.A. § 24-9-27. Childs v. State, 158 Ga. App. 376, 280 S.E.2d 401, 1981 Ga. App. LEXIS 2214 (1981) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen the defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. Leonard v. State, 228 Ga. App. 792, 492 S.E.2d 747 (decided under former O.C.G.A. § 24-9-27).

No protection for testimony of eyewitness. — When the defendant was seeking the testimony of an eyewitness to the incident which formed the basis of the crimes charged, the witness was not subject to protection as a confidential informer and the defendant did not have the burden of proving the materiality or necessity of the witness's testimony. Swint v. State, 199 Ga. App. 515, 405 S.E.2d 333, 1991 Ga. App. LEXIS 514 (1991) (decided under former O.C.G.A. § 24-9-27).

In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. Turner v. State, 247 Ga. App. 775, 544 S.E.2d 765, 2001 Ga. App. LEXIS 120 (2001) (decided under former O.C.G.A. § 24-9-27).

Nondisclosure grounded in public policy. — Privilege of not disclosing sources of information in criminal cases is grounded in a sound public policy which recognizes the need for informants in the enforcement of the criminal laws and the further consideration that revelation of the identity of an informer destroys the informer's usefulness for any other cases. Stanford v. State, 134 Ga. App. 61, 213 S.E.2d 519, 1975 Ga. App. LEXIS 1904 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the possible testimony of an informant would be of minimal significance to a defendant and when the information provided was mere evidence tending to establish a public nuisance, the public policy in favor of nondisclosure of the informant's identify must control. Chancey v. Hancock, 233 Ga. 734, 213 S.E.2d 633, 1975 Ga. LEXIS 1429 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Absolute privilege against disclosure not permitted. — An absolute privilege against disclosure of the identity of every informer who supplied the information upon which an arrest was based was impermissible when a motion was made to disclose information favorable to the defendant. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, 1977 Ga. LEXIS 940 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Disclosure of informant's identity was discretionary with court. — Disclosure of the name, address, and the other information of an informant was not required as a matter of law, but rested in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. Taylor v. State, 136 Ga. App. 31, 220 S.E.2d 49, 1975 Ga. App. LEXIS 1235

State Matters (Cont'd)

(1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332, 1976 Ga. App. LEXIS 1825 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727, 1977 Ga. LEXIS 939 (1977); Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, 1977 Ga. LEXIS 940 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Hatcher v. State, 154 Ga. App. 770, 270 S.E.2d 16, 1980 Ga. App. LEXIS 2381 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Miller v. State, 163 Ga. App. 889, 296 S.E.2d 182, 1982 Ga. App. LEXIS 3268 (1982) (decided under former O.C.G.A. § 24-9-27).

Disclosure not warranted if informant is mere tipster. — If the state proves to the court's satisfaction that an informer is a pure tipster, who has neither participated in nor witnessed the offense, any evidence the informer might offer would be hearsay and inadmissible. Thus, the tipster's identity could not be material to the guilt or innocence of the defendant or be relevant and helpful to the defense. The public policy of the state toward nondisclosure would not be overcome and the state may rely on the privilege. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, 1977 Ga. LEXIS 940 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the interviewing officer testified that the tipster had no personal knowledge of the crime and was merely repeating the conversation of an unknown person the tipster had overheard at a party, and when the tipster's information was not supportable by any evidence the police were able to uncover, the state was empowered to refuse to identify the tipster on the ground that the tipster's contribution was not material to the defense on the issue of guilt or punishment. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, 1979 Ga. LEXIS 910, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, 1979 U.S. LEXIS 3232 (1979) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-27 (see now O.C.G.A. §§ 24-5-501 and 24-5-505), the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446, 2012 Ga. App. LEXIS 207 (2012) (decided under former O.C.G.A. § 24-9-27).

Disclosure not warranted if informant's life threatened. — If the district attorney objects to a question asking whether a "responsible citizen" in an affidavit is a particular person, and states that the lives of the informants had been threatened and requests the court not to require the witness to name them, there is no error in a court's refusing to disclose the name of the person who gave the information. Pass v. State, 227 Ga. 730, 182 S.E.2d 779, 1971 Ga. LEXIS 825 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Informant and decoy compared. — When a person merely takes an undercover police officer to a location and identifies, or introduces the officer to the defendant, and the officer arranges for and buys contraband from the defendant, and the person witnesses such sale, or alleged sale, such person is an informant and not a "decoy" and a disclosure of one's name, address, etc., to the defendant is not required as a matter of law but rests in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. Bell v. State, 141 Ga. App. 277, 233 S.E.2d 253, 1977 Ga. App. LEXIS 1869 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Miller v. State, 141 Ga. App. 382, 233 S.E.2d 460, 1977 Ga. App. LEXIS 1916 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Howard v. State, 144 Ga. App. 208, 240 S.E.2d 908, 1977 Ga. App. LEXIS 2638 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Court must hear evidence before ordering disclosure. — Mere refusal of the state to disclose the identity of an

informer does not authorize a trial judge to exercise the judge's discretion as to whether disclosure should be required when the judge hears no evidence as the judge was required to do under Ga. L. 1966, p. 567, § 13 (now O.C.G.A. § 17-5-30(b)). State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332, 1976 Ga. App. LEXIS 1825 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727, 1977 Ga. LEXIS 939 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Disclosure when informant was a witness or participant in trial. — See Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77, 1982 Ga. App. LEXIS 3122 (1982) (decided under former O.C.G.A. § 24-9-27).

Trial court exercised discretion in determining that the witness need not disclose the identity of the informer. — See Carter v. State, 168 Ga. App. 6, 308 S.E.2d 30, 1983 Ga. App. LEXIS 2654 (1983) (decided under former O.C.G.A. § 24-9-27).

Failure to compel disclosure of informant not error. — Trial court does not err in failing to compel the state to disclose an informant's identity in camera at a motion to suppress hearing. Miller v. State, 169 Ga. App. 552, 314 S.E.2d 120, 1984 Ga. App. LEXIS 1634 (1984) (decided under former O.C.G.A. § 24-9-27).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-1102, 38-1205, and 38-1711 are included in the annotations for this Code section.

Georgia Bureau of Investigation is not required to turn its files over to an investigating subcommittee of the United States Senate. 1954-56 Ga. Op. Att'y Gen. 336 (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Criminal Law — Need for Disclosure of identity of Informant, 33 POF2d 549.

C.J.S.

27 C.J.S., Discovery, §§ 5, 7, 24 et seq.

ALR.

Right to recover property held by public authorities as evidence for use in a criminal trial, 13 A.L.R. 1168.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 A.L.R. 749.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 A.L.R. 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 A.L.R. 143.

Footprint evidence as violating rule against self-defense, 64 A.L.R. 1089.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 A.L.R. 77.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 A.L.R. 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 A.L.R. 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 A.L.R. 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 A.L.R. 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 A.L.R. 911.

Right as against objection of one other than voter himself to consider testimony as to how he voted given by him after his claim of privilege had been erroneously overruled, 113 A.L.R. 1228.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 A.L.R. 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 A.L.R. 1208.

Testimony of incriminating character which witness as compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 A.L.R. 428.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R.2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 A.L.R.2d 388.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him, 24 A.L.R.2d 895.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 A.L.R.2d 1403.

Sufficiency of witness's claim of privilege against self-incrimination, 51 A.L.R.2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 A.L.R.2d 1030; 29 A.L.R.5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 A.L.R.2d 431.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 A.L.R.2d 830.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 A.L.R.2d 876.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262.

Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel, 90 A.L.R.2d 732.

Comment on accused's failure to testify, by counsel for codefendant, 1 A.L.R.3d 989.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 A.L.R.3d 1261.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 A.L.R.3d 906.

Propriety of requiring accused to give handwriting exemplar, 43 A.L.R.3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 A.L.R.3d 1413.

Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 A.L.R.3d 304.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 A.L.R.4th 368.

24-5-506. Privilege against self-incrimination; testimony of accused in criminal case.

(a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

(b) If an accused in a criminal proceeding wishes to testify and announces in open court his or her intention to do so, the accused may so testify. If an accused testifies, he or she shall be sworn as any other witness and, except as provided in Code Sections 24-6-608 and 24-6-609, may be examined and cross-examined as any other witness. The failure of an accused to testify shall create no presumption against the accused, and no comment shall be made because of such failure.

History.

Code 1981, § 24-5-506, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Testimony by defendant in pretrial hearing, § 17-7-28.

Law reviews.

For note, "Defendant as a Witness in a Criminal Proceeding," see 3 Mercer L. Rev. 335 (1952).

For comment criticizing Lovett v. State, 108 Ga. App. 478, 133 S.E.2d 595 (1963), as to right of accused to assistance of counsel in making an unsworn statement, see 15 Mercer L. Rev. 512 (1964).

For article on the effect of a conviction that is based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

For note on the Georgia right against self-incrimination, see 15 Ga. L. Rev. 1104 (1981).

For article, "Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the Supreme Court Decision in Winston v. Lee," see 37 Mercer L. Rev. 1005 (1986).

For annual survey on criminal law, see 71 Mercer L. Rev. 69 (2019).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — Prior to the 1962 amendment of former Code 1933, § 38-415, a defendant in a criminal case could not give sworn testimony but could make an unsworn statement in the defendant's behalf. Between 1962 and 1973, a defendant had the option of making an unsworn statement or giving sworn testimony. Effective July 1, 1973, unsworn statements were abolished. Although many of the cases noted below pertain to the making of unsworn statements, the notes have been retained as those cases seem to have continued validity under the present law.

In light of the similarity of the statutory provisions, decisions under former Ga. L. 1866, p. 138, § 2, former Ga. L. 1868, p. 24, § 1, former Code 1868, § 3798, former Code 1873, §§ 3854 and 4637, former Ga. L. 1874, § p. 22, § 1, former Ga. L. 1878-79, p. 53, § 1, former Code 1882, §§ 3854, 4637, former Penal Code 1895, §§ 1010, 1011, former Penal Code 1910, §§ 1036, 1037, former Code 1933, §§ 38-415 and 38-416, and former O.C.G.A. § 24-9-20 are included in the annotations for this Code section.

Constitutionality. — See Williams v. State, 220 Ga. 766, 141 S.E.2d 436, 1965 Ga. LEXIS 626 (1965) (decided under former Code 1933, §§ 38-415 and 38-416).

Grand jury proceedings. — Grand jury has no lawful right to call the accused before the grand jury while considering the bill of indictment against the accused, and swear or question the accused regarding such charge. It is against the public policy of this state. Jenkins v. State, 65 Ga. App. 16, 14 S.E.2d 594, 1941 Ga. App. LEXIS 233 (1941) (decided under former Code 1933, §§ 38-415 and 38-416).

Former statute was not relevant to a probation revocation hearing since such a hearing was not a criminal trial. Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790, 1963 Ga. App. LEXIS 895 (1963) (decided under former Code 1933, §§ 38-415 and 38-416).

Right to testify did not apply to hearing on motion to withdraw guilty plea. — Trial court did not deny the defendant's constitutional right to testify on the defendant's own behalf at the hearing on the defendant's motion to withdraw the defendant's guilty plea because the right to testify applied to a trial on the question of guilt or innocence, not to a hearing on a motion to withdraw a guilty plea. Lavendar v. State, 306 Ga. App. 257, 701 S.E.2d 892, 2010 Ga. App. LEXIS 908 (2010) (decided under former O.C.G.A. § 24-9-20).

Former statute not implicated when defendant not in police custody. — Because the defendant was not in police custody at the time of the defendant's secretly taped telephone conversation with a coconspirator, former O.C.G.A. § 24-9-20 was not implicated. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-9-20).

Testimony not under oath. — Defendant should not have testified without being under oath; however, because the defendant could not show that the defendant was harmed, the error did not require a new trial. Bell v. State, 226 Ga. App. 271, 486 S.E.2d 422, 1997 Ga. App. LEXIS 585 (1997), cert. denied, No. S97C1370, 1997 Ga. LEXIS 853 (Ga. Oct. 3, 1997) (decided under former O.C.G.A. § 24-9-20).

If defendant chose to testify in an effort to make defendant's prima facie case of justification, the defendant was subject to cross examination as are other witnesses. Walden v. State, 267 Ga. 162, 476 S.E.2d 259 (decided under former O.C.G.A. § 24-9-20).

When a defendant voluntarily testifies to matters on direct examination, the defendant can be cross-examined, and required to give a physical demonstration concerning the matters to which the defendant testified on direct examination. Scott v. State, 270 Ga. 93, 507 S.E.2d 728 (decided under former O.C.G.A. § 24-9-20).

Sobriety test. — Defendant was not in custody nor compelled by force or threats to perform roadside sobriety tests in violation of the defendant's right against self incrimination. Sisson v. State, 232 Ga. App. 61, 499 S.E.2d 422, 1998 Ga. App. LEXIS 574 (1998), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-9-20).

Self-Incrimination

1. In General

Defendant's right to testify. — Trial court did not err by allowing the defendant to testify at trial because, although the defendant contended that the defendant was not sufficiently competent to knowingly waive the right to remain silent, the record showed that experts found the defendant competent to stand trial prior to the proceedings; the trial court engaged in a full and extensive colloquy with the defendant about the right to remain silent before the defendant took the stand at trial; and the defendant rejected counsel's strong recommendation that the defendant should not testify; thus, the defendant knowingly waived the right against self-incrimination and exercised the right to testify at trial after being fully informed of the consequences. Owens v. State, 298 Ga. 813, 783 S.E.2d 611, 2016 Ga. LEXIS 264, cert. denied, 580 U.S. 860, 137 S. Ct. 143, 196 L. Ed. 2d 110, 2016 U.S. LEXIS 4872 (2016).

Failure to give Miranda warnings prior to DUI testing. — Arrestee was not, under Georgia constitutional or statutory law, entitled to Miranda warnings before deciding whether to submit to the state's request for an additional test of breath, blood, or urine. State v. Coe, 243 Ga. App. 232, 533 S.E.2d 104, 2000 Ga. App. LEXIS 447 (2000), overruled in part, Olevik v. State, 302 Ga. 228, 806 S.E.2d 505, 2017 Ga. LEXIS 898 (2017), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019)(overruling State v. Warmack, 230 Ga. App. 157, 495 S.E.2d 632, 1998 Ga. App. LEXIS 77 (1998)) (decided under former O.C.G.A. § 24-9-20).

Trial court's suppression of urine test results could not be sustained on the ground that Miranda warnings were not given to a DUI arrestee before the arrestee decided to submit to a urine test after taking a breath or blood test. State v. Coe, 243 Ga. App. 232, 533 S.E.2d 104, 2000 Ga. App. LEXIS 447 (2000), overruled in part, Olevik v. State, 302 Ga. 228, 806 S.E.2d 505, 2017 Ga. LEXIS 898 (2017), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (overruling State v. Warmack, 230 Ga. App. 157, 495 S.E.2d 632, 1998 Ga. App. LEXIS 77 (1998)) (decided under former O.C.G.A. § 24-9-20).

Officer's comment to defendant that "I'm just going to shut your car door so some other drunk doesn't take it off," was insufficient to cause a reasonable person to believe that defendant's detention would not have been temporary, and a trial court erred in excluding on the basis of a Miranda violation evidence of the results of roadside sobriety tests performed on defendant thereafter. State v. Pierce, 266 Ga. App. 233, 596 S.E.2d 725, 2004 Ga. App. LEXIS 346 (2004), cert. denied, No. S04C1255, 2004 Ga. LEXIS 772 (Ga. Sept. 7, 2004), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-9-20).

Noncustodial defendant. — Defendant whose license was taken and who was placed temporarily in a patrol car for the defendant's own safety was not in custody and, therefore, evidence of the defendant's statements was admissible as was evidence of the defendant's refusals to submit to alco-sensor and HGN tests and of the defendant's failure of other tests administered before the defendant's arrest. Turner v. State, 233 Ga. App. 413, 504 S.E.2d 229 (decided under former O.C.G.A. § 24-9-20).

After defendant was stopped for a traffic violation and before defendant's Miranda rights were read defendant was told that a DUI task force officer had been called because defendant was under suspicion of DUI, defendant was allowed to walk around, and was not placed in the back of the police car nor handcuffed, defendant's detention had not ripened into an arrest before the sobriety tests were conducted. Harper v. State, 243 Ga. App. 705, 534 S.E.2d 157, 2000 Ga. App. LEXIS 541 (2000) (decided under former O.C.G.A. § 24-9-20).

Striking testimony after claim. — When the defendant asserted a possessory interest in a suit case, the ownership of the suit case was not a collateral matter and was a proper subject of cross-examination but once the defendant claimed the

In General (Cont'd)

defendant's privilege against self-incrimination, it was proper to strike testimony concerning the case. Rasnake v. State, 164 Ga. App. 765, 298 S.E.2d 42, 1982 Ga. App. LEXIS 3345 (1982), cert. denied, 250 Ga. 544, 301 S.E.2d 287, 1983 Ga. LEXIS 595 (1983), cert. denied, 462 U.S. 1132, 103 S. Ct. 3114, 77 L. Ed. 2d 1368, 1983 U.S. LEXIS 628 (1983) (decided under former O.C.G.A. § 24-9-20).

Refusal to consent to urine test inadmissible. — In a prosecution for driving under the influence, when defendant was deprived by the totality of the inaccurate, misleading, and/or inapplicable information given to the defendant by the arresting officer of making an informed choice under the implied consent statute, the defendant's refusal to consent to a urine test was rendered inadmissible. State v. Leviner, 213 Ga. App. 99, 443 S.E.2d 688, 1994 Ga. App. LEXIS 471 (1994), cert. denied, No. S94C1258, 1994 Ga. LEXIS 940 (Ga. Sept. 9, 1994) (decided under former O.C.G.A. § 24-9-20).

Use of substances excreted from the body. — Use of a substance naturally excreted by the human body did not violate a DUI suspect's constitutional rights, and therefore there was no requirement that the suspect be informed of the suspect's right against self-incrimination by a police officer giving the suspect the implied consent notice. Nawrocki v. State, 235 Ga. App. 416, 510 S.E.2d 301 (decided under former O.C.G.A. § 24-9-20).

Evidence voluntarily produced from body cavity. — After a small piece of plastic containing cocaine residue was produced by defendant from a body cavity in acquiescence to a search warrant for the defendant's person while the defendant was in lawful detention, the evidence was admissible. Scott v. State, 216 Ga. App. 692, 455 S.E.2d 609, 1995 Ga. App. LEXIS 249 (1995) (decided under former O.C.G.A. § 24-9-20).

Implied consent warnings administered. — Implied consent warnings administered to motorists suspected of driving under the influence need not inform the motorists of the privilege against self-incrimination. Heller v. State, 234 Ga. App. 630, 507 S.E.2d 518 (decided under former O.C.G.A. § 24-9-20).

Field sobriety tests given to a person under arrest, without first giving a Miranda warning, were inadmissible under former O.C.G.A. § 24-9-20. State v. O'Donnell, 225 Ga. App. 502, 484 S.E.2d 313 (decided under former O.C.G.A. § 24-9-20).

After defendant agreed to submit to field sobriety tests, which defendant understood to be voluntary, defendant was not therefore under arrest and the results of the officer's investigation should not be suppressed because defendant was not given the Miranda warnings prior to the tests. Lyons v. State, 244 Ga. App. 658, 535 S.E.2d 841, 2000 Ga. App. LEXIS 762 (2000), cert. dismissed, No. S00C1834, 2000 Ga. LEXIS 799 (Ga. Oct. 20, 2000) (decided under former O.C.G.A. § 24-9-20).

Defendant was not in custody when the officer administered field sobriety tests, nor was defendant compelled by force or threats to perform roadside field sobriety tests in violation of defendant's right against self-incrimination; the officer's admonishment as defendant left the bar that defendant would be arrested if defendant drove was insufficient to turn the subsequent stop into a custody situation. State v. Foster, 255 Ga. App. 704, 566 S.E.2d 418, 2002 Ga. App. LEXIS 739 (2002), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-9-20).

Breath test results. — Admission into evidence of the defendant's consent to a chemical breath test and the results of that test did not violate the statute since, although the defendant was in custody, the defendant was not charged in a criminal proceeding when the defendant consented to take and took the chemical breath test. Scanlon v. State, 237 Ga. App. 362, 514 S.E.2d 876, 1999 Ga. App. LEXIS 386 (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in admitting the results of the defendant's portable alcosensor test because even though the defendant was in custody for purposes of Miranda, the portable test was adminis-

tered in response to a demand from the defendant, not the officer; thus, the situation was more akin to a spontaneous outburst from an unwarned suspect or a test conducted pursuant to the Georgia Implied Consent Statute, O.C.G.A. § 40-6-392. Hale v. State, 310 Ga. App. 363, 714 S.E.2d 19, 2011 Ga. App. LEXIS 567 (2011), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-9-20).

DNA tests. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with defendant's blood sample and with evidence retained from a prior rape prosecution that resulted in defendant's acquittal pursuant to former O.C.G.A. § 24-4-60 et seq. (see now O.C.G.A. § 35-3-160 et seq.) did not violate defendant's right against self-incrimination under former O.C.G.A. § 24-9-20(a). Fortune v. State, 300 Ga. App. 550, 685 S.E.2d 466, 2009 Ga. App. LEXIS 1222 (2009) (decided under former O.C.G.A. § 24-9-20).

Database match of DNA profile admissible. — Testimony concerning a CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555, 2011 Ga. App. LEXIS 491 (2011) (decided under former O.C.G.A. § 24-9-20).

Waiver of privilege. — Allowing a codefendant to give testimony regarding the substance of defendant's prior testimony at a probation revocation hearing, after defendant elected not to take the stand at trial, did not violate the defendant's privilege against self-incrimination since defendant waived the privilege by testifying voluntarily on the defendant's behalf at the prior hearing. Bobbitt v. State, 215 Ga. App. 131, 449 S.E.2d 674, 1994 Ga. App. LEXIS 1111 (1994) (decided under former O.C.G.A. § 24-9-20).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. Thompson v. State, 294 Ga. App. 363, 670 S.E.2d 152, 2008 Ga. App. LEXIS 1193 (2008) (decided under former O.C.G.A. § 24-9-20).

No coercion by requiring consent or refusal of breath test before allowing phone call. — Trial court's grant of appellee's motion in limine to suppress the results of a breath test was reversed because refusing to allow the appellee to make a phone call did not constitute coercion as there was no evidence to support the trial court's finding that the appellee's consent to the breath test was obtained after a DUI officer told the appellee that a call to the appellee's daughter could not be made unless the appellee took a breath test, so that finding was clearly erroneous. State v. Council, 348 Ga. App. 497, 823 S.E.2d 817, 2019 Ga. App. LEXIS 32 (2019).

2. Compelling Evidence

Courts should liberally construe provision against compelling the accused to be a witness against oneself, and refuse to permit any first or doubtful steps which may invade one's rights in this respect. Underwood v. State, 13 Ga. App. 206, 78 S.E. 1103, 1913 Ga. App. LEXIS 100 (1913) (decided under former Penal Code 1910, §§ 1036 and 1037).

Law embodies constitutional right against self-incrimination. Harris v. State, 237 Ga. 718, 230 S.E.2d 1, 1976 Ga. LEXIS 1370 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Law was governed by same standards as U.S. Const., amend. 5. Jordan v. State, 239 Ga. 526, 238 S.E.2d 69, 1977

Compelling Evidence (Cont'd)

Ga. LEXIS 1232 (1977) (decided under former Code 1933, §§ 38-415 and 38-416); Classic Art Corp. v. State, 245 Ga. 448, 265 S.E.2d 577, 1980 Ga. LEXIS 815 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Scope of statute. — Constitutional guarantee protects one from being compelled to furnish evidence against oneself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against one's will which is incriminating in its nature. Day v. State, 63 Ga. 667, 1879 Ga. LEXIS 311 (1879) (decided under former Code 1873, §§ 3854 and 4637); Calhoun v. State, 144 Ga. 679, 87 S.E. 893, 1916 Ga. LEXIS 72 (1916) (decided under former Penal Code 1910, §§ 1036 and 1037); Smith v. State, 17 Ga. App. 693, 88 S.E. 42, 1916 Ga. App. LEXIS 863 (1916) (decided under former Penal Code 1910, §§ 1036 and 1037); Walter v. State, 131 Ga. App. 667, 206 S.E.2d 662, 1974 Ga. App. LEXIS 1512 (1974).

Compelled evidence was inadmissible. — Evidence of guilt which a defendant, either directly or indirectly, was compelled to disclose was not admissible in a criminal prosecution against the defendant. Hughes v. State, 2 Ga. App. 29, 58 S.E. 390, 1907 Ga. App. LEXIS 262 (1907) (decided under former Penal Code 1905, §§ 1010 and 1011); Davis v. State, 4 Ga. App. 318, 61 S.E. 404, 1908 Ga. App. LEXIS 278 (1908) (decided under former Penal Code 1905, §§ 1010 and 1011).

Forcing defendant to submit to act permitted. — Although evidence may be compulsorily adduced from an accused, it was constitutionally impermissible to compel an accused to perform an act which resulted in the production of incriminating evidence; the distinction was between forcing an accused to do an act against the accused's will and requiring an accused to submit to an act; the latter "takes evidence from the defendant" and was constitutionally acceptable, the former compelled the defendant, in essence, to give evidence which violated an individual's right not to incriminate oneself. State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233, 1979 Ga. App. LEXIS 2808 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Although evidence may be compulsorily adduced from an accused, it was constitutionally impermissible to compel an accused to perform an act which resulted in the production of incriminating evidence. The distinction was between forcing an accused to do an act against one's will and requiring an accused to submit to an act. Hambrick v. State, 204 Ga. App. 668, 420 S.E.2d 308, 1992 Ga. App. LEXIS 973 (1992), cert. denied, No. S92C1274, 1992 Ga. LEXIS 729 (Ga. Sept. 11, 1992) (decided under former O.C.G.A. § 24-9-20).

Direct tendency to incriminate not required. — Protection was not limited to cases when the question or answer had a direct tendency to incriminate defendant, or to expose the defendant to a penalty or forfeiture; the defendant was protected from answering any question which may form a link in the chain by which such cases were to be established. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611, 1974 Ga. LEXIS 660 (1974) (decided under former Code 1933, §§ 38-415 and 38-416).

Provision applied when fine, forfeiture, or penalty involved. — In a proceeding against road commissioners for neglect of duty, it was error to compel the defendants to answer under oath questions, the answer to which may subject the defendants to a fine, forfeiture, or penalty. Bryan v. State, 40 Ga. 688, 1870 Ga. LEXIS 6 (1870) (decided under former Code 1868, § 3798).

Right applied during pendency of new trial motion. — In the trial of a codefendant, it was not error for the court to refuse to require a defendant who had been previously tried and convicted, and whose motion for new trial was then pending, to answer a question tending to incriminate that defendant. Stallings v. State, 136 Ga. 131, 70 S.E. 1015, 1911 Ga. LEXIS 439 (1911) (decided under former Penal Code 1910, §§ 1036 and 1037).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected the defendant to the self-incrimination choice once again, did

not preclude compelled testimony via immunity in the codefendant's trial. Lee v. State, 191 Ga. App. 882, 383 S.E.2d 366, 1989 Ga. App. LEXIS 858 (1989) (decided under former O.C.G.A. § 24-9-20).

Use of incriminating statement on second trial. — When a witness was informed that the witness would not be required to give any answer that would tend to incriminate the witness in reference to a given transaction, and the circumstances were such as to indicate that the witness appreciated the prejudicial effect that might result from an answer to a given question, the statement in the answer was admissible against the witness in a subsequent trial, although it tended to connect the witness with the transaction which was the foundation of the indictment upon which the witness was being tried. Davis v. State, 122 Ga. 564, 50 S.E. 376, 1905 Ga. LEXIS 260 (1905) (decided under former Penal Code 1895, §§ 1010 and 1011).

Witness decided whether question was incriminating. — When the witness was otherwise competent, the witness may decline to answer questions which tend to incriminate the witness; and in this event the witness, and not the judge, was to determine whether the answer to the question propounded to the witness will have the effect of subjecting the witness to punishment for crime. Empire Life Ins. Co. v. Einstein, 12 Ga. App. 380, 77 S.E. 209, 1913 Ga. App. LEXIS 576 (1913) (decided under former Penal Code 1910, §§ 1036 and 1037); see also Wilburn v. State, 141 Ga. 510, 81 S.E. 444, 1914 Ga. LEXIS 24 (1914).

Defendant compelled to reenact crime. — It was erroneous to admit testimony that the accused, while in the custody of the sheriff under arrest made without a warrant, was carried by the sheriff to the house alleged to have been burglarized, and there placed by the sheriff in a position at a window through which the house had been entered, and in which position an occupant of the house claimed to be able to identify the accused as the burglar, although the occupant was unable to do so before the accused was placed in this position, and that the sheriff placed the accused there at the occupant's request, for the purpose of enabling the occupant to identify the accused as the burglar. Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076, 1913 Ga. App. LEXIS 779 (1913) (decided under former Penal Code 1910, §§ 1036 and 1037).

To compel handwriting exemplar was to impermissibly compel the defendant to do an act, not to submit to an act. State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233, 1979 Ga. App. LEXIS 2808 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant was asked to submit to a handwriting exemplar act, which defendant readily agreed to do and was not compelled to do so, there was no violation of the Georgia constitutional right nor of subsection (a) of former O.C.G.A. § 24-9-20. Hambrick v. State, 204 Ga. App. 668, 420 S.E.2d 308, 1992 Ga. App. LEXIS 973 (1992), cert. denied, No. S92C1274, 1992 Ga. LEXIS 729 (Ga. Sept. 11, 1992) (decided under former O.C.G.A. § 24-9-20).

Removal of bullet from defendant. — Constitutional rights of defendant were not violated by the state in requiring removal of a bullet from the defendant's body. Creamer v. State, 229 Ga. 511, 192 S.E.2d 350, 1972 Ga. LEXIS 668 (1972), cert. dismissed, Creamer v. Georgia, 410 U.S. 975, 93 S. Ct. 1454, 35 L. Ed. 2d 709, 1973 U.S. LEXIS 3120 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

Compulsion by threat of force. — When a police officer compelled the defendant to produce, against the will of the defendant, illegal lottery tickets by threat and by placing the officer's hand on a pistol, the method of forcing defendant to produce this evidence violated defendant's constitutional rights in that it compelled the defendant to produce evidence to incriminate oneself. Grant v. State, 85 Ga. App. 610, 69 S.E.2d 889, 1952 Ga. App. LEXIS 796 (1952) (decided under former Code 1933, §§ 38-415 and 38-416).

Drug testing provision of probationary sentence. — Defendant's probation officer was authorized to request defendant to produce a blood specimen for analysis under the terms of a drug testing provision of defendant's probationary sentence. Toth v. State, 213 Ga. App. 247, 444

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S.E.2d 159, 1994 Ga. App. LEXIS 530 (1994) (decided under former O.C.G.A. § 24-9-20).

Submitting to blood-alcohol tests. — Since, under the Constitution of Georgia, the state may constitutionally take a blood sample from a defendant without the defendant's consent, O.C.G.A. §§ 40-5-55 and 40-6-392 grant, rather than deny, a right to a defendant by providing for refusal to take such a test. Allen v. State, 254 Ga. 433, 330 S.E.2d 588, 1985 Ga. LEXIS 740 (1985) (decided under former O.C.G.A. § 24-9-20).

Choice provided to a DUI defendant under Georgia law—submitting to a blood-alcohol test or refusing to submit, with resultant sanctions—was not so painful, dangerous, or severe, or so violative of religious beliefs, that no choice actually existed, and did not amount to compulsion on behalf of the state or a violation of due process. Allen v. State, 254 Ga. 433, 330 S.E.2d 588, 1985 Ga. LEXIS 740 (1985) (decided under former O.C.G.A. § 24-9-20).

Miranda like warnings not required for persons arrested for DUI before asking to submit to breath test. — Supreme Court of Georgia held that neither Georgia's right against compelled self-incrimination, Georgia's right to due process, nor Georgia's statute prohibiting compelled self-incrimination, O.C.G.A. § 24-5-506, requires law enforcement to provide Miranda warnings to persons arrested for DUI before asking a person to submit to a breath test. State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019).

Grant of the defendant's motion to suppress based on the officer not providing a Miranda warning before seeking consent for a breath sample was vacated because the state successfully argued that the Georgia Supreme Court's recent decision in State v. Turnquest, 305 Ga. 758 (2019) overruled Price v. State, 269 Ga. 222 (1998) and, thus, neither O.C.G.A. § 24-5-506(a) nor the Georgia Constitution required law enforcement to warn suspects in custody of the suspect's right to refuse to perform an incriminating act. State v. Blazek, 353 Ga. App. 127, 836 S.E.2d 213, 2019 Ga. App. LEXIS 670 (2019).

Field sobriety tests may be asked of noncustodial defendant. — There was no violation of defendant's right against self-incrimination since the defendant was not formally arrested until after the field sobriety test. Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498, 1992 Ga. App. LEXIS 879 (1992), cert. denied, No. S92C1162, 1992 Ga. LEXIS 675 (Ga. July 16, 1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127, 1993 U.S. LEXIS 93 (1993); State v. Sumlin, 224 Ga. App. 205, 480 S.E.2d 260 (decided under former O.C.G.A. § 24-9-20).

Driver could not assert right against self-incrimination to suppress results of field sobriety test, since the driver was not a person "charged in a criminal proceeding" at the time the test was given, the driver was not in police custody at that time, and no force or threat of penalty was used against the driver. Montgomery v. State, 174 Ga. App. 95, 329 S.E.2d 166, 1985 Ga. App. LEXIS 2695 (1985) (decided under former O.C.G.A. § 24-9-20); Keenan v. State, 263 Ga. 569, 436 S.E.2d 475, 1993 Ga. LEXIS 801 (1993), overruled in part, Ammons v. State, 315 Ga. 149, 880 S.E.2d 544, 2022 Ga. LEXIS 295 (2022) (decided under former O.C.G.A. § 24-9-20); Bravo v. State, 249 Ga. App. 433, 548 S.E.2d 129, 2001 Ga. App. LEXIS 516 (2001), cert. denied, No. S01C1267, 2001 Ga. LEXIS 704 (Ga. Sept. 7, 2001) (decided under former O.C.G.A. § 24-9-20).

Alco-sensor screening. — Defendant's refusal to submit to the alco-sensor screening could be admitted without proof that the device had been approved by the Georgia Bureau of Investigation. Johnson v. State, 268 Ga. App. 426, 602 S.E.2d 177, 2004 Ga. App. LEXIS 940 (2004) (decided under former O.C.G.A. § 24-9-20).

Alphabet test and physical dexterity tests were not inadmissible under the Fifth Amendment of the United States Constitution because those tests were not evidence of a testimonial or communicative nature. Smith v. State, 202 Ga. App. 701, 415 S.E.2d 495, 1992 Ga. App. LEXIS 169 (1992), overruled in part, State v. O'Donnell, 225 Ga. App. 502, 484 S.E.2d

313, 1997 Ga. App. LEXIS 442 (1997) (decided under former O.C.G.A. § 24-9-20); Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498, 1992 Ga. App. LEXIS 879 (1992), cert. denied, No. S92C1162, 1992 Ga. LEXIS 675 (Ga. July 16, 1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127, 1993 U.S. LEXIS 93 (1993).

Blood and urine analysis admissible. — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or former O.C.G.A. § 24-9-20(a) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190, 2011 Ga. LEXIS 823 (2011) (decided under former O.C.G.A. § 24-9-20).

Defendant who entered plea of nolo contendre could not be forced to testify in the sentencing hearing. Fuller v. State, 244 Ga. App. 618, 536 S.E.2d 296, 2000 Ga. App. LEXIS 811 (2000) (decided under former O.C.G.A. § 24-9-20).

Nontestifying defendant need not be advised of right. — Since defendant did not testify and was not cross-examined, there was no harm in the trial court's failure to advise defendant of the defendant's right not to be compelled to testify under oath. Coonce v. State, 171 Ga. App. 20, 318 S.E.2d 763, 1984 Ga. App. LEXIS 2085 (1984) (decided under former O.C.G.A. § 24-9-20).

Grand jury testimony. — Trial court committed reversible error by granting defendant's plea in abatement to an indictment charging defendant with reckless conduct, based on the ground that defendant was forced by the grand jury to give testimony against oneself, where the only proposed indictment before the grand jury at the time defendant was called as a witness was for the offense of feticide, allegedly committed by defendant's spouse, and the defendant did not claim defendant's privilege against self-incrimination. State v. Butler, 177 Ga. App. 594, 340 S.E.2d 214, 1986 Ga. App. LEXIS 1485 (1986) (decided under former O.C.G.A. § 24-9-20).

Burden on defendant to show self-incrimination. — When three defendants, one of whom was plaintiff in error, were charged in the indictment with arson, and that defendant's name along with six other names appeared on the back of the indictment, there was no presumption that the defendant was examined against oneself, and the burden was on the defendant to show that the defendant gave evidence to incriminate oneself. Cowart v. State, 51 Ga. App. 199, 179 S.E. 823, 1935 Ga. App. LEXIS 625 (1935) (decided under former Code 1933, §§ 38-415 and 38-416).

Jury instructions. — It was proper for the court to give a charge on defendant's failure to testify without a request and it was not reversible error to fail to give the charge if defendant did not request the charge. Stapleton v. State, 235 Ga. 513, 220 S.E.2d 269, 1975 Ga. LEXIS 918 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

Waiver. — If a defendant is fully apprised of the defendant's Fifth Amendment rights by the trial judge and by the defendant's attorney prior to the defendant's taking the stand for cross-examination, any objection to the procedure must be considered as waived at trial. Everett v. State, 238 Ga. 80, 230 S.E.2d 882, 1976 Ga. LEXIS 1107 (1976) (decided under former Code 1933, §§ 38-415 and 38-416).

3. Comments

It was error for a prosecutor to comment to the jury on defendant's exercise of the defendant's constitutional right to remain silent. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460, 1979 Ga. App. LEXIS 2875 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Rigid adherence to rule. — Rule that defendant's failure to make a statement cannot be commented upon has been rigidly adhered to since it was laid down in Bennet v. State, 86 Ga. 401, 12 S.E. 806, 22 Am. St. R. 465, 12 L.R.A. 449 (1890); Moore v. State, 10 Ga. App. 805, 74 S.E. 315, 1912 Ga. App. LEXIS 702 (1912) (decided under former Penal Code 1910, §§ 1036 and 1037).

Rule applied to judge as well as prosecutor. — Law prohibited any com-

Comments (Cont'd)

ment on the failure of defendant to testify in a criminal case; this inhibition applied to both the prosecutor and judge. Thomas v. State, 234 Ga. 615, 216 S.E.2d 859, 1975 Ga. LEXIS 1201 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment by prosecutor cuts down on privilege against self-incrimination by making its assertion costly. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527, 1977 Ga. LEXIS 803 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Rule applies only if defendant fails to testify. — Statutory prohibitions upon comment on defendant's failure to testify are applicable only when defendant fails to testify. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527, 1977 Ga. LEXIS 803 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Former statute plainly prohibited any attempt to discredit defendant in the eyes of the jury by the making of any comment upon the exercise of defendant's right not to be sworn. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280, 1971 Ga. App. LEXIS 1168 (1971) (decided under former Code 1933, §§ 38-415 and 38-416).

What was prohibited was a comment on the failure to testify. Roberts v. State, 231 Ga. 395, 202 S.E.2d 43, 1973 Ga. LEXIS 717 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

What was prohibited was a comment that the defendant could have denied, explained, or otherwise disputed the state's case against the defendant. Woodard v. State, 234 Ga. 901, 218 S.E.2d 629, 1975 Ga. LEXIS 1321 (1975) (decided under former Code 1933, §§ 38-415 and 38-416); Graham v. State, 156 Ga. App. 538, 275 S.E.2d 114, 1980 Ga. App. LEXIS 3114 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Remarks made by the court to defendant in presence of jury which serve to invite attention and emphasize the defendant's failure to defend oneself under oath were precisely what the statute prohibited, even if the remarks were intended to insure that defendant understood defendant's rights. Roberts v. State, 231 Ga. 395, 202 S.E.2d 43, 1973 Ga. LEXIS 717 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

Indirect reference to defendant's silence. — When the district attorney directly referred to silence as an indication of guilt, error had obviously been committed; when an indirect reference to this fact was made a more marginal question was involved. Redding v. State, 151 Ga. App. 140, 259 S.E.2d 146, 1979 Ga. App. LEXIS 2468 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's comments were not on defendant's silence. — Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617, 2010 Ga. LEXIS 842 (2010) (decided under former O.C.G.A. § 24-9-20).

Reference to defendant's contentions through counsel or by defendant's plea was not a comment on defendant's failure to testify. Bailey v. State, 142 Ga. App. 202, 235 S.E.2d 650, 1977 Ga. App. LEXIS 1542 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on failure to rebut incriminating evidence. — Prosecution was not permitted to refer to the fact that defendant had not made a statement, but may properly comment upon the fact that defendant had failed to adduce testimony in rebuttal of evidence introduced by the state, tending to show defendant's guilt. Saffold v. State, 11 Ga. App. 329, 75 S.E. 338, 1912 Ga. App. LEXIS 388 (1912) (decided under former Penal Code 1910, §§ 1036 and 1037); see also Caesar v. State, 125 Ga. 6, 53 S.E. 815, 1906 Ga. LEXIS 9 (1906); Battle v. State, 155 Ga.

App. 541, 271 S.E.2d 679, 1980 Ga. App. LEXIS 2665 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

It was not error for the prosecutor to reflect upon failure of the defense to present any evidence to rebut the proof adduced by the state. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31, 1981 Ga. App. LEXIS 1872 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

Trial judge did not violate former O.C.G.A. § 24-9-20 when the court's instruction given prior to the closing statements by either side merely informed the jury of the general procedure to be followed and did not amount to a comment on the defendant's failure to testify and defendant raised no objection. Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444, 1981 Ga. App. LEXIS 1979 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on failure of defendant as witness to rebut evidence. — When defendant testifies in defendant's own behalf, there is no violation of U.S. Const., amend. 5 when the district attorney comments upon defendant's failure, when the defendant testified, to explain or deny the testimony of particular witnesses. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527, 1977 Ga. LEXIS 803 (1977).

Prosecutor's statement that defendant had no excuse constituted an impermissible comment upon defendant's failure to testify. Spann v. State, 126 Ga. App. 370, 190 S.E.2d 924, 1972 Ga. App. LEXIS 1153 (1972) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's statement that only two people knew what went on in the room where an assault occurred, the victim and the defendant, did not violate defendant's rights against self-incrimination. Neal v. State, 198 Ga. App. 518, 402 S.E.2d 114, 1991 Ga. App. LEXIS 140 (1991) (decided under former O.C.G.A. § 24-9-20).

Prosecutor's comment that defendant "didn't take the stand" was an improper comment on defendant's failure to testify under former O.C.G.A., § 24-9-20(b). Raheem v. State, 275 Ga. 87, 560 S.E.2d 680, 2002 Ga. LEXIS 167 (2002), cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429, 2002 U.S. LEXIS 8372 (2002), overruled in part, Patel v. State, 282 Ga. 412, 651 S.E.2d 55, 2007 Ga. LEXIS 585 (2007) (decided under former O.C.G.A. § 24-9-20).

Impermissible comment mitigated by ample alternative evidence. — Since defendant offered no evidence on a robbery trial and the statement of the district attorney in closing argument was that the testimony of the victim stood unrefuted, this language did not constitute reversible error if other evidence was ample to support a guilty verdict. Redding v. State, 151 Ga. App. 140, 259 S.E.2d 146, 1979 Ga. App. LEXIS 2468 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment that defendant's testimony would exculpate codefendant. — Statement by counsel for codefendant when counsel sought to call defendant as a witness after objection was sustained was not a prohibited comment since counsel said that nothing would come from counsel's questions that would do anything other than exculpate the codefendant. Graham v. State, 156 Ga. App. 538, 275 S.E.2d 114, 1980 Ga. App. LEXIS 3114 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's acknowledgement that defendant had the right to present evidence and subpoena witnesses was not a comment upon defendant's failure to testify. Hutchinson v. State, 179 Ga. App. 485, 347 S.E.2d 315, 1986 Ga. App. LEXIS 1947 (1986) (decided under former O.C.G.A. § 24-9-20).

Prosecutor's questions constituted an improper comment upon the criminal defendant's failure to produce evidence. Creamer v. State, 168 Ga. App. 790, 310 S.E.2d 560, 1983 Ga. App. LEXIS 2923 (1983) (decided under former O.C.G.A. § 24-9-20); Brewster v. State, 205 Ga. App. 770, 424 S.E.2d 8, 1992 Ga. App. LEXIS 1389 (1992) (decided under former O.C.G.A. § 24-9-20).

Comment on failure to take test proper. — Prosecutor's comment on the defendant's failure to take a chemical test at the time of defendant's arrest was not an impermissible reference to the defendant's right to remain silent under the

Comments (Cont'd)

Fifth Amendment and was a proper subject for comment in closing argument. Givens v. State, 199 Ga. App. 709, 405 S.E.2d 898, 1991 Ga. App. LEXIS 601 (1991) (decided under former O.C.G.A. § 24-9-20).

Proper instructions. — Charge that the jury was to make no assumption or draw any conclusions from defendant's failure to testify would not have been error. Woodard v. State, 234 Ga. 901, 218 S.E.2d 629, 1975 Ga. LEXIS 1321 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

It was permissible for the trial court to charge that the jury was to make no assumption or draw any conclusions from defendant's failure to testify. Also permissible would be a charge that defendant's failure to testify created no presumption against the defendant and the burden of proving defendant's guilt beyond a reasonable doubt cannot be presumed to be carried because of the defendant's failure to testify. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460, 1979 Ga. App. LEXIS 2875 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

It was error for court to deny defendant's request for a charge that the defendant's failure to testify created no presumption against the defendant. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460, 1979 Ga. App. LEXIS 2875 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Impermissible comment cured by instructions. — While counsel for the state should not argue to the jury from the omission of defendant to make a statement, the effect of such impropriety may be obviated by an appropriate charge from the court. Robinson v. State, 82 Ga. 535, 9 S.E. 528, 1889 Ga. LEXIS 287 (1889) (decided under former Code 1882, §§ 3854 and 4637); see also Minor v. State, 120 Ga. 490, 48 S.E. 198, 1904 Ga. LEXIS 608 (1904).

After one of the state's counsel remarked that defendant did not even make a statement in the defendant's own behalf, and the court immediately rebuked counsel and thereafter during the charge instructed the jury that it should not take into consideration the fact that the defendant did or did not make a statement, the refusal of the trial court to grant a mistrial would not be reversed. Parks v. State, 208 Ga. 508, 67 S.E.2d 716, 1951 Ga. LEXIS 423 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence of Character or Other Crimes

1. In General

Nature of good character defense. — Defense of good character, which the law designated as a substantive fact, and which may itself alone be sufficient to generate a reasonable doubt, was that reputation for good character which surrounded the defendant previous to the transaction under consideration; it was the reputation for previous good character. Eidson v. State, 66 Ga. App. 765, 19 S.E.2d 373, 1942 Ga. App. LEXIS 300 (1942) (decided under former Code 1933, §§ 38-415 and 38-416).

Probative connection required. — Evidence of prior difficulties between the defendant and the alleged victim was not admissible because the evidence did not have a probative connection with the incident giving rise to the case being tried. Carr v. State, 267 Ga. 701, 482 S.E.2d 314, 97 Fulton County D. Rep. 819, 1997 Ga. LEXIS 104 (decided under former O.C.G.A. § 24-9-20). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155.

Character evidence generally inadmissible. — Evidence regarding the character of a defendant was generally inadmissible unless the defendant put the defendant's character in issue, and evidence of independent offenses committed by a defendant was generally inadmissible due to its inherently prejudicial nature and minimal probative value. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813, 1992 Ga. App. LEXIS 1037 (1992) (decided under former O.C.G.A. § 24-9-20).

In criminal trials, state cannot introduce evidence of defendant's character unless the defendant had personally first put it in issue; the state may then disprove or rebut, by competent evidence,

that which the defendant had seen cause to assert. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92, 1935 Ga. App. LEXIS 128 (1935), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758, 1940 Ga. App. LEXIS 658 (1940) (decided under former Code 1933, §§ 38-415 and 38-416); Posey v. State, 152 Ga. App. 216, 262 S.E.2d 541, 1979 Ga. App. LEXIS 2874 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

In a criminal case, the state cannot rebut or question the presumption of the defendant's good character unless the defendant discards the presumption thus afforded and elects to put the defendant's actual character in issue by evidence or by the defendant's statement to the jury. Murray v. State, 157 Ga. App. 596, 278 S.E.2d 2, 1981 Ga. App. LEXIS 1926 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

State cannot rebut or question the presumption of a defendant's good character unless the defendant first chose to place the defendant's character in issue. Arnold v. State, 193 Ga. App. 206, 387 S.E.2d 417, 1989 Ga. App. LEXIS 1366 (1989) (decided under former O.C.G.A. § 24-9-20).

Unless and until the accused introduced evidence of the accused's own character or reputation, the state could not show that the accused's general reputation for peaceableness and violence was bad, and evidence of the accused's general reputation for violence was legally irrelevant and the testimony was inadmissible. Ledford v. State, 202 Ga. App. 694, 415 S.E.2d 693, 1992 Ga. App. LEXIS 134 (1992) (decided under former O.C.G.A. § 24-9-20).

Impeachment by cross-examination. — Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination had voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits of defendant's character, was not prohibited. Butts v. State, 193 Ga. App. 824, 389 S.E.2d 395, 1989 Ga. App. LEXIS 1678 (1989) (decided under former O.C.G.A. § 24-9-20).

Even though defendant did not, merely by volunteering that defendant had been incarcerated, put defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, defendant nevertheless raised an issue which could be fully explored by the state on cross-examination. Wilkey v. State, 215 Ga. App. 354, 450 S.E.2d 846, 1994 Ga. App. LEXIS 1236 (1994) (decided under former O.C.G.A. § 24-9-20); Roman v. State, 245 Ga. App. 225, 537 S.E.2d 684, 2000 Ga. App. LEXIS 923 (2000) (decided under former O.C.G.A. § 24-9-20).

Testimony of defendant on direct examination regarding prior criminal conduct did not place defendant's character in issue, but did raise issues which could be fully explored by the state on cross-examination. Franklin v. State, 224 Ga. App. 578, 481 S.E.2d 852 (decided under former O.C.G.A. § 24-9-20).

Evidence that defendant knew that defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted defendant's testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in allowing the evidence to impeach defendant's testimony. Cooper v. State, 272 Ga. App. 209, 612 S.E.2d 42, 2005 Ga. App. LEXIS 247 (2005) (decided under former O.C.G.A. § 24-9-20).

Proof of other crimes to show bad character generally. — Proof of other crimes was never admissible (except in cases when defendant has personally put one's character in issue) when its chief or only probative value consisted in showing that defendant was, by reason of defendant's bad character (demonstrated through a criminal career), more likely to have committed the crime than defendant otherwise would have been; to admit such evidence, it must have relevancy and probative value from some other point of view. Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724, 1947 Ga. App. LEXIS 430 (1947) (decided under former Code 1933, §§ 38-415 and 38-416); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650, 1980 Ga. App. LEXIS 2646 (1980) (decided un-

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der former Code 1933, §§ 38-415 and 38-416).

Good character was a substantive fact, like any other fact tending to establish defendant's innocence, and ought to be so regarded by the court and jury; like all other facts proved in the case, it should be weighed and estimated by the jury, for it may render that doubtful which otherwise would be clear. Sims v. State, 84 Ga. App. 753, 67 S.E.2d 254, 1951 Ga. App. LEXIS 785 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Good character may of itself generate reasonable doubt in the minds of the jury as to defendant's guilt, and for this reason defendant was allowed when defendant saw fit to offer defendant's good character in issue. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92, 1935 Ga. App. LEXIS 128 (1935), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416); Walker v. State, 199 Ga. 418, 34 S.E.2d 446, 1945 Ga. LEXIS 314 (1945) (decided under former Code 1933, §§ 38-415 and 38-416); Sims v. State, 84 Ga. App. 753, 67 S.E.2d 254, 1951 Ga. App. LEXIS 785 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence admissible despite tendency to introduce character. — Evidence showing intent, motive, plan, scheme, and bent of mind was admissible although such evidence may also place in issue the character of the defendant. Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475, 1980 Ga. App. LEXIS 2048 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence admissible to show motive was not rendered inadmissible because it incidentally placed the defendant's character in issue. Brock v. State, 179 Ga. App. 519, 347 S.E.2d 230, 1986 Ga. App. LEXIS 1959 (1986) (decided under former O.C.G.A. § 24-9-20).

Defendant's response about whether it took a long time to make a drug transaction did not place defendant's character in issue since the defendant only hypothetically referred to a criminal act; such testimony was relevant to the alibi defense maintained by the defendant at the hearing and was not evidence of general bad character admitted in violation of subsection (b) of former O.C.G.A. § 24-9-20. Johnson v. State, 204 Ga. App. 277, 419 S.E.2d 118, 1992 Ga. App. LEXIS 843 (1992) (decided under former O.C.G.A. § 24-9-20).

Evidence that was material in explaining the conduct of the witness did not become inadmissible simply because defendant's character was incidentally put in issue. Hall v. State, 264 Ga. 85, 441 S.E.2d 245, 1994 Ga. LEXIS 143 (1994) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for simple assault, rape and battery, although defendant did not place defendant's character in question when defendant testified on cross-examination that "it wasn't in my nature to hurt [the victim]," testimony of a police officer that the officer had dealt with defendant two or three times, and that one time it took four officers to control defendant without their getting hurt, was admissible to prove the falsity of defendant's specific testimony. Height v. State, 214 Ga. App. 570, 448 S.E.2d 726, 1994 Ga. App. LEXIS 969 (1994) (decided under former O.C.G.A. § 24-9-20).

Testimony of the only witness who could identify defendant that the witness had spent time in jail with defendant was admissible. Kellibrew v. State, 239 Ga. App. 783, 521 S.E.2d 921 (decided under former O.C.G.A. § 24-9-20).

Testimony of victim that, before shooting the victim, defendant stated that defendant "can't go back to jail" was clearly admissible as part of the res gestae even if such evidence incidentally placed defendant's character in evidence. Kellibrew v. State, 239 Ga. App. 783, 521 S.E.2d 921 (decided under former O.C.G.A. § 24-9-20).

Evidence of defendant's financial problems and money mismanagement was admissible to show defendant's alleged financial motive for the murders of defendant's children by burning down defendant's trailer, and evidence about defendant's marital problems and romantic relationships was admissible to show that

defendant viewed the children as a source of friction between defendant and a girlfriend and to establish how defendant's wife and previous live-in girlfriend were able to see the relationship with the girlfriend, hear defendant's threats towards the children, and see how defendant treated the children; testimony as to prior difficulties between defendant and defendant's children, such as threats to kill the children made to other people and defendant's indifference to the children's welfare, was admissible to show motive and intent. Riley v. State, 278 Ga. 677, 604 S.E.2d 488, 2004 Ga. LEXIS 943 (2004), cert. denied, 544 U.S. 1002, 125 S. Ct. 1937, 161 L. Ed. 2d 778, 2005 U.S. LEXIS 3592 (2005) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in denying defendant's motion in limine to exclude evidence of defendant's prior incarceration in a criminal trial on new charges, although evidence of prior conviction or general bad character was generally inadmissible under former O.C.G.A. § 24-9-20(b), as the criminal history record was redacted, and the evidence was submitted for the relevant purpose of establishing a timeline in order to refute defendant's alibi that defendant was in another state at the time of the new incident, and further, to show that defendant was called by an alias name, which was used during the incident as well. Copprue v. State, 279 Ga. 771, 621 S.E.2d 457, 2005 Ga. LEXIS 723 (2005) (decided under former O.C.G.A. § 24-9-20).

Evidence of specific acts to show bad character. — When defendant puts defendant's general good character in issue, the state may rebut it by evidence as to defendant's general bad character but not by specific acts apart from proof of prior convictions. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584, 1954 Ga. App. LEXIS 832 (1954), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416); Smith v. State, 91 Ga. App. 360, 85 S.E.2d 623, 1955 Ga. App. LEXIS 740 (1955), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988). (giving certain exceptions) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant puts defendant's character in issue in defendant's statement regarding a specific transaction and place, the state can then rebut a statement regarding such transaction and place referred to. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584, 1954 Ga. App. LEXIS 832 (1954), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416).

While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions was prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. Williams v. State, 257 Ga. 761, 363 S.E.2d 535, 1988 Ga. LEXIS 9 (1988) (decided under former O.C.G.A. § 24-9-20).

Evidence showing intent, bent of mind, and disposition. — Evidence of defendant's lawful consensual sexual relationship with a minor could be used as similar transaction evidence to establish defendant's intent, bent of mind, and lustful disposition. Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (decided under former O.C.G.A. § 24-9-20).

General reputation of one held by community in which one lives is of the best evidence going to show general character. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92, 1935 Ga. App. LEXIS 128 (1935), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416).

Good character may be proved only by testimony of a witness as to the reputation of the person whose character was in issue; subject to minor exceptions, the opinion of a witness as to character based on personal observation was not an approved way of introducing evidence of character. Taylor v. State, 176 Ga. App. 567, 336 S.E.2d 832, 1985 Ga. App. LEXIS 2503 (1985) (decided under former O.C.G.A. § 24-9-20).

Voluntary statement by defendant. — Regardless of whether a statement by

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the defendant about defendant's sexual relationship with someone not connected with the case was voluntarily given, since the evidence was not relevant nor admissible for impeachment or for any other proper purpose (e.g., to show motive, scheme, or plan), its only purpose was to attempt to show bad character, and, in the absence of interjection of the issue of character by the defendant, this evidence was inadmissible and the admission required reversal. Duke v. State, 256 Ga. 671, 352 S.E.2d 561, 1987 Ga. LEXIS 540 (1987) (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than as evidence of bad character after defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." Walker v. State, 260 Ga. App. 241, 581 S.E.2d 295, 2003 Ga. App. LEXIS 336 (2003), cert. denied, No. S03C1067, 2003 Ga. LEXIS 673 (Ga. July 14, 2003) (decided under former O.C.G.A. § 24-9-20).

When the defendant testified that the defendant had previously been convicted of theft by receiving because the defendant was an innocent victim of circumstance, the defendant opened the door to the prosecution's cross examination concerning the defendant's other convictions for giving a false name and entering an auto. Cobb v. State, 251 Ga. App. 697, 555 S.E.2d 79, 2001 Ga. App. LEXIS 1117 (2001) (decided under former O.C.G.A. § 24-9-20).

Statement by ex-wife/victim's mother inadmissible. — In a child molestation prosecution, testimony by defendant's ex-wife, who was also the victim's mother, regarding her fear of defendant was not evidence of similar transactions as provided in former O.C.G.A. § 24-9-20. Keanum v. State, 212 Ga. App. 662, 442 S.E.2d 790, 1994 Ga. App. LEXIS 331 (1994) (decided under former O.C.G.A. § 24-9-20).

Conduct of family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of the defendant's family had "been in trouble for marijuana." Hill v. State, 176 Ga. App. 509, 336 S.E.2d 276, 1985 Ga. App. LEXIS 2316 (1985) (decided under former O.C.G.A. § 24-9-20).

State's reference in the opening statement to defendant's wife's employment as an exotic dancer was followed with testimony about that employment, which was relevant to the question of the couple's need for money, and therefore, the apparent motive for the crimes, which the state was authorized to present even if the evidence directly involved the defendant's wife's participation in an unsavory activity. Thomas v. State, 274 Ga. 156, 549 S.E.2d 359, 2001 Ga. LEXIS 586 (2001) (decided under former O.C.G.A. § 24-9-20).

Testimony concerning marital status. — Trial court did not abuse the court's discretion by allowing testimony concerning defendant's marital status, the number of times the defendant was divorced, and the fact that the defendant did not maintain a checking account. Grady v. State, 212 Ga. App. 118, 441 S.E.2d 253, 1994 Ga. App. LEXIS 134 (1994) (decided under former O.C.G.A. § 24-9-20).

Statement in defendant's pretrial statement that defendant had a "drinking problem" and that defendant had been "busted for burglary" did not violate the prohibition in subsection (b) of former O.C.G.A. § 24-9-20 against admission of evidence of a defendant's general bad character unless the defendant puts defendant's character in issue. Stitt v. State, 256 Ga. 156, 345 S.E.2d 578 (1986).

District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. Williams v. State, 257 Ga. 761, 363 S.E.2d 535, 1988 Ga. LEXIS 9 (1988) (decided under former O.C.G.A. § 24-9-20).

Gang membership. — Prosecutor's questions to an officer regarding defendant's gang affiliation and attire worn in committing the crime was properly al-

lowed as such was relevant to the issue of identity and defendant's gang membership was admissible to show motive. Johnson v. State, 261 Ga. App. 98, 581 S.E.2d 715, 2003 Ga. App. LEXIS 554 (2003) (decided under former O.C.G.A. § 24-9-20).

Duty to instruct when character evidence wrongly admitted. — It was error in a criminal case for the state to place the defendant's character in issue when the defendant had not voluntarily chosen to do so. If the prosecutor solicited excluded testimony, the trial court was, upon objection and if it chose not to declare a mistrial, required to direct the jury to disregard such testimony. Harris v. State, 251 Ga. App. 879, 555 S.E.2d 485, 2001 Ga. App. LEXIS 1187 (2001) (decided under former O.C.G.A. § 24-9-20).

Proper instruction should be given in every case when the defendant puts the defendant's character in issue; but in the absence of a timely request, an omission to give a specific charge on the subject would not require a new trial. It was only in exceptional cases where the court failed to charge relatively to the good character of defendant that a new trial should be granted. Widner v. State, 197 Ga. 542, 30 S.E.2d 97, 1944 Ga. LEXIS 298 (1944) (decided under former Code 1933, §§ 38-415 and 38-416); Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874, 1980 Ga. App. LEXIS 2570 (1980). (further holding that if defendant asserted another defense, denial of the instruction on character was not error) (decided under former Code 1933, §§ 38-415 and 38-416).

Written request to charge. — Barring exceptional circumstances, there must be a written request to charge on principles of law regarding good character; otherwise, the failure to do so will not require a new trial. Taylor v. State, 176 Ga. App. 567, 336 S.E.2d 832, 1985 Ga. App. LEXIS 2503 (1985) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in denying defendant's motion for mistrial after witness made statements about defendant dealing in drugs on previous occasions as the statements were unsolicited, the trial court gave immediate instructions to disregard the testimony, the witness did not tell the jury anything it did not already know about defendant, and defendant did not show the harm necessary to require the reviewing court to reverse based on the failure to grant the motion for mistrial. McCollum v. State, 258 Ga. App. 574, 574 S.E.2d 561, 2002 Ga. App. LEXIS 1421 (2002) (decided under former O.C.G.A. § 24-9-20).

Instructions when defendant's character evidence was uncontradicted. — When defendant puts the defendant's character in issue and offered testimony in support thereof, and the state offered no evidence in contradiction, and no contradiction had arisen from within defendant's testimony, it was error for the court to charge the jury that "the state has introduced evidence to the contrary." Eidson v. State, 66 Ga. App. 765, 19 S.E.2d 373, 1942 Ga. App. LEXIS 300 (1942) (decided under former Code 1933, §§ 38-415 and 38-416).

Even if the denial of mistrial was error, it was highly probable that the complained-of character evidence did not contribute to the verdict because the evidence against defendant was overwhelming; the state presented two police officer witnesses who identified defendant as the gunman shown in the videotape of the armed robbery and the state introduced defendant's statement, wherein defendant admitted that defendant robbed the store. Torres v. State, 258 Ga. App. 393, 574 S.E.2d 438, 2002 Ga. App. LEXIS 1468 (2002), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-20).

2. Putting Character in Issue

In general. — Only when the defendant makes an election to place defendant's good character in issue may the state offer evidence of the defendant's general bad character or defendant's prior convictions. Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant offers testimony of a witness as to defendant's general good reputation in the community, the state may prove the defendant's general bad

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reputation in the community and may additionally offer evidence that the defendant has been convicted of prior offenses. Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant testifies in the defendant's own behalf and "falsely denies past criminal conduct or past misdeeds," the state may introduce evidence reflecting negatively on the defendant's character only insofar as that evidence proves the falsity of specific testimony of the defendant. Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant elected to place defendant's character in evidence within the meaning of subsection (b) of former O.C.G.A. § 24-9-20, the state could offer evidence of the defendant's prior convictions. Strong v. State, 263 Ga. 587, 436 S.E.2d 213, 1993 Ga. LEXIS 786 (1993) (decided under former O.C.G.A. § 24-9-20).

Character not "put in issue" by inadvertent statements. — It was not necessary to determine whether defendant's testimony on direct examination had "opened the character door," since it was defendant who introduced the defendant's character into evidence by discussing the defendant's criminal record in the response defendant chose to give to the prosecutor's proper cross-examination as to defendant's direct examination testimony. Dill v. State, 193 Ga. App. 214, 387 S.E.2d 425, 1989 Ga. App. LEXIS 1413 (1989) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in failing to give a jury charge on the defendant's good character. Character was not "put in issue," within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 (see O.C.G.A. § 24-5-506) by inadvertent statements regarding the defendant's good conduct. Character, in order to be charged, should have been placed in evidence as an affirmative defense. Johnson v. State, 261 Ga. 419, 405 S.E.2d 686, 1991 Ga. LEXIS 333 (1991) (decided under former O.C.G.A. § 24-9-20); Keef v. State, 220 Ga. App. 134, 469 S.E.2d 318 (decided under former O.C.G.A. § 24-9-20).

Trial court correctly refused to allow defendant to impeach codefendants by proof of the codefendants' prior convictions since the codefendants had not placed the codefendants' own character into evidence. Morris v. State, 204 Ga. App. 437, 419 S.E.2d 733, 1992 Ga. App. LEXIS 860 (1992) (decided under former O.C.G.A. § 24-9-20).

When reference to defendant's criminal history was fleeting and incomplete, and the trial court immediately instructed the jurors to disregard the reference, the court did not abuse the court's discretion in electing to give curative instructions rather than granting a mistrial. Smith v. State, 244 Ga. App. 165, 534 S.E.2d 903, 2000 Ga. App. LEXIS 660 (2000) (decided under former O.C.G.A. § 24-9-20).

It was error under earlier provisions of former O.C.G.A. § 24-9-20(b) to question the defendant about the defendant's history of misdemeanor arrests as the defendant's remark that the defendant was not a violent person was at best an inadvertent statement of the defendant's good character, not an election to place the defendant's character in evidence; furthermore, the defendant had not testified untruthfully about the defendant's criminal record and had not testified that the defendant had no prior arrests. Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66, 2007 Ga. LEXIS 581 (2007) (decided under former O.C.G.A. § 24-9-20).

Defendant was not entitled to a mistrial simply because a state's witness, in a nonresponsive answer, mentioned that defendant did not want to go back to jail. The mere mention that the defendant had been in jail did not place defendant's character at issue, and a nonresponsive answer to a question impacting negatively on the defendant's character did not place the defendant's character in issue under former O.C.G.A. § 24-9-20(b). Mathis v. State, 299 Ga. App. 831, 684 S.E.2d 6, 2009 Ga. App. LEXIS 1154 (2009) (decided under former O.C.G.A. § 24-9-20).

Testimony of previous "trouble" did not place character in issue. — Defendant's testimony on direct examination

that defendant had previously been in "some trouble" did not place defendant's character in issue. Richardson v. State, 173 Ga. App. 695, 327 S.E.2d 813, 1985 Ga. App. LEXIS 2669 (1985) (decided under former O.C.G.A. § 24-9-20).

Subsequent conduct did not place character in issue. — Trial court erred in admitting detective's testimony that, when the detective questioned defendant seven weeks after the shooting, defendant appeared "to be high" and told the detective that the defendant had been smoking marijuana-laced cigars. Weems v. State, 269 Ga. 577, 501 S.E.2d 806 (decided under former O.C.G.A. § 24-9-20).

Evidence used to impeach specific testimony. — There were numerous instances when the state may offer evidence of prior crimes or bad acts committed by a defendant for a purpose other than to show that the defendant was a person of bad character, including instances when such evidence was necessary and relevant to impeach the defendant's specific testimony. Crane v. State, 263 Ga. 518, 436 S.E.2d 216, 1993 Ga. LEXIS 789 (1993) (decided under former O.C.G.A. § 24-9-20).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions was generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-405 and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621). Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729, 2004 Ga. App. LEXIS 174 (2004) (decided under former O.C.G.A. § 24-9-20).

Since, in cross-examining a friend of the defendant, defense counsel engaged in questioning about the defendant's church attendance, and since the only purpose of these questions was to elicit testimony about the defendant's character, the trial court properly allowed evidence of defendant's previous license suspensions and insurance cancellations as rebuttal evidence on the same subject. Donaldson v. State, 279 Ga. App. 407, 631 S.E.2d 443, 2006 Ga. App. LEXIS 584 (2006), cert. denied, No. S06C1663, 2006 Ga. LEXIS 748 (Ga. Sept. 18, 2006) (decided under former O.C.G.A. § 24-9-20).

Negative impact of nonresponsive answer. — Even when a witness's nonresponsive answer impacted negatively on the defendant's character, it did not place the defendant's character in issue under subsection (b) of former O.C.G.A. § 24-9-20. Williams v. State, 214 Ga. App. 834, 449 S.E.2d 532, 1994 Ga. App. LEXIS 1073 (1994) (decided under former O.C.G.A. § 24-9-20); Williams v. State, 269 Ga. 827, 504 S.E.2d 441 (decided under former O.C.G.A. § 24-9-20); Watkins v. State, 241 Ga. App. 251, 526 S.E.2d 155, 1999 Ga. App. LEXIS 1564 (1999) (decided under former O.C.G.A. § 24-9-20).

Evidence of prior difficulties between defendant and victim was admissible to show the relationship between the defendant and the victim, and did not place the defendant's character in evidence within the meaning of former O.C.G.A. § 24-9-20. McKissick v. State, 263 Ga. 188, 429 S.E.2d 655, 1993 Ga. LEXIS 392 (1993) (decided under former O.C.G.A. § 24-9-20). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155.

Eliciting evidence on direct examination that defendant had been "ripped off" by the victim in previous drug dealings was not an improper introduction of bad character evidence, but was evidence of motive for the crimes committed. Holcomb v. State, 268 Ga. 100, 485 S.E.2d 192 (decided under former O.C.G.A. § 24-9-20).

Testimony that a photograph was a "mug shot" from the files of the police department did not put the defendant's character in issue. Seals v. State, 176 Ga. App. 67, 335 S.E.2d 306, 1985 Ga. App. LEXIS 2847 (1985) (decided under former O.C.G.A. § 24-9-20).

Admission of photograph from website. — In a defendant's trial for vehicular homicide, for which the defendant was

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convicted, the trial court did not abuse the court's discretion in permitting the state to introduce photographs of the defendant in jail clothing, playfully posing for the camera from a website created by the defendant as the defendant testified how remorseful the defendant was for killing the victim and referenced the specific date that the website photographs were taken; therefore, the defendant opened the door for the state to admit the photographs of the defendant. Merritt v. State, 288 Ga. App. 89, 653 S.E.2d 368, 2007 Ga. App. LEXIS 1150 (2007) (decided under former O.C.G.A. § 24-9-20).

Evidence that an accused was presently confined or was in jail did not place the accused's character in evidence. Fields v. State, 176 Ga. App. 122, 335 S.E.2d 466, 1985 Ga. App. LEXIS 2214 (1985) (decided under former O.C.G.A. § 24-9-20).

Copies of sexually oriented magazines were not inadmissible at defendant's trial for child molestation and sodomy on grounds the magazines placed defendant's character in issue since the evidence was admitted to show defendant's motive generally and defendant's state of mind and lustful disposition. Stamey v. State, 194 Ga. App. 305, 390 S.E.2d 409, 1990 Ga. App. LEXIS 86, cert. denied, 498 U.S. 843, 111 S. Ct. 123, 112 L. Ed. 2d 91, 1990 U.S. LEXIS 4145 (1990); 498 U.S. 843, 111 S. Ct. 123, 112 L. Ed. 2d 91 (1990) (decided under former O.C.G.A. § 24-9-20).

Defendant's character incidentally put in issue. — When testimony of a witness for the state of what defendant stated to the witness shortly after the homicide was admissible to show the state of mind and intentions of defendant toward the deceased, the fact that such testimony incidentally put defendant's character in issue did not render the testimony inadmissible. Tiller v. State, 196 Ga. 508, 26 S.E.2d 883, 1943 Ga. LEXIS 371 (1943) (decided under former Code 1933, §§ 38-415 and 38-416).

In prosecution of defendant for the shooting death of his wife, testimony of defendant's sister-in-law to effect that she had seen defendant strike victim on two separate occasions was relevant to issue of defendant's motive in killing his wife, and was not rendered inadmissible because it incidentally placed defendant's character in issue. Hales v. State, 250 Ga. 112, 296 S.E.2d 577, 1982 Ga. LEXIS 1227 (1982) (decided under former O.C.G.A. § 24-9-20).

Defendant, in prosecution for armed robbery, injected defendant's character into issue after defendant stated defendant did not commit "wrong" which, viewed in the totality of defendant's testimony, was a general declaration of defendant's own good character. Johnson v. State, 169 Ga. App. 102, 311 S.E.2d 537, 1983 Ga. App. LEXIS 2994 (1983) (decided under former O.C.G.A. § 24-9-20).

Armed robbery defendant's statement that the reason defendant took a car was because defendant thought there was a warrant for defendant and defendant would "disappear for a while" was relevant to motive, intent, and course of conduct and was not rendered inadmissible because the statement incidentally placed the defendant's character in issue. Millis v. State, 196 Ga. App. 799, 397 S.E.2d 71, 1990 Ga. App. LEXIS 1083 (1990) (decided under former O.C.G.A. § 24-9-20).

In prosecution for armed robbery and related crimes, evidence of defendant's prior negotiations about the sale of a machine gun only incidentally placed defendant's character in evidence. Samuels v. State, 223 Ga. App. 275, 477 S.E.2d 414 (decided under former O.C.G.A. § 24-9-20).

Trial court did not violate former O.C.G.A. § 24-9-20 by admitting evidence which suggested that defendant had lied to friends about age and background and that defendant failed to grieve for the victim because the evidence was relevant to the case and was not rendered inadmissible by the fact that the evidence incidentally placed defendant's character in issue. Mullinax v. State, 273 Ga. 756, 545 S.E.2d 891, 2001 Ga. LEXIS 312 (2001) (decided under former O.C.G.A. § 24-9-20).

Trial court properly admitted evidence of defendant's conversations with a police

officer, wherein the defendant related that the defendant was carjacked, in an attempt to retrieve the defendant's car that had been involved in a high speed chase with police after robbery and other crimes had been committed, as the conversations were relevant to show that the defendant had given a false account to police; although character evidence that reflected poorly on the defendant was also admitted with those statements, such as the defendant's admission to police that the defendant spent a night with a female who was not defendant's wife, such admission was proper despite the fact that the defendant had not first put the defendant's character in issue, pursuant to former O.C.G.A. § 24-9-20(b). Nashid v. State, 271 Ga. App. 202, 609 S.E.2d 106, 2004 Ga. App. LEXIS 1608 (2004), cert. denied, No. S05C0810, 2005 Ga. LEXIS 314 (Ga. Apr. 26, 2005) (decided under former O.C.G.A. § 24-9-20).

Evidence admissible as part of res gestae. — Rape victim's statement, in response to a prosecutor's question regarding whether the defendant had threatened to kill the victim during the attack, that "He told me that he was going to kill me. He told me that he'd done it before and that he had no problem doing it," was admissible as part of the res gestae. Even if it placed the defendant's character in issue, the defendant's counsel agreed to a curative instruction, and it was highly probable that the statement did not contribute to the verdict. Dixon v. State, 303 Ga. App. 517, 693 S.E.2d 900, 2010 Ga. App. LEXIS 381 (2010) (decided under former O.C.G.A. § 24-9-20).

Character questioned by drug evidence. — Improper admission of witness's character evidence indicating that defendant was a "source" of cocaine was harmless error in light of evidence that defendant was observed giving the witness a package containing cocaine. Baptiste v. State, 190 Ga. App. 451, 379 S.E.2d 165, 1989 Ga. App. LEXIS 276 (1989) (decided under former O.C.G.A. § 24-9-20).

Although defendant did not put defendant's character into issue within the meaning of former O.C.G.A. § 24-9-20, it was proper to allow evidence of defendant's prior drug possession charge to disprove statements that the defendant did not use drugs. King v. State, 203 Ga. App. 287, 416 S.E.2d 842, 1992 Ga. App. LEXIS 502 (1992) (decided under former O.C.G.A. § 24-9-20).

While it was error to allow reference by a witness to defendant's purported need for cocaine after committing a crime, in view of the unintentional nature of the statement and overwhelming evidence of defendant's guilt, the motion for mistrial was properly denied. White v. State, 268 Ga. 28, 486 S.E.2d 338 (decided under former O.C.G.A. § 24-9-20).

Fact that the defendant possessed a bag of marijuana at the time of defendant's arrest was admissible in defendant's prosecution for robbery and kidnapping, even though this evidence incidentally put the defendant's character in evidence. Reynolds v. State, 234 Ga. App. 884, 508 S.E.2d 674 (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony that "I don't carry no drugs" clearly implied that defendant was neither in possession of drugs at the time in question nor on other occasions and, thus, defendant's prior convictions involving possession of cocaine were properly admitted as impeachment evidence. Porter v. State, 240 Ga. App. 554, 524 S.E.2d 259 (decided under former O.C.G.A. § 24-9-20).

Admission of evidence relevant to every aspect of crime charged. — Custodial statement in which the defendant admitted having turned over an electric meter used in the manufacture of drugs was properly admitted at the defendant's trial and did not improperly introduce character evidence against the defendant since even though a defendant is not charged with every crime committed during a criminal transaction, every aspect relevant to the crime charged may be presented at trial. Ward v. State, 285 Ga. App. 574, 646 S.E.2d 745, 2007 Ga. App. LEXIS 583 (2007) (decided under former O.C.G.A. § 24-9-20).

Defense counsel opening door. — When defense counsel first opened door pertaining to circumstances surrounding appellant's purchase of vehicle from witness by first asking the latter whether or

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not the vehicle had been stolen, the state's inquiry on rebuttal as to whether appellant knew that the vehicle had been stolen simply informed jury of true nature of that transaction, and the fact that this testimony may have incidentally placed appellant's character in issue did not render the testimony inadmissible. Mulkey v. State, 250 Ga. 444, 298 S.E.2d 487, 1983 Ga. LEXIS 997 (1983) (decided under former O.C.G.A. § 24-9-20).

When defense counsel initiated the issue of defendant's propensity for violence during cross-examination of a witness, the prosecution was authorized to further explore that area. Jordan v. State, 267 Ga. 442, 480 S.E.2d 18 (decided under former O.C.G.A. § 24-9-20).

Trial court did not err when the court allowed the admission of evidence of the defendant's bad character since the defendant opened the door to such evidence when, during cross-examination of the witness, defense counsel introduced three letters from the witness to the defendant and one of those letters referred to the defendant having stolen a car. Thomas v. State, 247 Ga. App. 798, 545 S.E.2d 354, 2001 Ga. App. LEXIS 128 (2001) (decided under former O.C.G.A. § 24-9-20).

Defense counsel opened the door to the prosecution exploring defendant's criminal history at trial based on the cross-examination of an investigating officer in which counsel asked the officer if defendant had ever been convicted of child molestation previous to the allegations of child molestation that were then pending against defendant; the exploration was not limited to defendant's criminal history with respect to sex crimes. Kimmons v. State, 267 Ga. App. 790, 600 S.E.2d 783, 2004 Ga. App. LEXIS 792 (2004) (decided under former O.C.G.A. § 24-9-20).

While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86, 2011 Ga. App. LEXIS 399 (2011) (decided under former O.C.G.A. § 24-9-20).

Defense of entrapment. — Defendant's assertion of defense of entrapment, in and of itself, did not have the effect of placing the defendant's character in issue. Johns v. State, 164 Ga. App. 133, 296 S.E.2d 638, 1982 Ga. App. LEXIS 2734 (1982) (decided under former O.C.G.A. § 24-9-20).

Character put in issue. — Defendant in prosecution for illegal possession of alcohol in defendant's statement injected defendant's character into issue after defendant stated: "I work for a living and I don't now fool with the liquor business." Dukes v. State, 90 Ga. App. 50, 81 S.E.2d 864, 1954 Ga. App. LEXIS 625 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

After a witness testified that the witness had identified appellant to police from the witness's picture in "some mug books," and after the prosecutor thereafter asked the police officer to explain what "mug books" were, defendant's character was placed in evidence. Stanley v. State, 250 Ga. 3, 295 S.E.2d 315, 1982 Ga. LEXIS 969 (1982) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err by allowing the state to introduce evidence of two prior convictions of defendant after defendant testified that defendant was in Tallahassee, Florida, purchasing drugs to sell, at the time the offenses charged were committed, although defendant argued that this was alibi evidence, not character evidence, and was not offered to show that defendant was of such good character that defendant could not have committed the offense charged. Laidler v. State, 180 Ga. App. 213, 348 S.E.2d 739, 1986 Ga. App. LEXIS 2695 (1986) (decided under former O.C.G.A. § 24-9-20).

When a defendant admitted any prior criminal conduct less than all defendant's criminal offenses, defendant had put defendant's character in issue within the meaning of former O.C.G.A. § 24-9-20, with the result that the prosecutor could cross-examine the defendant as to such conduct and may prove other prior convictions. Spencer v. State, 180 Ga. App. 498,

349 S.E.2d 513, 1986 Ga. App. LEXIS 2746 (1986) (decided under former O.C.G.A. § 24-9-20).

When during counsel's cross-examination of the victim, defense counsel elicited testimony from the victim that when the victim was two years old the victim's family's house caught on fire because the victim's father had been sniffing gas, and the victim and the victim's mother then left him, and where, in cross-examining defendant, the prosecuting attorney began asking him about the victim's testimony in regard to his sniffing gas, defendant opened the door to such evidence through defense counsel's cross-examination of the victim and the testimony given by the defendant on direct. Atwell v. State, 204 Ga. App. 187, 419 S.E.2d 77, 1992 Ga. App. LEXIS 740 (1992) (decided under former O.C.G.A. § 24-9-20).

When prior to the state's questioning of defendant about defendant's demotion, defendant's trial counsel, upon inquiry by the trial court, told the court that counsel anticipated putting defendant's character into evidence, the facts demonstrated that defendant, by way of counsel's statements voluntarily elected to place defendant's character in issue prior to any introduction of character evidence on the part of the state. Canup v. State, 216 Ga. App. 828, 456 S.E.2d 215, 1995 Ga. App. LEXIS 317 (1995) (decided under former O.C.G.A. § 24-9-20).

Defendant cannot intentionally testify regarding defendant's community volunteer work with the youth and the elderly in the community and then argue that defendant did not intentionally put defendant's character in issue. Campbell v. State, 221 Ga. App. 105, 470 S.E.2d 503, 1996 Ga. App. LEXIS 394 (1996) (decided under former O.C.G.A. § 24-9-20).

With numerous questions to the state's and defendant's own witnesses, defendant opened the door to defendant's character; thus, the state was permitted to respond with evidence of the prior conviction. Hill v. State, 243 Ga. App. 124, 532 S.E.2d 491, 2000 Ga. App. LEXIS 397 (2000) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in permitting the admission of evidence during cross-examination of the defendant about a prior conviction based on a nolo contendere plea to the offense of giving false information to an officer since, on direct examination, the defendant stated that the defendant had the "most respect for police officers" and that the defendant used to be a corrections officer. Payne v. State, 248 Ga. App. 158, 545 S.E.2d 336, 2001 Ga. App. LEXIS 117 (2001), cert. denied, No. S01C0838, 2001 Ga. LEXIS 545 (Ga. June 25, 2001) (decided under former O.C.G.A. § 24-9-20).

When defendant testified that defendant never confronted anyone, always walked away from violent confrontations, and was known in the community as a nonviolent person, defendant placed defendant's character in issue, allowing the admission of defendant's prior convictions for violent crimes under former O.C.G.A. § 24-9-20(b). Carswell v. State, 263 Ga. App. 833, 589 S.E.2d 605, 2003 Ga. App. LEXIS 1346 (2003) (decided under former O.C.G.A. § 24-9-20).

By stating that the defendant was a person who tried not to hurt anyone, the defendant put the defendant's character into issue under former O.C.G.A. § 24-9-20(b). Accordingly, it was not error to allow the state to introduce evidence of the defendant's armed robbery convictions. Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370, 2008 Ga. App. LEXIS 539 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417, 2009 Ga. LEXIS 813 (2009) (decided under former O.C.G.A. § 24-9-20).

Mistrial required. — Trial court erred in denying a mistrial for the injection of character after a state's witness was allowed to state that defendant told the witness that the defendant had been in court "too many times before." Ochle v. State, 218 Ga. App. 69, 459 S.E.2d 560, 1995 Ga. App. LEXIS 650, modified, 459 S.E.2d 560 (Ga. Ct. App. 1995), cert. denied, No. S95C1821, 1995 Ga. LEXIS 1141 (Ga. Oct. 27, 1995) (decided under former O.C.G.A. § 24-9-20).

Jury instruction on good character. — While testimony as to specific acts may not always be used to raise the character issue, after a defendant personally provides such testimony and is available to the state for cross-examination as to the defendant's own actions and disposition,

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the defendant's testimony is admissible to show the defendant's good character. As the testimony was admissible and sufficient to raise the character issue, a substantive issue in the case, the trial court should have given a jury charge, following the defendant's request, to consider evidence of the defendant's good character in reaching the jury's decision. State v. Braddy, 254 Ga. 366, 330 S.E.2d 338, 1985 Ga. LEXIS 722 (1985) (decided under former O.C.G.A. § 24-9-20).

Character not put in issue. — Testimony by one of the officers who had a search warrant that the officer was there because complaints had been made against defendant was not harmful to defendant, and did not tend to put defendant's character in issue. Lester v. State, 90 Ga. App. 43, 81 S.E.2d 894, 1954 Ga. App. LEXIS 622 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

When the defendant testified and admitted prior criminal conduct, defendant had not placed defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Rather, the defendant raised an issue which may be fully explored by the state on cross-examination. Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former O.C.G.A. § 24-9-20); Weston v. State, 216 Ga. App. 806, 456 S.E.2d 214, 1995 Ga. App. LEXIS 292 (1995) (decided under former O.C.G.A. § 24-9-20); Warren v. State, 232 Ga. App. 488, 502 S.E.2d 336 (decided under former O.C.G.A. § 24-9-20).

It was only when a defendant had "put his character in issue," as that term was defined in the context of O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404 and 24-5-506), that the court is required to give a charge on good character, and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of accident and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. Williams v. State, 187 Ga. App. 355, 370 S.E.2d 210, 1988 Ga. App. LEXIS 683 (1988) (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony that defendant had smoked marijuana and that "I ain't done no burglary. I never have." did not put defendant's character in issue at defendant's trial for burglary so as to permit the introduction of convictions for shoplifting and marijuana-related violations. Hurston v. State, 189 Ga. App. 748, 377 S.E.2d 519, 1989 Ga. App. LEXIS 27 (1989) (decided under former O.C.G.A. § 24-9-20).

In a trial for sex offenses, denial of the defendant's motion for a mistrial was proper since the motion was based upon the improper placement of defendant's character in issue when a detective testified about one victim's speculation that the defendant devised defendant's plan to molest the victim while the defendant was in jail. Shropshire v. State, 210 Ga. App. 241, 435 S.E.2d 700, 1993 Ga. App. LEXIS 1142 (1993), cert. denied, No. S94C0022, 1993 Ga. LEXIS 1141 (Ga. Dec. 3, 1993) (decided under former O.C.G.A. § 24-9-20).

When defendant did not testify either on direct- or cross-examination in such a way as to admit prior criminal conduct and did not testify in a manner implying that the defendant had no criminal record, the defendant did not place the defendant's character in issue and the trial court erred in admitting the records of defendant's previous convictions. Hancock v. State, 210 Ga. App. 528, 437 S.E.2d 610, 1993 Ga. App. LEXIS 1239 (1993) (decided under former O.C.G.A. § 24-9-20).

When the apparent intent of the questioning was not to impugn defendant's character but rather to cast doubt on the witness's credibility, including the witness's denial that any money bag was brought into the witness's apartment, by showing the witness's bias in favor of the witness's brother and the witness's history of coming to the brother's aid, the defendant's character was not put in issue; moreover, even if the jury could infer from the colloquy that defendant had a prior brush with the law, it did not improperly place defendant's character in evidence.

Norman v. State, 212 Ga. App. 105, 441 S.E.2d 94, 1994 Ga. App. LEXIS 156 (1994) (decided under former O.C.G.A. § 24-9-20).

Defendant did not open the door to evidence of prior convictions when, in a rambling, somewhat unresponsive answer to a question about the defendant having enough money to live on defendant's own, defendant said defendant didn't "convert himself to a criminal life." Stinson v. State, 221 Ga. App. 758, 472 S.E.2d 538 (decided under former O.C.G.A. § 24-9-20).

In a prosecution for trafficking in cocaine, defendant's character was not placed in issue when a police officer was asked if it would have been unusual to find a razor blade in defendant's pocket and the officer replied "No, not in this particular incident." Menefee v. State, 226 Ga. App. 725, 487 S.E.2d 489 (decided under former O.C.G.A. § 24-9-20).

When the defendant testified and admitted prior criminal conduct, the defendant had not placed defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20; rather, defendant raised an issue which may be fully explored by the state on cross-examination. Davidson v. State, 231 Ga. App. 605, 499 S.E.2d 697 (decided under former O.C.G.A. § 24-9-20).

In a prosecution for Medicaid fraud, testimony of defendant's employee that defendant put too much pressure on the employee and didn't respect the employee as a person did not rise to the level of general bad character evidence. Bullard v. State, 242 Ga. App. 843, 530 S.E.2d 265, 2000 Ga. App. LEXIS 261 (2000), cert. denied, No. S00C1219, 2000 Ga. LEXIS 652 (Ga. Sept. 8, 2000) (decided under former O.C.G.A. § 24-9-20).

Police officer's testimony that the officer understood an informant's reference to defendant as "Man" to be the use of defendant's street name did not place defendant's character in evidence as there was no evidence indicating how the officer knew defendant's nickname or that defendant had any history with the officer's drug task force, and, thus, did not require the mistrial defendant requested. Carter v. State, 261 Ga. App. 204, 583 S.E.2d 126, 2003 Ga. App. LEXIS 586 (2003) (decided under former O.C.G.A. § 24-9-20).

Defendant claimed that another person agreed to pay defendant to take that person to an informant's home, and denied that drugs found in the defendant's cell phone cover belonged to the defendant or that the defendant went to the informant's home to sell drugs; these responses at trial did not raise the question of the defendant's character, and the trial court improperly admitted defendant's prior convictions. King v. State, 270 Ga. App. 399, 606 S.E.2d 616, 2004 Ga. App. LEXIS 1448 (2004) (decided under former O.C.G.A. § 24-9-20).

Jury was improperly charged that a witness could be impeached by proof that the witness had been convicted of a crime involving moral turpitude since the defendant was the only witness for whom a certified copy of a previous conviction was introduced into evidence and the defendant's conviction should not have been admitted as the defendant had not placed the defendant's character into issue. However, there was not reversible error as the defendant requested the charge on impeachment that included the language the defendant challenged. Miller v. State, 281 Ga. App. 354, 636 S.E.2d 60, 2006 Ga. App. LEXIS 1100 (2006), cert. denied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-20).

Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good character into issue. Kurtz v. State, 287 Ga. App. 823, 652 S.E.2d 858, 2007 Ga. App. LEXIS 1110 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-9-20).

In a joint trial wherein a defendant and two codefendants were convicted of armed

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robbery, the trial court did not err by denying the defendant's motion for a new trial based on the trial court allegedly erroneously admitting character evidence of the defendant as the mere mention that the defendant had been in jail fell short of placing the defendant's character at issue, and a witness's nonresponsive answer to a question did not impact negatively on the defendant's character nor placed defendant's character in issue. Mathis v. State, No. A09A0215, No. A09A0308, 2009 Ga. App. LEXIS 586 (Ga. Ct. App. May 20, 2009) (decided under former O.C.G.A. § 24-9-20).

Character not in issue with discussion of whisky. — Defendant's statement that defendant lived in a certain county all defendant's life and had not had any whisky trouble there, that defendant had never been arrested for whisky, never been searched, and defendant's house had never been searched, did not put defendant's general character in issue. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584, 1954 Ga. App. LEXIS 832 (1954), superseded by statute as stated in Jones v. State, 257 Ga. 753, 363 S.E.2d 529, 1988 Ga. LEXIS 5 (1988) (decided under former Code 1933, §§ 38-415 and 38-416).

Introduction of prior guilty plea. — Since defendant did not by defendant's statement put defendant's character in issue but merely denied guilt of the crime with which defendant was charged, the introduction into evidence of defendant's prior guilty pleas was error. Smith v. State, 141 Ga. App. 64, 232 S.E.2d 401, 1977 Ga. App. LEXIS 1764 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Officer's testimony on available photograph did not put character in evidence. — Defendant's character was not impermissibly placed in issue when a police officer testified at trial that the officer found an available photograph of the subject to show to certain potential witnesses for purposes of identifying defendant, on grounds that such testimony indicated that defendant's photograph was already in police records, implying that defendant had been previously arrested or convicted of another crime. Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671, 1980 Ga. App. LEXIS 2659 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Officer's testimony on fingerprinting did not put character in evidence. — Detective's testimony that the police identified defendant's fingerprint by comparing the fingerprint to a print that the police already had on file did not inject defendant's character into evidence. Lewis v. State, 255 Ga. 681, 341 S.E.2d 434, 1986 Ga. LEXIS 642 (1986) (decided under former O.C.G.A. § 24-9-20).

Introduction of prior guilty pleas. — During a trial for possession of cocaine, the state offered the defendant's prior conviction for forgery into evidence, arguing that defendant's admission of possessing a gun was illegal by a convicted felon, which was prior criminal conduct and defendant had thus placed defendant's character in issue, but no criminal conduct could be shown until after the prior conviction was admitted into evidence over the objection of the defense counsel, because possession of a gun is presumptively lawful, allowing the prior conviction into evidence in order to place the defendant's character in issue demanded circular logic and defied even the broad parameters of the "simple rule" that when a defendant admits any prior criminal conduct, the prosecutor may cross-examine the defendant as to such conduct and may prove other prior convictions. Hall v. State, 180 Ga. App. 210, 348 S.E.2d 736, 1986 Ga. App. LEXIS 2078 (1986) (decided under former O.C.G.A. § 24-9-20).

Rape defendant's character not in issue. — Prosecution did not place a rape defendant's character in issue by questioning the defendant about information in a police accident report on which defendant relied and based defendant's alibi but merely exercised the prosecution's right to cross-examine and attempt to impeach defendant as any other witness could be impeached. Middlebrooks v. State, 184 Ga. App. 791, 363 S.E.2d 39, 1987 Ga. App. LEXIS 2393 (1987) (decided under former O.C.G.A. § 24-9-20).

Statement defendant "was not that kind of person". — Defendant's statement that defendant was "not that kind of

person" did not operate to place defendant's character in issue so as to open the door to proof of defendant's past criminal record at defendant's trial for rape and aggravated sodomy. McGuire v. State, 188 Ga. App. 891, 374 S.E.2d 816, 1988 Ga. App. LEXIS 1229 (1988) (decided under former O.C.G.A. § 24-9-20).

Character not in issue by possession of marijuana. — When, on direct examination, defendant attempted to explain that defendant possessed marijuana for medicinal purposes, and that defendant smoked marijuana on occasion to relieve headaches and eye problems, this testimony did not place defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Houston v. State, 192 Ga. App. 73, 383 S.E.2d 571, 1989 Ga. App. LEXIS 879 (1989) (decided under former O.C.G.A. § 24-9-20).

Character determinations from drug usage. — When defendant appeals convictions of possession of cocaine, possession of less than one ounce of marijuana, and driving under the influence of alcohol, the trial court erred in allowing the state to introduce evidence that the defendant had been convicted, some three years previously, of the offense of possession of marijuana with intent to distribute, since the state asserted that the prior conviction was admissible to impeach the defendant's testimony, elicited both on direct and on cross-examination, that defendant did not smoke marijuana, despite defendant's objection. Moses v. State, 190 Ga. App. 699, 379 S.E.2d 819, 1989 Ga. App. LEXIS 314 (1989) (decided under former O.C.G.A. § 24-9-20).

Because defendant had not placed defendant's character "in issue" within the meaning of former O.C.G.A. § 24-9-20, the state properly introduced evidence of a prior drug conviction to negate defendant's specific testimony that defendant had never been in the drug business. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181, 1992 Ga. App. LEXIS 1723 (1992) (decided under former O.C.G.A. § 24-9-20).

Prior difficulties testimony did not put character in issue. Witnesses' testimony of prior difficulties between defendant and the victim may have reflected negatively on defendant, but did not place defendant's character in evidence within the meaning of former O.C.G.A. § 24-9-20. Rotino v. State, 259 Ga. 295, 380 S.E.2d 261, 1989 Ga. LEXIS 283 (1989) (decided under former O.C.G.A. § 24-9-20).

Parole status did not put character in evidence. — In prosecution for armed robbery, questioning directed at defendant's reasons for defendant's "flight" was not rendered improper by the defendant's disclosure that defendant was on parole. Jones v. State, 205 Ga. App. 711, 423 S.E.2d 393, 1992 Ga. App. LEXIS 1305 (1992) (decided under former O.C.G.A. § 24-9-20).

Character not in issue but allowed admission of prior conviction. — Defendant's statement that defendant did not sell drugs did not place defendant's character in issue, but did provide a basis for the admission of evidence of defendant's prior conviction for possession of cocaine with intent to distribute. Jester v. State, 229 Ga. App. 490, 494 S.E.2d 284 (decided under former O.C.G.A. § 24-9-20).

Defendant's character put in issue by prosecution witness. — Rule which permitted the prosecution to rebut evidence adduced for the purpose of proving defendant's good character was not affected by the fact that the witness used for the purpose of showing good character was called to the stand by the state. Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246, 1951 Ga. App. LEXIS 783 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant placing character in issue. — When, during cross-examination, defendant described defendant's characteristics and testified to the lack of past misdeeds, the state was entitled to explore the truth of the statements regardless of whether defendant placed defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Bryant v. State, 226 Ga. App. 135, 486 S.E.2d 374 (decided under former O.C.G.A. § 24-9-20).

Defendant's statement on crossexamination that defendant "didn't rob nobody"

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opened the door to defendant's character and inquiries about defendant's prior armed robbery convictions. Morrison v. State, 232 Ga. App. 846, 502 S.E.2d 470 (decided under former O.C.G.A. § 24-9-20).

Because defendant admitted to using drugs on direct examination, the state was entitled to fully explore this issue on cross-examination and was entitled to explore the possibility of defendant's desire for drugs as a motive for robbery, even if it incidentally put defendant's character in issue. Maddox v. State, 238 Ga. App. 598, 521 S.E.2d 581 (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in allowing evidence of defendant's prior conviction into evidence because the fact that defendant was on probation was brought out on direct examination by defendant's own attorney and the defense informed the court that they would call the probation officer as a witness. Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305, 2000 Ga. App. LEXIS 1227 (2000), cert. denied, No. S01C0355, 2001 Ga. LEXIS 289 (Ga. Mar. 19, 2001) (decided under former O.C.G.A. § 24-9-20).

Questions and responses alluding to prior arrests impermissibly placed defendant's character in issue, and when the trial court failed to take any corrective action in fulfillment of the court's duty, the defendant was denied a fair trial. Richardson v. State, 199 Ga. App. 10, 403 S.E.2d 877, 1991 Ga. App. LEXIS 366 (1991) (decided under former O.C.G.A. § 24-9-20).

Trial court erred in allowing the state's attorney to question the defendant regarding several previous occasions on which defendant had been arrested on the theory that defendant's character had been placed in issue during an exchange between the state's attorney and the defendant's grandfather. Parker v. State, 198 Ga. App. 838, 403 S.E.2d 897, 1991 Ga. App. LEXIS 325 (1991) (decided under former O.C.G.A. § 24-9-20).

Instructions. — It was reversible error for the court to charge the jury that the defendant had "undertaken" to put the defendant's character in issue, when as a matter of fact the defendant in the defendant's statement did put the defendant's character in issue. Spikes v. State, 72 Ga. App. 537, 34 S.E.2d 561, 1945 Ga. App. LEXIS 634 (1945) (decided under former Code 1933, §§ 38-415 and 38-416).

Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the appellant's guilt. Peterson v. State, 212 Ga. App. 147, 441 S.E.2d 481, 1994 Ga. App. LEXIS 191 (1994) (decided under former O.C.G.A. § 24-9-20).

Whenever there is evidence to support a charge on good character and defendant requests that such a charge be given, the jury must be instructed that the jury may consider good character evidence in the jury's deliberations. Sapp v. State, 271 Ga. 446, 520 S.E.2d 462 (decided under former O.C.G.A. § 24-9-20).

Tendency to put character in issue mitigated by instructions. — Upon the trial of one accused of murder, it was not error to admit signatures to pleas of guilty on two indictments admittedly signed by the defendant as a standard for comparison with handwriting on an envelope and letter also introduced in evidence by the state and contended by the state to be in the handwriting of the defendant, but denied by the defendant, over the objection that this evidence would put the defendant's character in issue, even though the indictments themselves also went out to the jury, since the jury was instructed that the jury was not to consider anything in the two indictments other than signatures of the defendant appearing thereon, and only for the purpose of comparison, and that the indictments and pleas of guilty should not be considered by the jury as affecting the character or reputation of the defendant. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744, 1943 Ga. LEXIS 360 (1943) (decided under former Code 1933, §§ 38-415 and 38-416).

It was not erroneous for the trial judge to overrule a motion for a mistrial, when, in answer to a question propounded by the prosecution, evidence was elicited from a

witness (regarding a prior shooting by the accused) which tended to put the character of the accused in issue, when, upon objection by counsel for the accused, such evidence was excluded and the jury was instructed to disregard the question and the responsive answer. Joyner v. State, 208 Ga. 435, 67 S.E.2d 221, 1951 Ga. LEXIS 387 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

When during cross-examination counsel for defendant asked a question, the answer to which was complained of as tending to put defendant's character in evidence, and the trial judge, acting immediately, ruled out the evidence, thereby removing the evidence from consideration of the jury, court would not say, under the circumstances, that this action by the trial judge did not afford defendant all the protection to which defendant was entitled under law. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562, 1951 Ga. LEXIS 404 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence of victim's character. — In a homicide prosecution, defendant could introduce proof that deceased was a person of violent and turbulent character only when it was shown prima facie that defendant had been assailed by deceased and was honestly seeking to defend oneself. Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47, 1971 Ga. App. LEXIS 836 (1971) (decided under former Code 1933, §§ 38-415 and 38-416).

Victim's violent character and general reputation for violence were admissible after the codefendant arguably made a showing that the defendant was honestly seeking to defend oneself rather than to act as the aggressor. Smith v. State, 267 Ga. 372, 477 S.E.2d 827, 1996 Ga. LEXIS 912 (1996), overruled in part, State v. Jackson, 287 Ga. 646, 697 S.E.2d 757, 2010 Ga. LEXIS 484 (2010) (decided under former O.C.G.A. § 24-9-20).

Harmless error. — Evidence showing that defendant was willing to be a "big-time" cocaine dealer was erroneously admitted, but, when the evidence of defendant's guilt was ample and it was highly probable that the placing of defendant's character in issue did not contribute to the jury's verdict, the error was not harmful. Hargrove v. State, 188 Ga. App. 336, 373 S.E.2d 44, 1988 Ga. App. LEXIS 1030 (1988) (decided under former O.C.G.A. § 24-9-20).

Failure to give defendant's requested charge on good character was harmless error since it was likely that the jury would not have relied upon defendant's good character to acquit defendant since the state presented evidence of defendant's prior convictions and the evidence of defendant's guilt was overwhelming. Duvall v. State, 259 Ga. 801, 387 S.E.2d 880, 1990 Ga. LEXIS 27 (1990) (decided under former O.C.G.A. § 24-9-20).

Improper admission of testimony placing defendant's character in evidence was not reversible error since the trial judge gave adequate curative instructions, and the evidence against defendant was overwhelming. Ayers v. State, 194 Ga. App. 301, 390 S.E.2d 432, 1990 Ga. App. LEXIS 101 (1990) (decided under former O.C.G.A. § 24-9-20).

When a defendant did not voluntarily place defendant's character in issue, the particular facts and circumstances of this case made it highly probable that testimony regarding the defendant's violent character when drinking did not contribute to the verdict. The erroneously-admitted evidence was cumulative of a fact which had already been established beyond a reasonable doubt. Washington v. State, 194 Ga. App. 756, 391 S.E.2d 718, 1990 Ga. App. LEXIS 329 (1990) (decided under former O.C.G.A. § 24-9-20).

Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing modus operandi, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. Howard v. State, 202 Ga. App. 574, 415 S.E.2d 45, 1992 Ga. App. LEXIS 96 (1992) (decided under former O.C.G.A. § 24-9-20).

Any error in instructing the jury that a witness could be impeached upon proof of general bad character was harmless as the only person possibly impeached was defendant, who testified that defendant had been admitted to a club although defendant was underage because defen-

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dant knew the bouncer; the testimony was so innocuous as to not amount to evidence of bad character as defendant did not state that defendant lied to get in, cheated to get in, or broke any laws. Young v. State, 272 Ga. App. 304, 612 S.E.2d 118, 2005 Ga. App. LEXIS 285 (2005) (decided under former O.C.G.A. § 24-9-20).

In the absence of evidence connecting the defendant to the injuries depicted in a photograph of the defendant's love interest, the photo was not appropriate impeachment evidence, and the trial court erred in admitting it; however, the error was harmless because eyewitness testimony identified the defendant as the person who shot the victim multiple times while the victim lay on the ground partially paralyzed, and it was highly probable that the erroneous admission of the photograph into evidence did not contribute to the jury's verdict and the judgment of conviction entered against the defendant. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427, 2009 Ga. LEXIS 703 (2009) (decided under former O.C.G.A. § 24-9-20).

It was error for the trial court to refuse to charge the jury on impeachment by prior conviction for a crime of moral turpitude because the inmate who testified to the defendant's jailhouse confession was a convicted felon; however, the error was harmless because even disregarding the inmate's testimony, the evidence of defendant's guilt was overwhelming, and the trial court gave the pattern jury instruction on credibility. Brown v. State, 289 Ga. 259, 710 S.E.2d 751, 2011 Ga. LEXIS 376, cert. denied, 565 U.S. 989, 132 S. Ct. 524, 181 L. Ed. 2d 368, 2011 U.S. LEXIS 7832 (2011) (decided under former O.C.G.A. § 24-9-20).

3. Use of Evidence of Other Crimes

Evidence of codefendant's transactions admissible. — There was no call for a mistrial based on evidence of similar transactions since the state never suggested, nor would it be inferable from any of the evidence, that defendant was implicated in any way in the second count in which defendant's codefendant was charged. Ealy v. State, 203 Ga. App. 219, 416 S.E.2d 559, 1992 Ga. App. LEXIS 473 (1992) (decided under former O.C.G.A. § 24-9-20).

Prior conviction admissible to rebut specific testimony. — Although the defendant did not put the defendant's "character into issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20, it was proper to allow evidence of a prior drug possession charge to disprove defendant's statement that the defendant did not use drugs. The introduction of the prior conviction was permissible since the state was rebutting specific testimony. Sanders v. State, 199 Ga. App. 671, 405 S.E.2d 727, 1991 Ga. App. LEXIS 638 (1991) (decided under former O.C.G.A. § 24-9-20); Thrasher v. State, 243 Ga. App. 702, 534 S.E.2d 439, 2000 Ga. App. LEXIS 534 (2000) (decided under former O.C.G.A. § 24-9-20).

Evidence of independent crimes was admissible for limited purposes if two conditions were met: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tended to prove the latter. If these conditions were satisfied, evidence concerning the independent crimes could be admitted for the purposes of showing, among other things, identity, motive, plan, scheme, bent of mind, intent, and course of conduct. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82, 1983 Ga. LEXIS 754 (1983) (decided under former O.C.G.A. § 24-9-20); Lord v. State, 199 Ga. App. 814, 406 S.E.2d 137, 1991 Ga. App. LEXIS 651 (1991) (decided under former O.C.G.A. § 24-9-20).

Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813, 1992 Ga. App. LEXIS 1037 (1992) (decided under former O.C.G.A. § 24-9-20).

Conviction improperly admitted for impeachment. — Defendant's prior conviction was improperly admitted as

the timing of defendant's prior conviction was not inconsistent with defendant's trial testimony that defendant was "in the Persian Gulf" at the time of the codefendant's prior drug offense; the error was not harmless as the evidence of defendant's cocaine trafficking conviction, while sufficient, was not overwhelming. Patten v. State, 275 Ga. App. 574, 621 S.E.2d 550, 2005 Ga. App. LEXIS 1040 (2005) (decided under former O.C.G.A. § 24-9-20).

Use of evidence of other crimes held proper. — Question to one of defendant's witnesses who had testified as to defendant's good character, on cross-examination by counsel for the state, as to whether it would affect the witness's opinion of defendant's reputation if the witness knew that the defendant carried a pistol in defendant's bosom since there was evidence by at least one witness that defendant was carrying a pistol around in the bosom of the defendant's dress prior to the homicide, was a proper one under the circumstances in which it was asked. Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810, 1953 Ga. App. LEXIS 1078 (1953) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant was on trial for the offense of murder, and there was evidence tending to show that the defendant killed the deceased in the commission of a robbery, and also that on the occasion in question the defendant came to the home of the deceased in an automobile and left by the same conveyance, evidence that the defendant later admitted stealing the automobile in a different county tended to illustrate defendant's state of mind at the time of the homicide, and to corroborate the other evidence tending to show robbery as the motive, and was not subject to objection on the grounds that it was irrelevant and prejudicial, and placed defendant's character in issue. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled in part, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, §§ 38-415 and 38-416).

In the defendant's prosecution for the murder of his present wife, evidence that the defendant had shot his former wife in the shoulder with a pistol was admissible to show malice, intent, motive, and bent of mind and did not impermissibly place the defendant's character in issue. Clark v. State, 255 Ga. 370, 338 S.E.2d 269, 1986 Ga. LEXIS 483 (1986) (decided under former O.C.G.A. § 24-9-20).

Evidence of similar crimes held to be properly admitted. — See Anderson v. State, 184 Ga. App. 293, 361 S.E.2d 270, 1987 Ga. App. LEXIS 2214 (1987) (decided under former O.C.G.A. § 24-9-20); Flowers v. State, 191 Ga. App. 396, 381 S.E.2d 768, 1989 Ga. App. LEXIS 612 (1989) (decided under former O.C.G.A. § 24-9-20).

When a defendant, on trial for trafficking in cocaine, volunteered that the defendant tried to flee in a prior similar transaction case because the defendant was on parole, the trial court did not err in permitting the state to ask what crime the defendant had been paroled from, once the defendant had interjected the fact. Head v. State, 195 Ga. App. 445, 393 S.E.2d 730, 1990 Ga. App. LEXIS 562 (1990) (decided under former O.C.G.A. § 24-9-20).

When defendant was prosecuted for a drug offense arising out of defendant's attempt to deliver cocaine concealed in a box of toothpaste to a jail inmate, evidence of a similar transaction involving the defendant's codefendant at the jail five months later was admissible. Riley v. State, 196 Ga. App. 148, 395 S.E.2d 394, 1990 Ga. App. LEXIS 788 (1990) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol, and with an open container in the car, was admissible as circumstantial evidence of the defendant's bent of mind and course of conduct on the night in question. McCullough v. State, 230 Ga. App. 98, 495 S.E.2d 338 (decided under former O.C.G.A. § 24-9-20).

Mistrial was not required in a prosecution for selling and trafficking in cocaine since the defendant testified at length on

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direct examination that the defendant arranged numerous drug buys for the police and that the defendant was threatened and attacked by individuals who were arrested as a result of the defendant's aid and such testimony opened the door to the prosecutor's questions about how the defendant was able to arrange those drug buys and whether any danger the defendant faced could have come from the defendant's involvement in other drug transactions. Satterfield v. State, 248 Ga. App. 479, 546 S.E.2d 859, 2001 Ga. App. LEXIS 309 (2001) (decided under former O.C.G.A. § 24-9-20).

Because defendant's prior guilty pleas were made with assistance of counsel and were voluntary, the trial court did not err in admitting the pleas to show aggravating circumstances during sentencing. Sampson v. State, 271 Ga. App. 206, 609 S.E.2d 110, 2004 Ga. App. LEXIS 1614 (2004) (decided under former O.C.G.A. § 24-9-20).

Evidence of more convictions than defendant testified to. — When defendant testified to three prior convictions, the court properly allowed evidence of a fourth conviction as impeachment. Bounds v. State, 207 Ga. App. 665, 428 S.E.2d 673, 1993 Ga. App. LEXIS 304 (1993), overruled in part, Felix v. State, 271 Ga. 534, 523 S.E.2d 1, 1999 Ga. LEXIS 786 (1999) (decided under former O.C.G.A. § 24-9-20). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1.

Evidence of incarceration admissible. — Evidence introduced regarding defendant's incarceration under another name was relevant to the charge of giving a false name and was not objectionable based upon former O.C.G.A. § 24-9-20. Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (decided under former O.C.G.A. § 24-9-20).

Under former O.C.G.A. § 24-9-20(b), state did not elicit improper character evidence from the defendant regarding the defendant's prior incarceration during cross-examination because the defendant mentioned the prior incarceration during the defendant's testimony. Baker v. State, 307 Ga. App. 884, 706 S.E.2d 214, 2011 Ga. App. LEXIS 105 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. June 27, 2011) (decided under former O.C.G.A. § 24-9-20).

Evidence of parole status. — Assuming that the defendant did not, merely by volunteering that the defendant was on parole, place the defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, the defendant nevertheless subjected oneself to a through and sifting cross-examination by the state on that point. Wilson v. State, 231 Ga. App. 525, 499 S.E.2d 911 (decided under former O.C.G.A. § 24-9-20).

Similarity to previous offenses. — There was no requirement that a previous offense be absolutely identical to the one being prosecuted so as to make the offense admissible. Blige v. State, 205 Ga. App. 133, 421 S.E.2d 547, 1992 Ga. App. LEXIS 1048 (1992), aff'd, 263 Ga. 244, 430 S.E.2d 761, 1993 Ga. LEXIS 514 (1993) (decided under former O.C.G.A. § 24-9-20).

Similarity to other conduct. — Showing excerpt of a videotape found in defendant's possession which depicted the conduct with which defendant was charged was not error since it was relevant to defendant's bent of mind and modus operandi. Rushin v. State, 269 Ga. 599, 502 S.E.2d 454 (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in admitting the similar transaction evidence as the evidence described acts remarkably similar to those with which defendant was charged; the victims' older sister testified that defendant had forced her to have intercourse with him in a manner similar to that testified to by the victims, and defendant's wife testified that he performed the same deviant sexual act upon her that the victims testified he performed upon them, thus, the evidence was admissible to show defendant's bent of mind, course of conduct, and lustful disposition with respect to the offenses alleged against him. Beck v. State, 263 Ga. App. 256, 587 S.E.2d 316, 2003 Ga. App. LEXIS 1175 (2003) (decided under former O.C.G.A. § 24-9-20).

Remoteness in time. — Testimony concerning a prior shooting incident (six

years before the killing) involving the defendant and the defendant's subsequent murder victim was not too remote in time to have been admissible. Thurman v. State, 255 Ga. 286, 336 S.E.2d 746, 1985 Ga. LEXIS 1008 (1985) (decided under former O.C.G.A. § 24-9-20).

Permitting the prosecutor to ask defendant if the defendant had been arrested on a sex charge subsequent to the incident in question at defendant's trial for child molestation and enticing a child for indecent purposes was reversible error since the sole issue in the case was the credibility of the defendant and the alleged victim. Thomas v. State, 178 Ga. App. 674, 344 S.E.2d 496, 1986 Ga. App. LEXIS 1750 (1986) (decided under former O.C.G.A. § 24-9-20).

Proof of forgery conviction prejudicial. — When evidence of defendant's prior conviction of forgery was admitted during defendant's trial for possession of a controlled substance, since forgery was a crime of moral turpitude which went directly to the defendant's truthfulness and veracity, the Court of Appeals could not say with certainty that the defendant's conviction for possession of a controlled substance was not unduly influenced by inadmissible evidence of defendant's prior criminal record, and the judgment was reversed. Hall v. State, 180 Ga. App. 210, 348 S.E.2d 736, 1986 Ga. App. LEXIS 2078 (1986) (decided under former O.C.G.A. § 24-9-20).

Relevance of evidence concerning a previous altercation between defendant and defendant's subsequent murder victim wherein defendant cut the victim with a knife many times on the face and arm (for which defendant was convicted of simple battery) outweighed the possible prejudicial effect of such evidence since it shed light on the defendant's conduct toward the victim. Cooper v. State, 256 Ga. 234, 347 S.E.2d 553, 1986 Ga. LEXIS 811 (1986) (decided under former O.C.G.A. § 24-9-20).

Possession of firearm by convicted felon. — It was proper under former O.C.G.A. § 24-9-20 to try a firearms possession charge, which required evidence of a prior felony conviction, together with a marijuana and a burglary charge. State v. Santerfeit, 163 Ga. App. 627, 295 S.E.2d 756, 1982 Ga. App. LEXIS 2601 (1982) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for assault and possession of a pistol by a convicted felon, the testimony of an officer to show defendant's possession of the pistol prior to the date of the assault was admissible. Fulton v. State, 232 Ga. App. 898, 503 S.E.2d 54 (decided under former O.C.G.A. § 24-9-20).

Evidence of defendant's narcotic use admissible to show motive for burglaries. — When a defendant was charged with the robbery or burglary of a pharmacy or drug store, evidence that the defendant used narcotics was admissible since that evidence was relevant to the defendant's motive for committing the crime. Brock v. State, 179 Ga. App. 519, 347 S.E.2d 230, 1986 Ga. App. LEXIS 1959 (1986) (decided under former O.C.G.A. § 24-9-20).

Court's admission of evidence of prior sexual contact was not error since both the prior incident and the charged crime involved nonconsensual sexual conduct related to younger females in defendant's household, and the prior incident occurred in the same time frame as the onset of the charged crimes. Yelverton v. State, 199 Ga. App. 41, 403 S.E.2d 816, 1991 Ga. App. LEXIS 369 (1991) (decided under former O.C.G.A. § 24-9-20).

Proof of crimes involving moral turpitude was admissible to impeach witness who placed the witness's character in issue through testimony given by the witness on direct examination. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707, 1991 Ga. App. LEXIS 630 (1991), cert. denied, No. S91C1164, 1991 Ga. LEXIS 727 (Ga. June 20, 1991) (decided under former O.C.G.A. § 24-9-20).

Admission of fingerprint card was error. — In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against the defendant. Jinks v. State, 229 Ga. App. 18, 493 S.E.2d 214 (decided under former O.C.G.A. § 24-9-20).

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Parole records admissible. — It was not error to allow the state to introduce into evidence defendant's parole documents after these were taken from defendant's person upon arrest. Dowdy v. State, 209 Ga. App. 95, 432 S.E.2d 827, 1993 Ga. App. LEXIS 771 (1993) (decided under former O.C.G.A. § 24-9-20).

Evidence of probation violation. — Record did not support defendant's claim that the state violated former O.C.G.A. § 24-9-20 by introducing the issue of defendant's probation violation during cross-examination to show that the defendant had prior convictions, and the appellate court found that the trial court did not abuse the court's discretion by denying the defendant's motion for a mistrial. Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309, 2003 Ga. App. LEXIS 1307 (2003) (decided under former O.C.G.A. § 24-9-20).

Admissible in cross-examination when defendant raised probation status on direct. — When defendant admitted that defendant was on probation for prior criminal conduct during defendant's direct testimony, it was admissible for the trial court to allow the state, on cross-examination, to explore the nature of defendant's prior probation, including the fact that the defendant was on probation for having previously fled from the police, which was what the present trial was about; accordingly, there was no error in this admission of evidence pursuant to former O.C.G.A. § 24-9-20(b). Dyer v. State, 261 Ga. App. 289, 585 S.E.2d 81, 2003 Ga. App. LEXIS 608 (2003) (decided under former O.C.G.A. § 24-9-20).

No cross-examination on unproved crimes, violent acts. — When the state cross-examines a character witness, the prosecutor may not ask questions as to unproved crimes or acts of violence which are inflammatory, prejudicial, and suggestive of facts not in evidence. Chisholm v. State, 199 Ga. App. 746, 406 S.E.2d 112, 1991 Ga. App. LEXIS 654 (1991) (decided under former O.C.G.A. § 24-9-20).

Evidence of specific acts to rebut defendant's character evidence held harmless error. — When defendant's character had been put in issue, it was not permissible in rebuttal to prove specific acts of bad character, except on cross-examination for the purpose of testing the witness's knowledge or to impeach defendant's statement; nevertheless, admission of evidence that the police officer had received reports concerning liquor violations by defendant in rebuttal of evidence that defendant had never been previously arrested for liquor violations, the defendant conceding that the defendant had placed defendant's character in issue as to liquor violations, was not such error as to require reversal. Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246, 1951 Ga. App. LEXIS 783 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Because the trial court did not commit reversible error when the court erroneously allowed the state to introduce evidence of defendant's prior misdemeanor convictions under former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404 and 24-5-506), defendant failed to show that counsel's trial strategies constituted ineffective assistance. Harris v. State, 279 Ga. 522, 615 S.E.2d 532, 2005 Ga. LEXIS 446 (2005) (decided under former O.C.G.A. § 24-9-20).

Argument to Jury

Right to uninterrupted statements before jury. — Defendant in a criminal case has the right to make, without interruption, such statement to the jury in the defendant's defense as the defendant sees fit and proper to make. Defendant was not circumscribed, governed, or restricted by the rules controlling admissibility of evidence. It was error to interrupt the defendant and exclude from consideration of the jury a portion of defendant's statement, so long as the defendant confines oneself to the transaction under investigation. The court may, however, prevent the defendant from making wholly irrelevant statements entirely inapplicable to the case. Bradford v. State, 67 Ga. App. 462, 21 S.E.2d 108, 1942 Ga. App. LEXIS 448 (1942) (decided under former Code 1933, §§ 38-415 and 38-416).

Right to make a statement in the defendant's behalf was a personal right granted to defendant by law, and extended no

further than to permit defendant personally to make to the court and jury such statement as defendant deemed proper in the defendant's defense. Defendant's counsel had no right to ask the defendant questions while defendant was making defendant's statement. The trial judge, however, in the judge's discretion can permit the defendant's counsel to ask the defendant questions or make suggestions to defendant relating to the defendant's statement, while defendant was making it or when the defendant had concluded it. Williams v. State, 220 Ga. 766, 141 S.E.2d 436, 1965 Ga. LEXIS 626 (1965) (decided under former Code 1933, §§ 38-415 and 38-416).

Failure of a defendant's wife to testify was not a legitimate subject matter of argument for counsel for the state; although such a comment did not constitute reversible error when the trial court rebuked the prosecuting attorney immediately in the presence of the jury, instructs the jury that it was not necessary for any defendant or the defendant's spouse ever to take the stand, and that the burden was always upon the state to prove a defendant's guilt beyond a reasonable doubt. Casey v. State, 167 Ga. App. 437, 306 S.E.2d 683, 1983 Ga. App. LEXIS 3329 (1983) (decided under former O.C.G.A. § 24-9-20).

Denial of right was reversible error. — Making of a statement by defendant, when the defendant introduced no other evidence, entitled the defendant to conclude the argument in the case. This is an important right, and the right's denial would generally cause a reversal of the decision of the lower court. The presumption arising from denial of the right was that the party thus deprived was injured. Kelly v. State, 149 Ga. App. 388, 254 S.E.2d 737, 1979 Ga. App. LEXIS 1863 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Denying defendant the right to make the closing argument was not error since a codefendant had tendered an exhibit into evidence that was admitted without objection during cross-examination of a police officer. Boston v. State, 185 Ga. App. 740, 365 S.E.2d 885, 1988 Ga. App. LEXIS 231 (1988) (decided under former O.C.G.A. § 24-9-20).

Defendants may not suggest in argument what defendants saw fit not to put on stand, that there was other witness testimony favorable to their defense, and to nevertheless have benefit of privilege to open and conclude argument to jury. Sanders v. State, 156 Ga. App. 44, 274 S.E.2d 88, 1980 Ga. App. LEXIS 2868 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Suggestion that defendants sacrificed testimony to preserve argument. — It would not be proper to intimate to jury that defendants had sacrificed valuable defense witness testimony to preserve procedural right to open and conclude argument to jury. Sanders v. State, 156 Ga. App. 44, 274 S.E.2d 88, 1980 Ga. App. LEXIS 2868 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on lack of remorse. — Because there was sufficient evidence for a rational trier of fact to find defendant guilty and a prosecutor's closing argument simply made a reasonable inference based on defendant's lack of remorse, there was no prosecutorial misconduct under former O.C.G.A. § 24-9-20(b). Smith v. State, 279 Ga. 48, 610 S.E.2d 26, 2005 Ga. LEXIS 143 (2005) (decided under former Code 1933, §§ 38-415 and 38-416).

In charging jury upon defendant's right to make statement, it was preferable to confine the instruction to the language of the former statute. Garrett v. State, 203 Ga. 756, 48 S.E.2d 377, 1948 Ga. LEXIS 505 (1948) (decided under former Code 1933, §§ 38-415 and 38-416).

Treatment of Defendant as Witness

Defendants' testimony should be given the same weight and credit and be considered on the same basis and under the same rules as any other witness in the case. Burgan v. State, 59 Ga. App. 524, 1 S.E.2d 603, 1939 Ga. App. LEXIS 345 (1939) (decided under former Code 1933, §§ 38-415 and 38-416).

Sworn testimony of defendant has same evidentiary value as testimony of any other witness. Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47, 1971 Ga. App. LEXIS 836 (1971) (decided under former Code 1933, §§ 38-415 and

Treatment of Defendant as Witness (Cont'd)

38-416); Black v. State, 230 Ga. 614, 198 S.E.2d 314, 1973 Ga. LEXIS 1005 (1973) (decided under former Code 1933, §§ 38-415 and 38-416); Jester v. State, 131 Ga. App. 269, 205 S.E.2d 444, 1974 Ga. App. LEXIS 1397 (1974) (further holding that instruction on weight to be given defendant's testimony was unnecessary) (decided under former Code 1933, §§ 38-415 and 38-416).

Jury was authorized to believe part of defendant's statement, though the whole statement was not credible to the jury; and the same thing was true as to the testimony of each and every witness who appeared before the jury. Gray v. State, 77 Ga. App. 747, 49 S.E.2d 829, 1948 Ga. App. LEXIS 634 (1948) (decided under former Code 1933, §§ 38-415 and 38-416); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491, 1950 Ga. App. LEXIS 1086 (1950) (decided under former O.C.G.A. § 24-9-20); King v. State, 151 Ga. App. 762, 261 S.E.2d 485, 1979 Ga. App. LEXIS 2788 (1979) (decided under former O.C.G.A. § 24-9-20).

Cross-examination generally. — Former statute specifically permitted a defendant to be cross-examined as any other witness except as to general bad character or prior convictions. Such cross-examination may be thorough and sifting. Leonard v. State, 146 Ga. App. 439, 246 S.E.2d 450, 1978 Ga. App. LEXIS 2395 (1978) (decided under former Code 1933, §§ 38-415 and 38-416).

Counsel's errors in opening door to damaging testimony. — Defendant's convictions were reversed because the defendant showed the required prejudice to prevail on an ineffective assistance claim based on trial counsel's errors of opening the door to damaging testimony that introduced evidence into the record that directly contradicted the defendant's trial testimony and allowed the admission of other evidence that further challenged the defendant's credibility, the combined effect of which was to severely undercut the defense's case. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71, 2017 Ga. App. LEXIS 100 (2017).

Permissible questions. — In a shoplifting prosecution, the trial court did not err in permitting the state's attorney, over an objection that the state shifted the burden of proof, to ask defendant whether the defendant attempted to contact anyone at the store who could corroborate the defendant's testimony that the defendant entered the store with a stolen CD player in order to return the CD player. Singleton v. State, 240 Ga. App. 240, 522 S.E.2d 734 (decided under former O.C.G.A. § 24-9-20).

Permitting cross-examination of defendant before defendant testified was not necessarily error. Everett v. State, 238 Ga. 80, 230 S.E.2d 882, 1976 Ga. LEXIS 1107 (1976) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant may offer to subject oneself to cross-examination. — While the prosecution may refuse to cross-examine defendant and defendant had the right to refuse to answer any questions asked of the defendant, defendant, nevertheless, had the right to offer to subject oneself to cross-examination. Smith v. State, 215 Ga. 51, 108 S.E.2d 688, 1959 Ga. LEXIS 388 (1959) (decided under former Code 1933, §§ 38-415 and 38-416).

Striking defendant's testimony when defendant refused to be cross examined. — Once the defendant withdrew the defendant's consent to be cross-examined as a witness, the defendant could no longer be treated as a witness at all; thus, the trial court properly struck all of the defendant's direct testimony. McKoy v. State, 303 Ga. 327, 812 S.E.2d 293, 2018 Ga. LEXIS 175 (2018).

Striking of the defendant's testimony for refusing to be cross-examined did not deprive the defendant of the defendant's rights to present a defense and to due process because five other witnesses testified for the defense in support of the defendant's self-defense claim; the procedure the trial court followed before striking the defendant's testimony gave the defendant due process as the court clearly informed the defendant of the consequence if the defendant refused to retake the stand, allowed the defendant to consult with counsel, and then asked the defendant to make an informed decision;

and the defendant elected not to retake the stand and thereby suffer the consequence of the defendant's testimony being excluded from the evidence. McKoy v. State, 303 Ga. 327, 812 S.E.2d 293, 2018 Ga. LEXIS 175 (2018).

Impeachment generally. — While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions until the defendant puts the defendant's general good character in evidence, defendant was subject to impeachment the same as any other witness. Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902, 1978 Ga. App. LEXIS 2295 (1978) (decided under former Code 1933, §§ 38-415 and 38-416).

Trial court did not err by allowing the state to question the defendant regarding a prior domestic dispute with the defendant's wife because under former O.C.G.A. § 24-9-20(b), the trial court properly allowed the state to confront the defendant with evidence that the defendant beat the wife after an argument in order to impeach the defendant's testimony on direct that the defendant did not beat women with whom the defendant argued. Ridley v. State, 290 Ga. 798, 725 S.E.2d 223, 2012 Ga. LEXIS 252 (2012) (decided under former O.C.G.A. § 24-9-20).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 699.

Am. Jur. Proof of Facts.

Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under Miranda v. Arizona, 23 POF2d 713.

Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

ALR.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 A.L.R. 749.

Admissibility of evidence of refusal of accused to comply with order or request to do an act which might aid in establishing his guilt, 35 A.L.R. 1236.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 A.L.R. 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 A.L.R. 143.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 A.L.R. 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 A.L.R. 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 A.L.R. 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 A.L.R. 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 A.L.R. 911.

Right to cross-examine accused as to previous prosecution for or conviction of crime as affecting his credibility, 103 A.L.R. 350; 161 A.L.R. 233.

Admissibility of plea of guilty at preliminary hearing, 141 A.L.R. 1335.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 A.L.R. 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 A.L.R. 1208.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 A.L.R. 428.

Constitutional or statutory provision permitting comment on failure of defen-

dant in criminal case to explain or deny by his testimony, evidence or facts against him, 171 A.L.R. 1267.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R.2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 A.L.R.2d 388.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 A.L.R.2d 1403.

Privilege against self-incrimination as to testimony before grand jury, 38 A.L.R.2d 225.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 A.L.R.2d 1258.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Sufficiency of witness's claim of privilege against self-incrimination, 51 A.L.R.2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 A.L.R.2d 1030; 29 A.L.R.5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 A.L.R.2d 431.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 A.L.R.2d 463.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 A.L.R.2d 643.

Comment on accused's failure to testify by counsel for codefendant, 1 A.L.R.3d 989.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 A.L.R.3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 A.L.R.3d 1054.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial, 16 A.L.R.3d 726.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 A.L.R.3d 1093; 32 A.L.R.4th 774.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 A.L.R.3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 A.L.R.3d 1076.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 A.L.R.3d 1373.

Propriety of requiring accused to give handwriting exemplar, 43 A.L.R.3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 A.L.R.3d 1413.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 A.L.R.3d 325.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of Miranda rule, 77 A.L.R.3d 669.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 A.L.R.3d 706.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 A.L.R.3d 230.

Requiring defendant in criminal case to exhibit self, or perform physical acts, during trial and in presence of jury, 3 A.L.R.4th 374.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 A.L.R.4th 796.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 A.L.R.4th 934.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error — modern cases, 32 A.L.R.4th 774.

Admissibility of evidence of accused's membership in gang, 39 A.L.R.4th 775.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding — post-Luce cases, 80 A.L.R.4th 1028.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse, 24 A.L.R.5th 465.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USC Appx.) of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 A.L.R. Fed. 511.

24-5-507. Grant of immunity; contempt.

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request in writing the superior court to order such person to testify or produce the evidence. Upon order of the court, such person shall not be excused on the basis of the privilege against self-incrimination from testifying or producing any evidence required, but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence shall be used against the person in any proceeding or prosecution for a crime or offense concerning which he or she testified or produced evidence under court order. However, such person may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify or in producing or failing to produce evidence in accordance with the order but shall not be required to produce evidence that can be used in any other court of this state, the United States, or any other state. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof, and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court.

(b) If a person refuses to testify after being granted immunity from

prosecution and after being ordered to testify as set forth in this Code section, such person may be adjudged in contempt and committed to the county jail until such time as such person purges himself or herself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which such person was ordered to testify has been dissolved, such person may purge himself or herself by testifying before the court.

History.

Code 1981, § 24-5-507, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Georgia's Witness Immunity Statute: Explication for Judicial Development," see 32 Mercer L. Rev. 341 (1980).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1975, p. 727, §§ 1 and 2, and former O.C.G.A. § 24-9-28 are included in the annotations for this Code section.

Disclosures used in other county. — County prosecutor's agreement not to make derivative use of defendant's disclosures of criminal conduct did not prevent prosecutor in another county from making use of those disclosures. Bryant v. State, 164 Ga. App. 555, 296 S.E.2d 792, 1982 Ga. App. LEXIS 2868 (1982) (decided under former O.C.G.A. § 24-9-28).

Discretion of court. — It was within the discretion of the trial court to order that a codefendant testify; however, the court abused the court's discretion in refusing such order based upon the court's own determination of the credibility of the witness since that issue was reserved for jury determination. State v. Mosher, 265 Ga. 666, 461 S.E.2d 219, 1995 Ga. LEXIS 726 (1995) (decided under former O.C.G.A. § 24-9-28).

Grant of Immunity

Effect. — Trial court's grant of an order of immunity pursuant to subsection (a) of former O.C.G.A. § 24-9-28 removed any right of the witness to invoke the privilege against self-incrimination. Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820, 2000 Ga. App. LEXIS 743 (2000) (decided under former O.C.G.A. § 24-9-28).

State's interest outweighs defense's need. — When the state was planning to proceed with the prosecution of defendant if defendant decided not to plead guilty, the state's interest in denying use immunity to defendant outweighed the codefendant's need for defendant's testimony in a separate trial. House v. State, 203 Ga. App. 55, 416 S.E.2d 108, 1992 Ga. App. LEXIS 369 (1992), cert. denied, No. S92C0719, 1992 Ga. LEXIS 288 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-9-28).

No denial of due process shown. — There was no denial of due process since the record showed defendant exercised the opportunity to cross-examine a witness and expressly waived defendant's right for further cross-examination after use immunity was offered to the witness. Eschena v. State, 203 Ga. App. 621, 417 S.E.2d 214, 1992 Ga. App. LEXIS 553 (1992), cert. denied, No. S92C0851, 1992 Ga. LEXIS 564 (Ga. July 8, 1992) (decided under former O.C.G.A. § 24-9-28).

Former statute was limited to proceedings in which the right against self-incrimination can legitimately be raised. Smith v. State, 138 Ga. App. 683, 227 S.E.2d 84, 1976 Ga. App. LEXIS 2282, aff'd, 237 Ga. 647, 229 S.E.2d 433, 1976 Ga. LEXIS 1340 (1976) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected defendant to the self-incrimination choice once again, did not preclude compelled testimony via immunity in a codefendant's trial. Lee v. State, 191 Ga. App. 882, 383 S.E.2d 366, 1989 Ga. App. LEXIS 858 (1989) (decided under former O.C.G.A. § 24-9-28).

Prosecutor had the power to forego prosecution as long as the promise contained a "description of the crimes or transaction's " for which an individual was excused from prosecution and the promise was approved by the court. State v. Dean, 212 Ga. App. 724, 442 S.E.2d 830, 1994 Ga. App. LEXIS 387 (1994), cert. denied, No. S94C1151, 1994 Ga. LEXIS 842 (Ga. July 1, 1994) (decided under former O.C.G.A. § 24-9-28).

District attorney, not the trial court, had the discretion to grant immunity to witnesses for the state and there was no provision under which the trial court could have granted immunity to a jail inmate so the inmate could testify as a defense witness in a defendant's attempted armed robbery trial. Dennard v. State, 313 Ga. App. 419, 721 S.E.2d 610, 2011 Ga. App. LEXIS 1099 (2011) (decided under former O.C.G.A. § 24-9-28).

Former statute did not authorize conditional grants of immunity. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75, 1977 Ga. LEXIS 1236 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Former statute authorized only a grant of use and derivative use immunity. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75, 1977 Ga. LEXIS 1236 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

"Use and derivative use" immunity. — It was the intention of the General Assembly to grant "use and derivative use" immunity. Brooks v. State, 238 Ga. 435, 233 S.E.2d 208, 1977 Ga. LEXIS 1051 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

State was not required to seek "use immunity" for defendant's alibi witness. Hampton v. State, 308 Ga. 797, 843 S.E.2d 542, 2020 Ga. LEXIS 356 (2020).

Former statute did not authorize a grant of transactional immunity, i.e., immunity from prosecution. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75, 1977 Ga. LEXIS 1236 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

State was not required to grant immunity to codefendant in return for testimony. In re J.S.S., 168 Ga. App. 340, 308 S.E.2d 855, 1983 Ga. App. LEXIS 2768 (1983) (decided under former O.C.G.A. § 24-9-28).

Former statute applied only if witness forfeits a right. — Although the language of former O.C.G.A. § 24-9-28 was theoretically broad enough to encompass all promises to forgo prosecution in exchange for evidence, there was no indication that the legislature intended the statute to apply except to the extraction of information in a situation in which the witness gave up a valuable right; the statute was intended to extend the requisite constitutional protection in such a case. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297, 1982 Ga. LEXIS 1190 (1982) (decided under former O.C.G.A. § 24-9-28).

No common-law transactional immunity existed in Georgia in the sense of the protection of a witness who gave up a valuable right. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297, 1982 Ga. LEXIS 1190 (1982) (decided under former O.C.G.A. § 24-9-28).

Transactional immunity flowing from full disclosure of crime was not a matter of right but rested in the discretion of the court, which could determine whether the defendant lived up to defendant's end of the bargain. Hanson v. State, 161 Ga. App. 536, 287 S.E.2d 764, 1982 Ga. App. LEXIS 1934, aff'd, 249 Ga. 739, 295 S.E.2d 297, 1982 Ga. LEXIS 1190 (1982) (decided under former O.C.G.A. § 24-9-28).

Irrelevant that no conviction results. — State may contract with a criminal for the criminal's exemption from

Grant of Immunity (Cont'd)

prosecution whether the party testified against was convicted or not. Hanson v. State, 161 Ga. App. 536, 287 S.E.2d 764, 1982 Ga. App. LEXIS 1934, aff'd, 249 Ga. 739, 295 S.E.2d 297, 1982 Ga. LEXIS 1190 (1982) (decided under former O.C.G.A. § 24-9-28).

Conditions under which city may order employees to take polygraph test. — City may, without violating the employees' privilege against self-incrimination, order fire fighters or police officers to take a polygraph test and may discipline those who do not pass, as long as the employees are not coerced into taking the test, are not required to waive any constitutional rights, and the results are not to serve as a sole ground for any action against the employees, since the privilege against self-incrimination does not prevent a governmental unit from taking non-criminal disciplinary action against an employee on the basis of compelled testimony. Hester v. City of Milledgeville, 777 F.2d 1492, 1985 U.S. App. LEXIS 25198 (11th Cir. 1985) (decided under former O.C.G.A. § 24-9-28).

Court cannot grant use immunity at request of defendant. — Trial court did not err in not granting use immunity to the co-indictee as Georgia law does not authorize a trial court to grant use immunity to a witness at the request of a defendant. Brown v. State, 295 Ga. 804, 764 S.E.2d 376, 2014 Ga. LEXIS 751 (2014) (decided under former O.C.G.A. § 24-9-28(a)).

Rule that indictments returned by grand jury were not amendable by district attorney was not violated by grant of immunity. Kesler v. State, 249 Ga. 462, 291 S.E.2d 497, 1982 Ga. LEXIS 1147 (1982) (decided under former O.C.G.A. § 24-9-28).

Curative instruction removed prejudice of testimony about immunity. — When defendant testified in the trial of defendant's co-conspirators under a grant of immunity and a witness mentioned that fact in defendant's trial, even if such mention violated former O.C.G.A. § 24-9-28, a curative instruction was sufficient to remove any potential prejudice. Robertson v. State, 268 Ga. 772, 493 S.E.2d 697 (decided under former O.C.G.A. § 24-9-28).

Refusal to Testify

No violation of immunity order occurred when, in trial for murder and hindering apprehension of a criminal, an officer was asked by a prosecutor whether the defendant had testified at a previous trial of another to everything the defendant had told the officer, to which the officer stated no, since the prosecutor was attempting to ensure that the testimony from the previous trial not be used in defendant's trial, and to clarify officer's response to an earlier inquiry by defense counsel. Highfield v. State, 246 Ga. 478, 272 S.E.2d 62, 1980 Ga. LEXIS 1171 (1980) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Appearance of immunized witness. — Defendants were not deprived of their right to effective cross-examination on the basis of the state's creation of an "unfavorable inference" through the appearance on the witness stand of a witness who had been granted immunity pursuant to subsection (a) of former O.C.G.A. § 24-9-28 and who refused to testify. Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820, 2000 Ga. App. LEXIS 743 (2000) (decided under former O.C.G.A. § 24-9-28).

Violation of immunity order found. — Trial court properly found defendant in contempt for refusing to testify against a codefendant after being granted testimonial immunity pursuant to former O.C.G.A. § 24-9-28(a); an evidentiary hearing was not required prior to the grant of immunity, and the immunity removed any Fifth Amendment privilege against self-incrimination. In the Interest of S.U., 269 Ga. App. 306, 603 S.E.2d 790, 2004 Ga. App. LEXIS 1136 (2004) (decided under former O.C.G.A. § 24-9-28).

Criminal contempt conviction reversed. — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering defendant to testify and neither court made a finding that defendant's testimony was "necessary to the public interest" as required by former O.C.G.A. § 24-9-28; the state had to grant

a valid immunity as broad in scope as the privilege it replaced and to show the applicability of that state immunity to the witness. In re Long, 276 Ga. App. 306, 623 S.E.2d 181, 2005 Ga. App. LEXIS 1237 (2005) (decided under former O.C.G.A. § 24-9-28).

RESEARCH REFERENCES

ALR.

Privilege against self-incrimination as extending to danger of prosecution in other state or country, 59 A.L.R. 895; 82 A.L.R. 1380.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 A.L.R. 101.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 118 A.L.R. 602; 53 A.L.R.2d 1030; 29 A.L.R.5th 1.

Promise of immunity or leniency as affecting one's competency as witness in criminal case, 120 A.L.R. 751.

Necessity and sufficiency of assertion of privilege against self-incrimination as condition of statutory immunity of witness from prosecution, 145 A.L.R. 1416.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 A.L.R. 428.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1438.

Immunity from service of process of nonresident witness appearing in other than strictly judicial proceedings, 35 A.L.R.2d 1353.

Sufficiency of witness's claim of privilege against self-incrimination, 51 A.L.R.2d 1178.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes, 43 A.L.R.3d 281.

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity, 62 A.L.R.3d 1145.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 A.L.R.4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution, 4 A.L.R.4th 1221.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony—post-Kastigar cases, 29 A.L.R.5th 1.

24-5-508. Qualified privilege for news gathering or dissemination.

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant;

(2) Cannot be reasonably obtained by alternative means; and

(3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

History.

Code 1981, § 24-5-508, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment, "The Reporter's Privilege in Georgia: 'Qualified' to Do the Job?," see 9 Ga. St. U.L. Rev. 495 (1993).

For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Comment: 2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs are Changing the Legal Community," see 60 Mercer L. Rev. 1353 (2009).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-30 are included in the annotations for this Code section.

Availability of information by alternative means. — State sought information state could reasonably have obtained by alternative means when several questions sought the identity of law enforcement officers and jailers who may have had public contact with the reporter or served as a confidential source. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (decided under former O.C.G.A. § 24-9-30).

Materiality and relevance. — State sought information that was not material or relevant when the state propounded interrogatories which inquired when and how the reporter found out that an attorney represented the defendant, whether the reporter advised the defendant of defendant's rights under Miranda or made promises to the defendant in exchange for the interview, whether the defendant referred to defendant's attorney during the interview, and why the reporter did not call the defendant's attorney to notify the attorney about the interview before the interview occurred and to inform the attorney about the interview after the interview took place. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (decided under former O.C.G.A. § 24-9-30).

Necessity of information for prosecution. — State failed to show that the reporter's testimony was necessary for the state to prosecute the defendant for murder when, although the state contended that the state needed the reporter's testimony to prove the defendant's mental state at the time the defendant made the incriminating admissions to the reporter, the state had already presented evidence at pre-trial hearings of the defendant's mental capacity and demeanor when the defendant confessed to police; not only did the state have at least two confessions on videotape, where the jury could observe the defendant, but the state also presented expert testimony of a forensic psychiatrist at the Jackson-Denno hearing concerning the defendant's competency to stand trial and whether defendant was suffering from any mental illness or delusion. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (decided under former O.C.G.A. § 24-9-30).

Courtroom gossip or speculation. — Former O.C.G.A. § 24-9-30 was not meant to be used to uncover the source of mere courtroom gossip or speculation. Nobles v. State, 201 Ga. App. 483, 411 S.E.2d 294, 1991 Ga. App. LEXIS 1443 (1991) (decided under former O.C.G.A. § 24-9-30).

Privilege properly invoked. — Trial court did not err by allowing a reporter who declined to reveal "confidential sources" in the sheriff's department to invoke the privilege created by former O.C.G.A. § 24-9-30 since the evidence showed that there were fewer than a dozen former employees of the sheriff's office in the relevant time period, and that the defense team made no effort to contact any of the employees. Stripling v. State, 261 Ga. 1, 401 S.E.2d 500, 1991 Ga. LEXIS 96, cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617, 1991 U.S.

LEXIS 6855 (1991) (decided under former O.C.G.A. § 24-9-30).

Privilege not waived by partial disclosure. — Reporter did not waive reporter's qualified privilege against disclosure of reporter's confidential sources and unpublished information by writing a news article based on the reporter's interview with the defendant; publication of part of the information gathered did not waive the privilege as to all of the information gathered on the same subject matter because it would chill the free flow of information to the public. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (decided under former O.C.G.A. § 24-9-30).

Appeal. — Non-parties engaged in news gathering may file a direct appeal of an order denying the parties the statutory reporter's privilege under the collateral order exception to the final judgment rule. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (decided under former O.C.G.A. § 24-9-30).

24-5-509. Communications between victim of family violence or sexual assault and agents providing services to such victim; termination of privilege.

(a) As used in this Code section, the term:

(1) "Agent" means a current or former employee or volunteer of a program who has successfully completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council certified victim assistance program.

(2) "Family violence" shall have the same meaning as provided in Code Section 19-13-1.

(3) "Family violence shelter" means a program whose primary purpose is to provide services to family violence victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(4) "Family violence victim" means a person who consults a family violence shelter for the purpose of securing advice or other services concerning an act of family violence, an alleged act of family violence, or an attempted act of family violence.

(5) "Government agency" means any agency of the executive, legislative, or judicial branch of government or political subdivision or authority thereof of this state, any other state, the District of Columbia, the United States and its territories and possessions, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(6) "Negative effect of the disclosure of the evidence on the victim" shall include the impact of the disclosure on the relationship between the victim and the agent and the delivery and accessibility of services.

(7) "Program" means a family violence shelter or rape crisis center.

(8) "Rape crisis center" means a program whose primary purpose is to provide services to sexual assault victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(9) "Services" means any services provided to a victim by a program including but not limited to crisis hot lines, safe homes and shelters, assessment and intake, counseling, services for children who are victims of family violence or sexual assault, support in medical, administrative, and judicial systems, transportation, relocation, and crisis intervention. Such term shall not include mandatory reporting as required by Code Section 19-7-5 or 30-5-4.

(10) "Sexual assault" shall have the same meaning as provided in Code Section 17-5-70.

(11) "Sexual assault victim" means a person who consults a rape crisis center for the purpose of securing advice or other services concerning a sexual assault, an alleged sexual assault, or an attempted sexual assault.

(12) "Victim" means a family violence victim or sexual assault victim.

(b) No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services, unless the privilege has been waived by the victim or, upon motion by a party, the court finds by a preponderance of the evidence at a pretrial hearing or hearing outside the presence of the jury that:

(1) In a civil proceeding:

(A) The evidence sought is material and relevant to factual issues to be determined;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim; or

(2) In a criminal proceeding:

(A) The evidence sought is material and relevant to the issue of

guilt, degree of guilt, or sentencing for the offense charged or a lesser included offense;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

(c) If the court finds that the evidence sought may be subject to disclosure pursuant to subsection (b) of this Code section, the court shall order that such evidence be produced for the court under seal, shall examine the evidence in camera, and may allow disclosure of those portions of the evidence that the court finds are subject to disclosure under this Code section.

(d) The privilege afforded under this Code section shall terminate upon the death of the victim.

(e) The privilege granted by this Code section shall not apply if the agent was a witness or party to the family violence or sexual assault or other crime that occurred in the agent's presence.

(f) The mere presence of a third person during communications between an agent and a victim shall not void the privilege granted by this Code section, provided that the communication occurred in a setting when or where the victim had a reasonable expectation of privacy.

(g) If the victim is or has been judicially determined to be incompetent, the victim's guardian may waive the victim's privilege.

(h) In criminal proceedings, if either party intends to compel evidence based on this Code section, the party shall file and serve notice of his or her intention on the opposing party at least ten days prior to trial, or as otherwise directed by the court. The court shall hold a pretrial hearing in accordance with subsection (b) of this Code section and determine the issue prior to trial.

History.

Code 1981, § 24-5-509, enacted by Ga. L. 2012, p. 105, § 2/HB 711.

Law reviews.

For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 204 (2012).

24-5-510. Privileged communications between law enforcement officers and peer counselors.

(a) As used in this Code section, the term:

(1) "Client" means a public safety officer.

(2) "Peer counselor" means:

(A) An employee of the Office of Public Safety Support within the Department of Public Safety; or

(B) An individual who is certified by the support coordinator of the Office of Public Safety Support within the Department of Public Safety pursuant to subsection (b) of Code Section 35-2-163 who is an employee of a public entity that employs public safety officers and who is designated by the executive head of such public entity.

(3) "Public entity" shall have the same meaning as provided for in Code Section 35-2-160.

(4) "Public safety officer" means a peace officer, correctional officer, emergency health worker, firefighter, highway emergency response operator, jail officer, juvenile correctional officer, probation officer, or emergency services dispatcher.

(b) Except as provided in subsection (c) of this Code section, communications between a client and a peer counselor shall be privileged. A peer counselor shall not disclose any such communications made to him or her and shall not be competent or compellable to testify with reference to any such communications in any court.

(c) The privilege created by subsection (b) of this Code section shall not apply when:

(1) The disclosure is authorized by the client, or if the client is deceased, by his or her executor or administrator, and if an executor or administrator is not appointed, by the client's next of kin;

(2) Compelled by court order;

(3) The peer counselor was an initial responding public safety officer, witness, or party to an act that is the subject of the counseling;

(4) The communication was made when the peer counselor was not performing official duties; or

(5) The client is charged with a crime.

(d) The privilege created by this Code section shall not be grounds to fail to comply with mandatory reporting requirements as set forth in

Code Section 19-7-5 or Chapter 5 of Title 30, the "Disabled Adults and Elder Persons Protection Act."

History.
Code 1981, § 24-5-510, enacted by Ga. L. 2014, p. 339, § 1/HB 872; Ga. L. 2018, p. 716, § 1/HB 703; Ga. L. 2020, p. 493, § 24/SB 429; Ga. L. 2020, p. 671, § 1/HB 838.

CHAPTER 6

WITNESSES

Article 1

General Provisions

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24-6-605. Judge as witness.
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Article 3

Use of Sign Language and Intermediary Interpreter in Administrative and Judicial Proceedings

24-6-650. State policy on hearing impaired persons.
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24-6-653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws.
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24-6-655. Waiver of right to interpreter.
24-6-656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters.
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24-6-658. Compensation of interpreters.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

GENERAL PROVISIONS

Cross references.
Televising of testimony of child who is victim of certain offenses, § 17-8-55.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. T. 24, C. 9, A. 3 are included in the annotations for this article.

Discretion of court. — Examination of witnesses is a matter largely within the discretion of the court. National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7, 1930 Ga. LEXIS 320 (1930) (decided under former Code 1933, § 33-1701 et seq.).

Examination by more than one counsel. — Although a defendant has both a state and federal right to self-representation, when the defendant has counsel to represent the defendant, the trial court can require the examination and cross-examination of witnesses to be conducted by one counsel only. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18, 1980 Ga. LEXIS 987 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Examination by judge. — Trial judge has the right to propound a question or series of questions to any witness for the purpose of developing fully the truth of the case; and the extent to which the examination conducted by the court shall go is a matter within the judge's discretion. Daniels v. State, 154 Ga. App. 323, 268 S.E.2d 376, 1980 Ga. App. LEXIS 2143 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Lengthy examination of a witness by the court will not be cause for a new trial unless the court during the examination of the witness expresses an opinion on the facts of the case or the examination becomes argumentative. Daniels v. State, 154 Ga. App. 323, 268 S.E.2d 376, 1980 Ga. App. LEXIS 2143 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Recall of witnesses. — Trial judge's discretion extends to allowing the state to reopen the case and recall a witness for the purpose of amplifying testimony previously given, and to allowing a witness to be recalled after the close of evidence to correct the witness's former testimony, which the witness contends was mistaken. Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, 1980 Ga. App. LEXIS 1762, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114, 1980 U.S. LEXIS 3413 (1980) (decided under former Code 1933, § 33-1701 et seq.).

It is within the discretionary power of the court to allow a witness to be sworn after the evidence on both sides has been announced closed and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice. Robinson v. State, 154 Ga. App. 591, 269 S.E.2d 86, 1980 Ga. App. LEXIS 2300 (1980) (decided under former Code 1933, § 33-1701 et seq.).

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, § 157 et seq.

Am. Jur. Proof of Facts.
Impeachment of Expert Witness — Financial Interest, 21 POF2d 73.

Expert Testimony at Sentencing, 21 POF2d 645.

Contradiction of Expert Witness Through Use of Authoritative Treatise, 31 POF2d 443.

Qualification of Medical Expert Witness, 33 POF2d 179.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Establishing an Adequate Foundation for Proof of Medical Expenses, 23 POF3d 243.

Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

Challenge to Eyewitness Testimony Through Expert Testimony, 35 POF3d 1.

Proof of Contamination in Toxic Tort Cases Through Expert Testimony, 39 POF3d 539.

Damages for Loss of Enjoyment of Life, 49 POF3d 339.

Firearms Forensics — Firearms Identification at Trial, 60 POF3d 1.

Proof of Identity of Fiber, Fabric, or Textile, 61 POF3d 501.

Proof of Incompetency, 62 POF3d 197.

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Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 56 A.L.R. 1418; 74 A.L.R. 849; 95 A.L.R. 388; 105 A.L.R. 1319; 4 A.L.R.2d 761.

Propriety of conduct of trial judge in propounding questions to witnesses in criminal case, 84 A.L.R. 1172.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 A.L.R. 1089.

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees, 165 A.L.R. 1302.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 A.L.R.2d 1354.

Coaching of witness by spectator at trial as prejudicial error, 81 A.L.R.2d 1142.

Closed-circuit television witness examination, 61 A.L.R.4th 1155.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 A.L.R.5th 149.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 A.L.R. Fed. 541.

24-6-601. General rule of competency.

Except as otherwise provided in this chapter, every person is competent to be a witness.

History.

Code 1981, § 24-6-601, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Adultery generally, § 16-6-19.

Child abandonment generally, § 19-10-1.

Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

Competency to testify in general, Fed. R. Evid. 601.

Law reviews.

For comment discussing the effect of mental unsoundness on the competency of witnesses, in light of O'Shea v. Jewel Tea Co., 233 F.2d 530 (9th Cir. 1956), see 19 Ga. B.J. 533 (1957).

For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12 year old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958).

For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

For note discussing the admissibility of husband and wife's testimony concerning nonaccess in determining the legitimacy of a child, see 6 Ga. St. B.J. 448 (1970).

For article, "The Evidence Code and Cases Instituted in Consequence of Adultery," see 15 Ga. St. B.J. 176 (1979).

For article, "The Need for a Special

Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

JUDICIAL DECISIONS

Analysis

General Consideration
Role of Court
Objection Requirement
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3796, 3800, 3803, 3804, 3805, former Code 1873, §§ 3852, 3856, 3859, 3860, 3861, former Code 1882, §§ 3852, 3856, 3859, 3860, 3861, former Civil Code 1895, §§ 5267, 5273, 5276, 5277, 5278, former Penal Code 1895, § 1012, former Civil Code 1910, §§ 5856, 5858, 5859, 5862, 5865, 5866, 5867, former Penal Code 1910, § 1038, former Code 1933, §§ 38-1601, 38-1603, 38-1607, 38-1608, 38-1610, 38-1611, 38-1612, and former O.C.G.A. §§ 24-9-1, 24-9-2, 24-9-5, 24-9-6, and 24-9-7 are included in the annotations for this Code section.

Everyone is presumed competent to testify, and even if a person is shown to have been insane, or to have been adjudged insane previously and is presently in a state mental hospital, this does not necessarily render the person incompetent to testify. Redfield v. State, 240 Ga. 460, 241 S.E.2d 217, 1978 Ga. LEXIS 756 (1978) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

There is no presumption that a witness is incompetent; and a witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266, 1902 Ga. LEXIS 302 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Admissibility not equated with competency. — An objection on the ground of admissibility of the evidence does not raise the issue as to the competency of the witness. Sumter County v. Pritchett, 125 Ga. App. 222, 186 S.E.2d 798, 1971 Ga. App. LEXIS 785 (1971) (decided under former Code 1933, § 38-1603).

Lex fori regulates competency. Bowers v. Southern Ry., 10 Ga. App. 367, 73 S.E. 677, 1912 Ga. App. LEXIS 516 (1912) (decided under former Civil Code 1910, §§ 5858 and 5859).

Competent claimant's testimony not to be ignored. — There was competent evidence to support an award based on claimant's testimony, considering its interpretation and credibility; the superior court's denial of the award solely because of the claimant's statements was reversed. Gasses v. Professional Plumbing Co., 204 Ga. App. 69, 418 S.E.2d 424, 1992 Ga. App. LEXIS 682 (1992) (decided under former O.C.G.A. § 24-9-1).

Former Georgia witness competency statutes presented a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and did not violate the equal protection clause. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555, 1989 Ga. LEXIS 348 (1989) (decided under former O.C.G.A. § 24-9-5).

General Consideration (Cont'd)

State had standing to challenge the former Georgia witness competency statutes. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555, 1989 Ga. LEXIS 348 (1989) (decided under former O.C.G.A. § 24-9-5).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial, the defendant made the defendant's "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7 [now repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204, 1988 Ga. App. LEXIS 691 (1988) (decided under former O.C.G.A. § 24-9-5).

Nothing in the record to indicate witness could not understand trial oath. — Ruling that a witness was incompetent to testify under former O.C.G.A. § 24-9-5(a) (see now O.C.G.A. §§ 24-6-601 and 24-6-603) failed since there was absolutely nothing in the record to demonstrate that the witness could not understand the nature of the trial oath simply because the witness was originally from Somalia and spoke in halting English. Trueblood v. State, 248 Ga. App. 78, 545 S.E.2d 628, 2001 Ga. App. LEXIS 173 (2001) (decided under former O.C.G.A. § 24-9-5).

Partly competent testimony. — If a witness was competent as to some matters and incompetent as to others, the objection could be taken under former statute at the time the witness offerred to testify as to the matters concerning which the witness was incompetent. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266, 1902 Ga. LEXIS 302 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Interrogatory responses inadmissible due to incompetence. — When the plaintiff and the plaintiff's guardian and conservator sued the defendants, a corporation, one of its franchised restaurants, and the owner of that restaurant, asserting that the plaintiff was harmed by a severe allergic reaction to a peach pie served to the plaintiff instead of the apple pie the plaintiff had ordered, summary judgment was properly granted to the defendants because the plaintiff's verified interrogatory responses were inadmissible due to the plaintiff's incompetence; and the trial court was authorized to disregard the plaintiff's verified interrogatory responses even though the verification preceded the ruling in the guardianship proceeding. Little v. Jim-Lar Corporation, 352 Ga. App. 764, 835 S.E.2d 794, 2019 Ga. App. LEXIS 636 (2019).

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Jurisdiction of court and jury generally. — Questions as to the relevancy and admissibility of the testimony are properly for the court. Its sufficiency and effect belong exclusively to the jury. Hotchkiss v. Newton, 10 Ga. 560, 1851 Ga. LEXIS 141 (1851) (decided under former law).

Trial court determines competency of a witness and jury decides credibility. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606, 1981 Ga. App. LEXIS 2921 (1981) (decided under former O.C.G.A. § 24-9-5).

Competency for court. — It is left to the sound discretion of the trial court to determine upon preliminary examination whether or not a child of tender years is a competent witness. Peterson v. State, 47 Ga. 524, 1873 Ga. LEXIS 155 (1873) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); Moore v. State, 79 Ga. 498, 5 S.E. 51, 1887 Ga. LEXIS 257 (1887) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); Beebee v. State, 124 Ga. 775, 53 S.E. 99, 1906 Ga.

LEXIS 609 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Young v. State, 125 Ga. 584, 54 S.E. 82, 1906 Ga. LEXIS 228 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Richardson v. State, 141 Ga. 782, 82 S.E. 134, 1914 Ga. LEXIS 143 (1914) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Rogers v. State, 11 Ga. App. 814, 76 S.E. 366, 1912 Ga. App. LEXIS 203 (1912) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Frasier v. State, 143 Ga. 322, 85 S.E. 124, 1915 Ga. LEXIS 417 (1915) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Holden v. State, 144 Ga. 338, 87 S.E. 27, 1915 Ga. LEXIS 194 (1915), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Reece v. State, 155 Ga. 350, 116 S.E. 631, 1923 Ga. LEXIS 67 (1923) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Bell v. State, 164 Ga. 292, 138 S.E. 238, 1927 Ga. LEXIS 175 (1927) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Gordon v. State, 186 Ga. 615, 198 S.E. 678, 1938 Ga. LEXIS 644 (1938) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Carver v. State, 60 Ga. App. 593, 4 S.E.2d 474, 1939 Ga. App. LEXIS 94 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Ellison v. State, 197 Ga. 129, 28 S.E.2d 453, 1943 Ga. LEXIS 464 (1943) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264, 1951 Ga. App. LEXIS 981 (1951) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Askins v. State, 210 Ga. 532, 81 S.E.2d 471, 1954 Ga. LEXIS 364 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Allen v. State, 150 Ga. App. 605, 258 S.E.2d 285, 1979 Ga. App. LEXIS 2224 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720, 1990 Ga. App. LEXIS 567 (1990) (decided under former O.C.G.A. § 24-9-7).

Question of competency is one of law for the trial judge to determine in the judge's discretion. Cooper v. Simmons, 50 Ga. App. 130, 177 S.E. 263, 1934 Ga. App. LEXIS 655 (1934) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Ellison v. State, 197 Ga. 129, 28 S.E.2d 453, 1943 Ga. LEXIS 464 (1943) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872, 1954 Ga. App. LEXIS 613 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Porter v. State, 237 Ga. 580, 229 S.E.2d 384, 1976 Ga. LEXIS 1310 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806, 1977 U.S. LEXIS 1395 (1977).

After an objection as to the competency of a witness, the duty to examine the witness and determine the witness's competency rests with the trial court. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326, 1983 Ga. App. LEXIS 2448 (1983) (decided under former O.C.G.A. § 24-9-7).

Questions for court and jury. — Competency of a witness is a question generally to be determined by the court; the jury may consider such evidence only for the purpose of affecting the credibility of such witness. Bonner v. State, 59 Ga. App. 737, 1 S.E.2d 768, 1939 Ga. App. LEXIS 399 (1939) (decided under former Code 1933, § 38-1607).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial the defendant made his "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7 [now repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the

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use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204, 1988 Ga. App. LEXIS 691 (1988) (decided under former O.C.G.A. § 24-9-7).

Court may allow attorneys to pose questions to determine competency of witnesses. — Fact that the court allowed the attorneys representing both sides to actually pose the questions in a proceeding to determine competency of witnesses did not diminish the function or abdicate responsibility for making the decision based on evidence produced before the court and the court's observations. Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731, 1985 Ga. App. LEXIS 2727 (1985) (decided under former O.C.G.A. § 24-9-7); Vaughn v. State, 226 Ga. App. 318, 486 S.E.2d 607 (decided under former O.C.G.A. § 24-9-7).

Parameters of examination by counsel. — When counsel is permitted to examine witness as to issue of competency, parameters of such inquiry rest within broad discretion of trial court. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Decision of court will not be overturned. — Decision of the trial court regarding competency will not be overturned in absence of abuse of discretion. Cooper v. Simmons, 50 Ga. App. 130, 177 S.E. 263, 1934 Ga. App. LEXIS 655 (1934) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Porter v. State, 237 Ga. 580, 229 S.E.2d 384, 1976 Ga. LEXIS 1310 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806, 1977 U.S. LEXIS 1395 (1977) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Whitehead v. State, 144 Ga. App. 836, 242 S.E.2d 754, 1978 Ga. App. LEXIS 1809 (1978) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Herron v. State, 155 Ga. App. 791, 272 S.E.2d 756, 1980 Ga. App. LEXIS 2792 (1980) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination may be unnecessary. — There may be situations when the trial judge would not have to examine the potential witness. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Credibility for jury. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the examination before the jury, are matters for the consideration of the jury. Frasier v. State, 143 Ga. 322, 85 S.E. 124, 1915 Ga. LEXIS 417 (1915) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

Jury may not decide competency. — When the trial court without any examination whatever permits the jury to pass upon the competency of a witness who has been objected to as incompetent at the time the witness was offered, on the ground that the witness has been adjudged insane and not restored to sanity, a new trial will be granted. Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872, 1954 Ga. App. LEXIS 613 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Disputed facts. — If the determination of the question as to whether a witness is competent to testify depends upon the decision of disputed facts, the proper practice is for the judge, after a preliminary examination, to decide the questions of fact thus arising; but the judge may in the judge's discretion take the opinion of the jury thereon. Dowdy v. Watson &

Lewis, 115 Ga. 42, 41 S.E. 266, 1902 Ga. LEXIS 302 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Evidence during trial touching competency. — If a witness has been declared to be competent by the court, and during the progress of the trial evidence should be introduced which would make the witness's competency doubtful, the jury should be instructed to determine this question of fact, and, if the jury should find that the witness is incompetent, not to consider the witness's testimony on the points concerning which the witness was not competent to testify. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266, 1902 Ga. LEXIS 302 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Decision of court will not be disturbed. — When the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, the appellate court will not interfere, when it does not appear that such discretion has been manifestly abused. Moore v. State, 79 Ga. 498, 5 S.E. 51, 1887 Ga. LEXIS 257 (1887) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); see also Peterson v. State, 47 Ga. 524, 1873 Ga. LEXIS 155 (1873); Beebee v. State, 124 Ga. 775, 53 S.E. 99, 1906 Ga. LEXIS 609 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Young v. State, 125 Ga. 584, 54 S.E. 82, 1906 Ga. LEXIS 228 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Richardson v. State, 141 Ga. 782, 82 S.E. 134, 1914 Ga. LEXIS 143 (1914) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Rogers v. State, 11 Ga. App. 814, 76 S.E. 366, 1912 Ga. App. LEXIS 203 (1912) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Frasier v. State, 143 Ga. 322, 85 S.E. 124, 1915 Ga. LEXIS 417 (1915) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Shields v. State, 16 Ga. App. 680, 85 S.E. 1057, 1915 Ga. App. LEXIS 190 (1915) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Holden v. State, 144 Ga. 338, 87 S.E. 27, 1915 Ga. LEXIS 194 (1915), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Reece v. State, 155 Ga. 350, 116 S.E. 631, 1923 Ga. LEXIS 67 (1923) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Bell v. State, 164 Ga. 292, 138 S.E. 238, 1927 Ga. LEXIS 175 (1927) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Gordon v. State, 186 Ga. 615, 198 S.E. 678, 1938 Ga. LEXIS 644 (1938) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Carver v. State, 60 Ga. App. 593, 4 S.E.2d 474, 1939 Ga. App. LEXIS 94 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264, 1951 Ga. App. LEXIS 981 (1951) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Askins v. State, 210 Ga. 532, 81 S.E.2d 471, 1954 Ga. LEXIS 364 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200, 1974 Ga. App. LEXIS 1713 (1974), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120 (2004) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Bradley v. State, 148 Ga. App. 727, 252 S.E.2d 648 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Allen v. State, 150 Ga. App. 605, 258 S.E.2d 285, 1979 Ga. App. LEXIS 2224 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Competency of seven-year-old as a witness is decided by the trial court, and an appellate court will overrule that determination only if there is an abuse of discretion. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882, 1983 Ga. LEXIS 674 (1983) (decided under former O.C.G.A. § 24-9-7).

Objection Requirement

Testimony received without objection. — Testimony of an incompetent witness, if it is material, when received with-

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out objection, is of probative value, and will be considered and given such weight as the jury deems the testimony entitled to in view of the witness's interest and other circumstances. Brittain Bros. Co. v. Davis, 174 Ga. 1, 161 S.E. 841, 1931 Ga. LEXIS 1 (1931) (decided under former Civil Code 1910, §§ 5858 and 5859).

Competency objection must be distinctly raised. — Witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. Sumter County v. Pritchett, 125 Ga. App. 222, 186 S.E.2d 798, 1971 Ga. App. LEXIS 785 (1971) (decided under former Code 1933, § 38-1603).

Waiver. — Even though a witness may be termed incompetent, unless a question of public policy is involved, the incompetency of the witness may be waived. Williams v. State, 69 Ga. App. 863, 27 S.E.2d 54, 1943 Ga. App. LEXIS 198 (1943) (decided under former Code 1933, § 38-1603).

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Constitutionality. — Former subsection (b) of O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not violate due process; it was not fundamentally unfair to require one accused of child molestation to face one's accuser, even if the accuser was unable to articulate the meaning of an oath, and the defendant had the opportunity to cross-examine the child witness, and test the child's credibility before the jury. Sims v. State, 260 Ga. 782, 399 S.E.2d 924, 1991 Ga. LEXIS 52 (1991) (decided under former O.C.G.A. § 24-9-5).

Subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) applied equally to all those accused of child molestation, and therefore did not violate the equal protection clause of the federal constitution. Sims v. State, 260 Ga. 782, 399 S.E.2d 924, 1991 Ga. LEXIS 52 (1991) (decided under former O.C.G.A. § 24-9-5).

Child "available to testify" in former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) meant one competent to testify under former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness was not available to testify and any out-of-court statements were not rendered admissible by former § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790, 1990 Ga. App. LEXIS 319 (1990) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. §§ 24-9-5 and 24-3-16 (see now O.C.G.A. §§ 24-6-601, 24-6-603, and 24-8-820) must be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-9-5); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695, 1994 Ga. App. LEXIS 119 (1994), cert. denied, No. S94C0811, 1994 Ga. LEXIS 506 (Ga. Mar. 25, 1994) (decided under former O.C.G.A. § 24-9-5).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, 1991 Ga. App. LEXIS 530 (1991), cert. denied, No. S91C1028, 1991 Ga. LEXIS 751 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not expand the circumstances under which hearsay statements of a child could be admitted in evidence. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98, 1994 Ga. LEXIS 863 (1994), superseded by statute as stated in Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-9-65).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath as required by subsection (a) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714, 2000 Ga. LEXIS 493 (2000) (decided under former O.C.G.A. § 24-9-605).

No required showing child competent to testify. — For offenses involving child victims occurring after April 19,

1989, a determination that the child victim is competent to testify was not necessary; a child witness was "available" for purposes of the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), as long as the child was physically available to appear at trial. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-9-5).

Statement admissible regardless of child's age or degree of comprehension. — Out-of-court statements of a victim of child molestation are admissible whenever the victim is available to appear at trial, whether or not the child is capable of understanding the nature of an oath and thus regardless of age or degree of comprehension. Lang v. State, 201 Ga. App. 836, 412 S.E.2d 866, 1991 Ga. App. LEXIS 1635 (1991) (decided under former O.C.G.A. § 24-9-5).

Oath not required when child did not comprehend oath's nature. — Under subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603), which provided that in certain limited categories of cases a child was deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by former O.C.G.A. § 24-9-60 (see now O.C.G.A. § 24-6-603) had been obviated when the child did not comprehend the oath's nature. The child simply became an unsworn witness, made so because incapable of taking an oath. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. §§ 24-9-5 and 24-9-60).

Children who did not understand nature of oath were incompetent. — Porter v. State, 237 Ga. 580, 229 S.E.2d 384, 1976 Ga. LEXIS 1310 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806, 1977 U.S. LEXIS 1395 (1977) (decided under former Code 1933, § 38-1607).

Mentally retarded children subject to competency challenge. — Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) was construed as subjecting children to a competency challenge based on the allegation that children did not understand the nature of an oath. Children, like adults, were also subject to a competency challenge on the ground that the children do not have the use of reason because of mental retardation. Sizemore v. State, 262 Ga. 214, 416 S.E.2d 500, 1992 Ga. LEXIS 504 (1992) (decided under former O.C.G.A. § 24-9-5).

Determining factor in deciding competency of a witness to testify was not age but rather the ability to understand the nature of an oath. Horton v. State, 35 Ga. App. 493, 133 S.E. 647, 1926 Ga. App. LEXIS 936 (1926) (decided under former Penal Code 1910, § 1038); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, § 38-1607).

Standard of intelligence required to qualify child as a witness is not that the child be able to define the meaning of an oath, nor that the child understand the process under which the oath is administered, but rather that the child know and appreciate the fact that as a witness the child assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as the child may be interrogated on, and that if the child violates the obligation the child is subject to be punished by the court. Jones v. State, 219 Ga. 245, 132 S.E.2d 648, 1963 Ga. LEXIS 414 (1963) (decided under former Code 1933, § 38-1607); Smith v. State, 247 Ga. 511, 277 S.E.2d 53, 1981 Ga. LEXIS 767 (1981) (decided under former Code 1933, § 38-1607); Alvin v. State, 253 Ga. 740, 325 S.E.2d 143, 1985 Ga. LEXIS 565 (1985), overruled in part, Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former O.C.G.A. § 24-9-5).

Knowledge of nature of oath. — It is enough if children know the mere nature of an oath, regardless of knowledge of the oath's effects, and whether or not the children have such knowledge is to be determined by the court on a preliminary examination. Peterson v. State, 47 Ga. 524, 1873 Ga. LEXIS 155 (1873) (decided under former law); Moore v. State, 79 Ga. 498, 5 S.E. 51, 1887 Ga. LEXIS 257 (1887) (decided under former Code 1882, § 3856); Young v. State, 122 Ga. 725, 50

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S.E. 996, 1905 Ga. LEXIS 307 (1905) (decided under former Penal Code 1895, § 1012); Beebee v. State, 124 Ga. 775, 53 S.E. 99, 1906 Ga. LEXIS 609 (1906) (decided under former Penal Code 1895, § 1012); Young v. State, 125 Ga. 584, 54 S.E. 82, 1906 Ga. LEXIS 228 (1906) (decided under former Penal Code 1895, § 1012); Richardson v. State, 141 Ga. 782, 82 S.E. 134, 1914 Ga. LEXIS 143 (1914) (decided under former Penal Code 1910, § 1038); Reece v. State, 155 Ga. 350, 116 S.E. 631, 1923 Ga. LEXIS 67 (1923) (decided under former Penal Code 1910, § 1038).

Challenge for "understanding truth." — Understanding the truth was one element of understanding the nature of an oath, and as such, subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) excepted a child from a competency challenge brought on such basis. Norton v. State, 263 Ga. 448, 435 S.E.2d 30, 1993 Ga. LEXIS 649 (1993) (decided under former O.C.G.A. § 24-9-5); Jeffries v. State, 272 Ga. 510, 530 S.E.2d 714, 2000 Ga. LEXIS 472 (2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 864, 148 L. Ed. 2d 777, 2001 U.S. LEXIS 754 (2001) (decided under former O.C.G.A. § 24-9-5).

Child should not be held competent when the child does not understand nature of oath. — While questions of this character are to be left largely to the discretion of the trial judge, the judge should not hold a child-witness competent when it does not appear that such witness sufficiently understands the nature and obligation of an oath to testify in the case. Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90, 1981 Ga. App. LEXIS 1862 (1981), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120 (2004) (decided under former Code 1933, § 38-1607).

It was not necessary for child to understand meaning of the word "oath." Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90, 1981 Ga. App. LEXIS 1862 (1981), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120 (2004) (decided under former Code 1933, § 38-1607); Raborn v. State, 192 Ga. App. 99, 383 S.E.2d 650, 1989 Ga. App. LEXIS 905 (1989) (decided under former O.C.G.A. § 24-9-5).

It is not necessary that a child understand the penalties for perjury in order for the trial court to rule the child competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

Age not determinative of competency as a witness. Johnson v. State, 146 Ga. 190, 91 S.E. 42, 1916 Ga. LEXIS 653 (1916) (decided under former Penal Code 1910, § 1038).

Capacity to commit crime not determinative of competency as a witness. Johnson v. State, 61 Ga. 35, 61 Ga. 36, 1878 Ga. LEXIS 11 (1878) (decided under former Code 1873, § 3856).

Testimony of children sufficiently reliable. — Record contained sufficient evidence of indicia of reliability when the two girls, who were 12 and 10 years old, were interviewed separately on at least two different occasions, their statements were consistent with each other over time, the state's witnesses were all professionals trained in interviewing victims of child abuse without asking leading questions, and all three considered the girls credible. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-9-5).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error if the witness is under 14 years of age. Young v. State, 122 Ga. 725, 50 S.E. 996, 1905 Ga. LEXIS 307 (1905) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Bennett v. State, 145 Ga. App. 56, 243 S.E.2d 265, 1978 Ga. App. LEXIS 1861 (1978) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination during testimony. — When the competency of a child is questioned, the better practice is for the court to make, or cause to be made, a prelimi-

nary examination of the child, for the purpose of testing the child's competency; but the failure of the court to do so will not be reversible error since it appears that the witness was fully examined on this point in the presence of the jury during examination on the main issue. Webb v. State, 7 Ga. App. 35, 66 S.E. 27, 1909 Ga. App. LEXIS 521 (1909) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

When preliminary examination of a 12-year-old witness was made and showed that the witness knew what it was to swear to tell the truth, understood the object of testifying, and the consequences of telling the truth and of telling a lie, the court properly held that the witness was competent. Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60, 1929 Ga. App. LEXIS 22 (1929) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

When each child testified that each child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606, 1981 Ga. App. LEXIS 2921 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination of child sufficient. — When the principal state's witness against a defendant is a child and on examination by the court to determine the child's competency to testify stated the child knew what it meant to tell a lie and that the child was supposed to tell the truth, such examination was sufficient to determine whether the child understood the nature of an oath as required by law. Turpin v. State, 121 Ga. App. 294, 173 S.E.2d 455, 1970 Ga. App. LEXIS 1202 (1970) (decided under former Code 1933, § 38-1607); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520, 1976 Ga. App. LEXIS 1960 (1976) (decided under former Code 1933, § 38-1607).

Since each child testified that the child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and that the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606, 1981 Ga. App. LEXIS 2921 (1981) (decided under former Code 1933, § 38-1607).

When the record revealed that, during the trial the prosecuting attorney asked the victim, nearly nine years old, a series of questions, the answers to which clearly demonstrated that the child understood both the difference between truth and falsehood and the importance of telling only the truth, and the record further revealed that the defendant's counsel failed to question the witness following the examination by the state, or to object at that time on competency grounds, counsel's conduct amounted to a waiver of the right to raise the issue of the witness's competency on appeal. Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720, 1990 Ga. App. LEXIS 567 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the trial court examined each of three juvenile witnesses at the beginning of his or her testimony to ascertain that the child knew the difference between telling the truth and telling a lie and understood why telling the truth was better than telling a falsehood, and obtained from each witness a promise to tell the truth in response to questions from counsel, it was not an abuse of discretion to allow the children to testify. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746, 1990 Ga. App. LEXIS 579 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the 15-year-old victim of a sexual abuse testified at trial that the victim knew it was bad to tell a lie, that the victim would be punished if the victim did so and that the victim also understood the importance of telling the truth, the trial court did not abuse the court's discretion in refusing to strike the victim's testimony. Lott v. State, 206 Ga. App. 886, 426 S.E.2d 667, 1992 Ga. App. LEXIS 1821 (1992) (decided under former O.C.G.A. § 24-9-5).

Defense counsel was not ineffective for falling to challenge the competency of child witnesses because both victims were

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asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137, 2011 Ga. App. LEXIS 70 (2011) (decided under former O.C.G.A. § 24-9-5).

Presumption not conclusive. — Child over 14 is presumed competent to testify, but to hold that this presumption is so conclusive that the court is inhibited from examining the witness on this point unless objection has been specifically made on one of the grounds stated in the former statute would be to circumscribe the authority of the court to elicit the truth, and would seriously impede the administration of justice. Schamroth v. State, 84 Ga. App. 580, 66 S.E.2d 413, 1951 Ga. App. LEXIS 728 (1951) (decided under former Code 1933, § 38-1607).

Trial court determines if child competent. — It is left to sound discretion of trial court to determine whether or not a child of tender years is a competent witness; and when the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, this court will not interfere, if it does not appear that such discretion has been manifestly abused. Gordon v. State, 186 Ga. 615, 198 S.E. 678, 1938 Ga. LEXIS 644 (1938) (decided under former Code 1933, § 38-1607); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, § 38-1607); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264, 1951 Ga. App. LEXIS 981 (1951) (decided under former Code 1933, § 38-1607); Middleton v. State, 194 Ga. App. 815, 392 S.E.2d 293, 1990 Ga. App. LEXIS 337 (1990) (decided under former O.C.G.A. § 24-9-5).

Competency of a child as a witness is within the sound discretion of the court, and the court's ruling will not be disturbed unless there is a manifest abuse of discretion. Adams v. State, 166 Ga. App. 807, 305 S.E.2d 651, 1983 Ga. App. LEXIS 2338 (1983) (decided under former O.C.G.A. § 24-9-5).

Trial court had sound discretion to determine whether a child was competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326, 1983 Ga. App. LEXIS 2448 (1983) (decided under former O.C.G.A. § 24-9-5).

Testimony admitted erroneously. — When an examination by the court shows that the child has no knowledge of the nature of an oath, it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S.E. 647, 1926 Ga. App. LEXIS 936 (1926) (decided under former Penal Code 1910, § 1038).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70, 1965 Ga. App. LEXIS 656 (1965) (decided under former Code 1933, §§ 38-1601, 38-1607, 38-1610, 38-1611, 38-1612).

No error in refusing to give former statute in charge. — Since the question of the competency of a victim's ten-year-old brother was one of law for the trial court to determine, the court did not err in refusing to give in charge to the jury the requested language contained in former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) which was relevant only to that issue. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, § 38-1607).

Inconsistency in a child's testimony did not render the child incompetent to testify, but went to the child's credibility as a witness. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585, 1983 Ga. App. LEXIS 2724 (1983) (decided under former O.C.G.A. § 24-9-5).

When a four-year-old victim expressed the victim's understanding of the difference between the truth and a lie and of the importance of telling the truth, expressed a fear of punishment if the victim did not tell the truth, and stated that the victim would tell the truth, there was no abuse of the trial court's discretion in the court's determination that the child was competent to testify, even though there may have been some inconsistency in the child's responses. Hutton v. State, 192 Ga. App. 239, 384 S.E.2d 446, 1989 Ga. App. LEXIS 1004 (1989) (decided under former O.C.G.A. § 24-9-5).

Child witness's unresponsiveness to a number of questions as put by the defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-9-5).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111, 1992 Ga. App. LEXIS 840 (1992) (decided under former O.C.G.A. § 24-9-5).

Trial court did not err by allowing the victim, a five-year-old child, to testify since although the child was unable to define the meaning of an oath or of the truth, it was demonstrated that the child appreciated the difference between the truth and a lie and that the child knew the child was obligated to tell the truth on the witness stand. Akers v. State, 179 Ga. App. 529, 346 S.E.2d 861, 1986 Ga. App. LEXIS 2636 (1986) (decided under former O.C.G.A. § 24-9-7).

Fact that five-year-old victim may have testified inconsistently did not render the victim incompetent to testify as a matter of law. Akers v. State, 179 Ga. App. 529, 346 S.E.2d 861, 1986 Ga. App. LEXIS 2636 (1986) (decided under former O.C.G.A. § 24-9-7).

Court did not err in finding nine-year-old child competent to testify, since when the child testified as to the child's grade in school, the child's teacher's name, that it was good to tell the truth and bad to tell a lie, that the child would get a whipping if the child told a lie, and that the child was going to tell the truth in court. Hester v. State, 187 Ga. App. 873, 371 S.E.2d 684, 1988 Ga. App. LEXIS 1009 (1988) (decided under former O.C.G.A. § 24-9-7).

Trial court did not abuse the court's discretion in ruling competent to testify children who witnessed a crime since the children testified that to tell the truth means "to tell what really happened" as opposed to "making something up," and also testified that the children understand the significance of their oath to tell the truth while testifying in court and that if the children lied they would "get in big trouble." Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

When a child was examined at length by the court and by counsel, and the court found that the child was inattentive and not responsive, and also found that there were inconsistencies in the testimony of the child, there was no abuse of discretion in the court refusing to allow the child to testify. Batton v. State, 260 Ga. 127, 391 S.E.2d 914, 1990 Ga. LEXIS 184 (1990) (decided under former O.C.G.A. § 24-9-5).

After two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child

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qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262, 1990 Ga. App. LEXIS 428 (1990), cert. denied, No. S90C1024, 1990 Ga. LEXIS 756 (Ga. May 16, 1990) (Trial held prior to April 19, 1989) (decided under former O.C.G.A. § 24-9-5).

For illustrations of preliminary examination to test a child's competency, see Minton v. State, 99 Ga. 254, 25 S.E. 626, 1896 Ga. LEXIS 330 (1896) (decided under former Penal Code 1895, § 1012); Gaines v. State, 99 Ga. 703, 26 S.E. 760, 1896 Ga. LEXIS 503 (1896) (decided under former Penal Code 1895, § 1012); Miller v. State, 109 Ga. 512, 35 S.E. 152, 1900 Ga. LEXIS 247 (1900) (decided under former Penal Code 1895, § 1012).

Sufficient evidence to determine child met required standard of intelligence. — Although a child witness said the witness did not know the meaning of the worth "oath," there was sufficient evidence, including testimony on direct and cross-examination that the witness knew right from wrong and that the witness had to tell the truth when the witness was in court, to determine that the child met the standard of intelligence required to qualify the child as a witness. Maynard v. State, 171 Ga. App. 605, 320 S.E.2d 806, 1984 Ga. App. LEXIS 2995 (1984) (decided under former O.C.G.A. § 24-9-7).

Trial court did not err by not conducting a preliminary hearing before determining that two minor witnesses were competent to testify since the record shows that one witness was seventeen years old and the other was fourteen. Johnson v. State, 195 Ga. App. 385, 393 S.E.2d 712, 1990 Ga. App. LEXIS 496 (1990) (decided under former O.C.G.A. § 24-9-7).

Insufficient intelligence. — When a child of five years was not shown to possess sufficient intelligence to understand the nature of an oath or the penalty for the oath's violation, it was held that the court erred in permitting the witness to testify. Edwards v. State, 162 Ga. 204, 132 S.E. 892, 1926 Ga. LEXIS 138 (1926) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

Mental illness of child. — Fourteen-year-old witness suffered from hyperactivity, seizures, and schizophrenia, but took medication for these problems; since the trial judge questioned this witness outside of the jury's presence about the witness's understanding of the difference between the truth and a lie, and there was no basis to inquire further into the witness's competency, allowing the witness to testify was not an abuse of discretion. Simmons v. State, 251 Ga. App. 682, 555 S.E.2d 59, 2001 Ga. App. LEXIS 1124 (2001), cert. denied, No. S02C0189, 2002 Ga. LEXIS 131 (Ga. Feb. 4, 2002) (decided under former O.C.G.A. § 24-9-7).

Children held competent in the following cases. — See Johnson v. State, 76 Ga. 76, 1885 Ga. LEXIS 24 (1885) (child of six) (decided under former Code 1882, § 3856); Marshall v. State, 74 Ga. 26, 1884 Ga. LEXIS 351 (1884) (child of seven) (decided under former Code 1882, § 3856); Minton v. State, 99 Ga. 254, 25 S.E. 626, 1896 Ga. LEXIS 330 (1896) (child of eight) (decided under former Penal Code 1895, § 1012); Hicks v. State, 105 Ga. 627, 31 S.E. 579, 1898 Ga. LEXIS 776 (1898) (child of ten) (decided under former Penal Code 1895, § 1012); Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60, 1929 Ga. App. LEXIS 22 (1929) (child of twelve) (decided under former Civil Code 1910, § 5862); Thurmond v. State, 220 Ga. 227, 138 S.E.2d 372 (1964) (child of eight) (decided under former Code 1933, § 38-1607); Perryman v. State, 244 Ga. 720, 261 S.E.2d 588, 1979 Ga. LEXIS 1386 (1979) (victim's nine-year-old daughter) (decided under former Code 1933, § 38-1607); Brown v. State, 167 Ga. App. 245, 306 S.E.2d 361, 1983 Ga. App. LEXIS 2486 (1983) (child of seven) (decided under former O.C.G.A. § 24-9-5); Aleywine v. State, 169 Ga. App. 805, 315 S.E.2d 35, 1984 Ga. App. LEXIS 1720 (1984) (child of eight) (decided under former O.C.G.A. § 24-9-5); Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, 1988 Ga. App. LEXIS 392 (1988) (child of five) (decided under former O.C.G.A. § 24-9-5); Syfrett v. State, 210 Ga. App. 185, 435 S.E.2d 470, 1993 Ga. App. LEXIS 1073 (1993), cert. denied, No. S93C1993, 1993 Ga. LEXIS 1151 (Ga. Dec. 3, 1993) (child of nine) (decided under former O.C.G.A. § 24-9-5).

Testimony of competent child, not formerly sworn, admitted. — Testi-

mony of a child witness who, in response to questioning by the state, demonstrated that the child was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn, when, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child's testifying. Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784, 1992 Ga. App. LEXIS 797 (1992) (decided under former O.C.G.A. § 24-9-5).

Parent's objection to competency of child rejected. — In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303, 2008 Ga. App. LEXIS 1278 (2008) (decided under former O.C.G.A. § 24-9-5).

Any apparently inconsistent testimony presented by children does not render such children incompetent to testify as a matter of law, but is a matter for consideration by the trial court in making the court's determination of competency and by the jury in determining the credibility of the witnesses. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881, 1983 Ga. App. LEXIS 2859 (1983) (decided under former O.C.G.A. § 24-9-7).

Inconsistency in a child's testimony does not render the child incompetent to testify, nor is it necessary for a child to understand the meaning of the word "oath." Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731, 1985 Ga. App. LEXIS 2727 (1985) (decided under former O.C.G.A. § 24-9-7).

When the trial court used suggested questions from the Criminal Benchbook for Georgia Superior Courts (p. 166) to examine a seven-year-old as to the child's understanding of the nature of an oath and the necessity for telling the truth and found the child competent, there was no abuse of discretion. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882, 1983 Ga. LEXIS 674 (1983) (decided under former O.C.G.A. § 24-9-7).

No error in refusing to charge jury that child's testimony should be corroborated. — When competency of victim's ten-year-old brother has been determined as a matter of law by the trial court, there is no error in the trial court's refusal to charge the jury that testimony of a child of such tender age should be corroborated by other testimony. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former O.C.G.A. § 24-9-7).

Jury judges child's credibility. — Thrust of the child witness statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), was to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who had reported child molestation to an adult permitted to testify to the out-of-court statement at trial, was incapable of reiterating the accusation at trial or was unresponsive or evasive during cross-examination, the jury must decide the child's credibility. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85, 1991 Ga. App. LEXIS 769 (1991) (decided under former O.C.G.A. § 24-9-5).

Insane Persons

Former rules applicable to idiots and lunatics were analogous to those applicable to children. Langston v. State, 153 Ga. 127, 111 S.E. 561, 1922 Ga. LEXIS 34 (1922) (decided under former Penal Code 1910, § 1038).

No presumption of incompetency. — There was no presumption that the declarant was so bereft of reason as to forbid the reception of evidence concerning the declarant's declarations, although it was admitted that before the making thereof the declarant had been adjudged insane and committed to an asylum. Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610, 1942 Ga. LEXIS 569 (1942)

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(decided under former Code 1933, § 38-1607).

Insane persons not always incompetent. — Person who has been adjudged insane is not, in all cases, incompetent as a witness. The person's testimony is admissible if the person has sufficient understanding to apprehend the obligations of an oath and to be capable of giving a correct account of the matters the person has seen or heard in reference to the questions at issue; and whether the person has that understanding is a question to be determined in each case, the weight to be given to the person's testimony being finally a question for the jury. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S.E. 983, 1907 Ga. App. LEXIS 146 (1907) (decided under former Civil Code 1895, § 5273); Watkins v. State, 19 Ga. App. 234, 91 S.E. 284, 1917 Ga. App. LEXIS 72 (1917) (decided under former Penal Code 1910, § 1038).

Effect of insanity. — One may be medically or metaphysically insane, yet be capable in law of making a contract, a will, or of giving competent testimony in the trial of a case; from a legal standpoint there can be no satisfactory definition of insanity, but each case must be determined from the case's own peculiar facts. The law adopts as a general standard: the ability of the witness to understand the obligation of an oath and the ability to give a correct account of the matters the witness has seen or heard in reference to the questions at issue; the fact that a person has previously been adjudged insane upon an inquisition is by no means conclusive that the person is incompetent to testify. Bonner v. State, 59 Ga. App. 737, 1 S.E.2d 768, 1939 Ga. App. LEXIS 399 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Effect of dissociative state. — Trial court did not abuse the court's discretion in admitting the testimony statements of a sexual abuse victim in a dissociative state because their nonvolitional nature rendered statements made while in such a state inherently more reliable than comparable statements made in a hypnotic trance. Moreover, the testimony indicated that the witness was sufficiently competent to understand the witness's obligation to tell the truth, and that in a dissociative state, the witness could remember what happened to the witness previously in a dissociative state and truthfully relate this material evidence to the jury. Dorsey v. State, 206 Ga. App. 709, 426 S.E.2d 224, 1992 Ga. App. LEXIS 1753 (1992), cert. denied, No. S93C0470, 1993 Ga. LEXIS 87 (Ga. Jan. 15, 1993) (decided under former O.C.G.A. § 24-9-7).

Prior adjudication of insanity. — Mere fact that the declarant had been adjudged insane and placed in a lunatic asylum previously to the time that the declarant is alleged to have been the declarant, the declarant at that time not being in the asylum, was not in itself a reason why the testimony should have been excluded. Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610, 1942 Ga. LEXIS 569 (1942) (decided under former Code 1933, § 38-1607).

That the chief witness for the state had been adjudicated insane in another state prior to the commission of the offense charged and testified about does not have the effect of denying probative value to the testimony of such witness: such a person is not incompetent to testify and the proof of the commitment for insanity goes to the credit of the witness only. Saxe v. State, 112 Ga. App. 804, 146 S.E.2d 376, 1965 Ga. App. LEXIS 838 (1965) (decided under former Code 1933, § 38-1603).

Continuation of mental state. — Witness had been previously adjudged insane, and the jury was authorized to find that this mental state still existed, and to reject the witness's testimony for that reason. Harris v. Folsom, 17 Ga. App. 676, 87 S.E. 1090, 1915 Ga. App. LEXIS 235 (1915) (decided under former Civil Code 1910, § 5862).

Question of sanity for jury. — Witness having been examined on interrogatories by commission duly issued, the witness was, prima facie, mentally competent to testify, and evidence subsequently taken tending to show that the witness was insane when examined, was for consideration by the jury under proper instructions from the court, and not for final adjudication by the judge presiding, there

being also testimony in favor of insanity. Formby v. Wood, 19 Ga. 581, 1856 Ga. LEXIS 230 (1856) (decided under former law); Mayor of Gainesville v. Caldwell, 81 Ga. 76, 7 S.E. 99, 1888 Ga. LEXIS 66 (1888) (decided under former Code 188, § 3856).

When preliminary examination required. — Once an objection was interposed to the calling of a witness to testify as being incompetent on the ground of having been adjudicated insane, the trial judge must conduct a preliminary examination of the witness and then rule upon the witness's competency. Bryant v. State, 236 Ga. 790, 225 S.E.2d 309, 1976 Ga. LEXIS 1030 (1976) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Statement admitted when no motion to strike made. — When a defendant objected to admitting a statement made to police implicating the defendant in a murder for reason that the defendant was insane at the time the defendant made the statement, but offered no evidence concurrent with the objection to prove insanity, the trial court properly admitted the statement because no motion was made to strike the statement following the statement's introduction into evidence. Kimbell v. State, 252 Ga. 65, 311 S.E.2d 465, 1984 Ga. LEXIS 596 (1984) (decided under former O.C.G.A. § 24-9-5).

Illustrations. — See Ray v. State, 32 Ga. App. 513, 124 S.E. 57, 1924 Ga. App. LEXIS 517 (1924) (woman 21 years old declared incompetent in bastardy proceeding) (decided under former Penal Code 1910, § 1038); Ravenel v. State, 153 Ga. 130, 111 S.E. 643, 1922 Ga. LEXIS 37 (1922) (female victim in rape case held competent) (decided under former Penal Code 1910, § 1038).

Retarded Persons

Witness somewhat retarded. — Though there was evidence that the witness was "somewhat retarded," when in response to questions by the court the witness testified that the witness went through the eighth grade in school, attended church and Sunday school, and knew that it was right to tell the truth, the trial court was correct in determining that the witness was competent to testify. Lee v. State, 108 Ga. App. 97, 132 S.E.2d 107, 1963 Ga. App. LEXIS 556 (1963) (decided under former Code 1933, § 38-1607).

Evidence of competency. — After the 22-year-old retarded victim indicated the victim knew how to tell the truth and the victim's mother and sister testified the victim knew the difference between right and wrong, such evidence was sufficient to show that the victim had an appreciation for the truth and could testify. Dumas v. State, 239 Ga. App. 210, 521 S.E.2d 108 (decided under former O.C.G.A. § 24-9-5).

Mental disability does not necessarily imply incompetent to testify. — Defendant's girlfriend, the victim, was not presumed to be incompetent to testify under former O.C.G.A. § 24-9-7 simply because of the victim's mental disability; absent an objection by the defendant, it was not error to allow the victim to testify without first determining the victim's competence. Austin v. State, 286 Ga. App. 149, 648 S.E.2d 414, 2007 Ga. App. LEXIS 630 (2007), cert. denied, No. SO7C1698, 2007 Ga. LEXIS 687 (Ga. Sept. 24, 2007) (decided under former O.C.G.A. § 24-9-7).

Application in Other Circumstances

Impeachment at prior trial. — Fact that a witness for the state had been impeached by the state, as unworthy of belief, in a previous trial of the witness, is not ground for refusing to permit the witness to testify in a present case. Daniel v. State, 118 Ga. App. 370, 163 S.E.2d 863, 1968 Ga. App. LEXIS 1399 (1968), cert. denied, 394 U.S. 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453, 1969 U.S. LEXIS 2196 (1969) (decided under former Code 1933, § 38-1603).

Testimony concerning adultery. — Former O.C.G.A. § 24-9-1 allowed a party to be a witness for oneself on all relevant issues; but former O.C.G.A. § 24-9-2 created an exception for proceedings "instituted in consequence of adultery," with the result that in such proceedings a party was not competent to testify to that party's or that party's spouse's adultery. Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484, 1981 Ga. LEXIS 643 (1981) (decided un-

Application in Other Circumstances (Cont'd)

der former O.C.G.A. §§ 24-9-1 and 24-9-2).

Accountant employed under authority of court. — When the judge appointed an auditor to pass upon all questions arising in a case, and authorized the auditor to employ a certified public accountant to assist in examining books, records, and accounts, an accountant who was thereafter so employed, and who had made an examination of books of the plaintiff upon which the defendant relied in part to establish a defense and counterclaim, was not incompetent as a witness to testify as to what the books showed, either because the accountant was employed under authority of the court to assist the auditor, or because the order referring the case to an auditor had been revoked and the objecting party had never had an opportunity to appear before the auditor. Bible v. Somers Constr. Co., 197 Ga. 761, 30 S.E.2d 623, 1944 Ga. LEXIS 336 (1944) (decided under former Code 1933, § 38-1603).

Ex parte statements insufficient. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Pre-1979 testimony admissible when not against estate's interests. — Testimony of a transaction alleged to have been undertaken with the deceased in 1978 should have been admitted because it was not against the interest of the estate of the deceased. Bowens v. Holmes, 262 Ga. 179, 415 S.E.2d 632, 1992 Ga. LEXIS 351 (1992) (decided under former O.C.G.A. § 24-9-1).

Pre-1979 statement admissible as to appellee's parents regarding decedent's statements. — Appellee's parents were competent witnesses regarding statements made to the parents by the decedent prior to July 1, 1979 to prove that the decedent contracted to adopt the appellee. Morgan v. Howard, 285 Ga. 512, 678 S.E.2d 882, 2009 Ga. LEXIS 294 (2009) (decided under former O.C.G.A. § 24-9-1).

Continuing business relationship did not constitute a "transaction" within the meaning of subsection (b) of former O.C.G.A. § 24-9-1 and thus testimony as to an alleged oral contract made before July 1, 1979 with a party since deceased, which defined the relationship which extended beyond that date, was not admissible under the former dead man's statute. Wilson v. Nichols, 253 Ga. 84, 316 S.E.2d 752, 1984 Ga. LEXIS 812 (1984) (decided under former O.C.G.A. § 24-9-1).

Former dead man's statute barred testimony regarding a conversation between plaintiff, plaintiff's mother, and a person since deceased because the plaintiff's claim was "against the interest" of the deceased, i.e., the interest of the deceased's estate. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (decided under former O.C.G.A. § 24-9-1).

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (decided under former O.C.G.A. § 24-9-1).

Under former Code 1933, § 38-1603, neither plaintiff nor his wife could testify as to promise of a "contract for life" allegedly made to plaintiff and plaintiff's spouse by two deceased officers of defendant corporation. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537.

For application of former dead man's statute in action seeking cancellation of deed allegedly obtained by fraud, see McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1992 U.S. Dist. LEXIS 631 (M.D. Ga. 1992) (decided under former O.C.G.A. § 24-9-1); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456, 1995 U.S. Dist. LEXIS 11282 (M.D. Ga. 1995). (decided under former O.C.G.A. § 24-9-1).

Competency rules apply in adultery cases. — Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981), was no longer

applicable in view of the 1982 amendment to former O.C.G.A. § 24-9-2 which eliminated language excepting certain adultery cases from the broad competency rules of former O.C.G.A. § 24-9-1 (see now O.C.G.A. § 24-9-601); consequently, in such cases the competency rules of former § 24-9-1 were now applicable. Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1, 1982 Ga. LEXIS 862 (1982) (decided under former O.C.G.A. §§ 24-9-1 and 24-9-2).

Offer of proof following introduction of previously suppressed evidence regarding adulterous conduct. — When spouse obtained a favorable ruling on motion in limine to suppress evidence as to the spouse's adulterous conduct, and abided by that ruling, but nevertheless such evidence was offered at trial, that spouse was entitled to make an offer of proof as to such allegations. Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94, 1982 Ga. LEXIS 954 (1982), superseded by statute as stated in Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-2).

Expert witness. — Question of qualification as expert witness is one of discretion with the trial court judge. Wilkie v. State, 153 Ga. App. 609, 266 S.E.2d 289, 1980 Ga. App. LEXIS 1922 (1980) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Exclusion of expert witness improper. — Trial court abused the court's discretion in excluding a homeowner's expert witness solely on the basis of the expert's alleged interest in the outcome of the case, and because the trial court's unauthorized preemptive protection of the homeowner's attorney immediately led to the dismissal of the claim for damages for failure to produce any expert evidence of causation, the homeowner did not have a day in court; although the expert indicated that, at the time of the expert's deposition, the expert intended to decide how much to bill the homeowner after the trial, based on the expert's own evaluation of whether the expert testimony was "usable," there was no evidence in the truncated voir dire of the expert that the homeowner's attorney agreed to that scheme or otherwise agreed that the expert's compensation would be contingent on the outcome of the case. Meacham v. Franklin-Heard County Water Auth., 302 Ga. App. 69, 690 S.E.2d 186, 2009 Ga. App. LEXIS 1458 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. June 1, 2010) (decided under former O.C.G.A. § 24-9-1).

Witness under influence of alcohol or drugs. — Former law required the trial court to determine the competency to testify of a witness who was under the influence of alcohol or other drugs. Geter v. State, 231 Ga. 615, 203 S.E.2d 195, 1974 Ga. LEXIS 1161 (1974) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Time of drunkenness. — Evidence that the witness was in a drunken condition when the witness undertook to testify went to the witness's competency, while proof that the witness was drunk on the occasion concerning which the witness testified went only to the witness's credit. Whitus v. State, 222 Ga. 103, 149 S.E.2d 130, 1966 Ga. LEXIS 408 (1966), rev'd in part, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, 1967 U.S. LEXIS 2452 (1967) (decided under former Code 1933, § 38-1608).

Prior conviction of felony. — Person convicted of a felony is a competent witness; the fact of the person's conviction only goes to the person's credit. Bowers v. Southern Ry., 10 Ga. App. 367, 73 S.E. 677, 1912 Ga. App. LEXIS 516 (1912) (decided under former Civil Code 1910, §§ 5858 and 5859); Lewis v. State, 243 Ga. 443, 254 S.E.2d 830, 1979 Ga. LEXIS 931 (1979) (decided under former Code 1933, § 38-1603).

Witness testifying to market value. — Competency of the witness to testify as to market value is for the court. Williams v. Colonial Pipeline Co., 110 Ga. App. 824, 140 S.E.2d 150, 1964 Ga. App. LEXIS 769 (1964) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611 and 38-1612).

Alzheimer's disease. — When an attorney-in-fact sought to enjoin the attorney-in-fact's siblings from enforcing a revocation of their parent's durable health care power of attorney, the trial court did not err in determining that the parent,

Application in Other Circumstances (Cont'd)

who had Alzheimer's disease, was not competent, as well as in refusing to allow the siblings to present the ailing parent as a witness, given the evidence of the parent's seriously impaired mental capacity. Luther v. Luther, 289 Ga. App. 428, 657 S.E.2d 574, 2008 Ga. App. LEXIS 111 (2008), cert. denied, No. S08C0912, 2008 Ga. LEXIS 520 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-9-7).

Identity of confidential informant. — Trial court did not err by refusing to allow the defendant to learn the identity of the confidential informant on grounds that identity was the defendant's sole defense, and the confidential informant was the one who "fingered" defendant as a drug dealer, given the state's interest in retaining the informant's confidentiality because of other, ongoing investigations and the fact that the evidence as to defendant's identity was overwhelming in that two police officers positively identified the defendant. Wilson v. State, 191 Ga. App. 833, 383 S.E.2d 197, 1989 Ga. App. LEXIS 822 (1989) (decided under former O.C.G.A. § 24-9-7).

Instruction unnecessary. — In the absence of a written request, the trial judge does not ordinarily charge the jury concerning the witness's competency, and it is never error for the judge to omit to instruct the jury concerning the credibility of a witness. Whitus v. State, 222 Ga. 103, 149 S.E.2d 130, 1966 Ga. LEXIS 408 (1966), rev'd in part, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, 1967 U.S. LEXIS 2452 (1967) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611 and 38-1612).

Appointment of guardian. — Trial court did not err by allowing the victim to testify in a prosecution for aggravated assault, notwithstanding the fact that a probate judge had appointed a guardian for the victim's person and property after the victim's injuries, since the trial court questioned the victim outside the presence of the jury and determined that the victim was competent to testify. McClain v. State, 248 Ga. App. 338, 545 S.E.2d 926, 2001 Ga. App. LEXIS 258 (2001) (decided under former O.C.G.A. § 24-9-7).

Physical problems cannot render a witness incompetent to testify. — See Smith v. State, 249 Ga. App. 39, 547 S.E.2d 598, 2001 Ga. App. LEXIS 394 (2001), cert. denied, No. S01C1124, 2001 Ga. LEXIS 720 (Ga. Sept. 7, 2001) (decided under former O.C.G.A. § 24-9-7).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 157 et seq.

C.J.S.

98 C.J.S. (Rev), Witnesses, §§ 92, 108 et seq., 102, 124 et seq., 132 et seq., 215, 216, 238, 245, 270, 290, 447.

ALR.

Exhibition of child in criminal prosecution, or civil action, for seduction, 1 A.L.R. 622.

Competency of hospital physician or attendant to testify as to condition of patient, 22 A.L.R. 1217.

Mental condition as affecting competency of witness, 26 A.L.R. 1491; 148 A.L.R. 1140.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 A.L.R. 297.

Competency of witness to testify as to his own age, 39 A.L.R. 376.

Insanity of witness as ground of writ of error coram nobis, 43 A.L.R. 1387.

Admissibility and probative force, on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 68 A.L.R. 1309.

Infant's admissions out of court as evidence in civil cases, 89 A.L.R. 708; 12 A.L.R.3d 1051.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 A.L.R. 788.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not

amounting to unsoundness of mind, 97 A.L.R. 893.

Competency of testimony as to one's mental condition, based upon handwriting, 103 A.L.R. 900.

Judge as a witness in a cause on trial before him, 157 A.L.R. 315.

Competency of child as witness as affected by fact that his prosecution for perjury is prohibited, 159 A.L.R. 1102.

Review on appeal of decision of trial court as to qualification or competency of expert witnesses, 166 A.L.R. 1067.

Conviction in another jurisdiction as disqualifying witness, 2 A.L.R.2d 579.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 A.L.R.2d 645.

Testimony of children as to grounds of divorce of their parents, 2 A.L.R.2d 1329.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 A.L.R.2d 598.

Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer, 8 A.L.R.2d 1013.

Alleged incompetent as witness in lunacy inquisition, 22 A.L.R.2d 756.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 A.L.R.2d 1247.

Court's witnesses (other than expert) in criminal prosecution, 67 A.L.R.2d 538.

Competency of young child as witness in civil case, 81 A.L.R.2d 386.

Admissibility of evidence of train speed prior to grade-crossing accident, and competency of witness to testify thereto, 83 A.L.R.2d 1329.

Declarant's age as affecting admissibility as res gestae, 83 A.L.R.2d 1368; 15 A.L.R.4th 1043.

Competency of physician or surgeon of school of practice other than that to which defendant belongs to testify in malpractice case, 85 A.L.R.2d 1022.

Validity of indictment where grand jury heard incompetent witness, 39 A.L.R.3d 1064.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Rule as regards competency of husband or wife to testify as to nonaccess, 49 A.L.R.3d 212.

Power of court to control evidence or witnesses going before grand jury, 52 A.L.R.3d 1316.

Judge as witness in cause not on trial before him, 86 A.L.R.3d 633.

Trial jurors as witnesses in same state court or related case, 86 A.L.R.3d 781.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 A.L.R.4th 468.

Court's witnesses (other than expert) in state criminal prosecution, 16 A.L.R.4th 352.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination, 17 A.L.R.4th 867.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 A.L.R.4th 368.

Attorney as witness for client in civil proceedings — Modern state cases, 35 A.L.R.4th 810.

Deaf-mute as witness, 50 A.L.R.4th 1188.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

Witnesses: child competency statutes, 60 A.L.R.4th 369.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 A.L.R.5th 841.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

Admissibility of expert testimony regarding questions of domestic law, 66 A.L.R.5th 135.

Validity, construction, and application of child hearsay statutes, 71 A.L.R.5th 637.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

Calling and interrogation of witnesses by court under Rule 614 of the Federal Rules of Evidence, 53 A.L.R. Fed. 498.

24-6-602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions.

History.
Code 1981, § 24-6-602, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Need for personal knowledge, Fed. R. Evid. 602.

JUDICIAL DECISIONS

Lay testimony on why defendant's charges upgraded. — To the extent the trial court concluded that the investigator's testimony was proper lay testimony because it was based on personal knowledge about why the defendant's charges were upgraded, the Georgia Supreme Court saw no abuse of discretion in the trial court denying the defendant's motion for mistrial on that basis. Taylor v. State, 315 Ga. 630, 884 S.E.2d 346, 2023 Ga. LEXIS 42 (2023).

Personal recollection. — Because the fellow inmate was an eyewitness to the events depicted in the surveillance video, the fellow inmate's testimony identifying the defendants from the still images from the surveillance video was admissible because the fellow inmate was testifying based on the fellow inmate's recollection of the stabbing, not providing the fellow inmate's opinion. Draughn v. State, 311 Ga. 378, 858 S.E.2d 8, 2021 Ga. LEXIS 193 (2021).

24-6-603. Oath or affirmation.

(a) Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

(b) Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving dependency as defined by Code Section 15-11-2, in all proceedings involving termination of parental rights under Article 4 of Chapter 11 of Title 15, and in all criminal proceedings in which a child was a victim of or witness to any crime, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter.

History.
Code 1981, § 24-6-603, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 294, § 4-41/HB 242; Ga. L. 2023, p. 374, § 1/SB 134, effective July 1, 2023.

The 2023 amendment, effective July 1, 2023, inserted ", in all proceedings involving termination of parental rights under Article 4 of Chapter 11 of Title 15," in the middle of subsection (b).

Cross references.
Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

Oath or affirmation to testify truthfully, Fed. R. Evid. 603.

Editor's notes.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews.

For comment discussing the effect of mental unsoundness on the competency of witnesses, in light of O'Shea v. Jewel Tea Co., 233 F.2d 530 (9th Cir. 1956), see 19 Ga. B.J. 533 (1957).

For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12 year old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958).

For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

For article, "The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3800, former Code 1873, § 3856, former Code 1882, § 3856, former Civil Code 1895, § 5273, former Penal Code 1895, § 1012, former Civil Code 1910, § 5862, former Penal Code 1910, § 1038, former Code 1933, §§ 38-1607, 38-1701, and former O.C.G.A. §§ 24-9-5 and 24-9-60 are included in the annotations for this Code section.

Oath or affirmation required of all. — In this state, an oath or affirmation is required of all witnesses, and unsworn statements are not treated as amounting to evidence, except in specified cases from necessity. Huiet v. Schwob Mfg. Co., 196 Ga. 855, 27 S.E.2d 743, 1943 Ga. LEXIS 429 (1943) (decided under former Code 1933, § 38-1701).

Framing oath according to religious faith. — It was not error to accept testimony of a witness who declined to take an oath, saying: "Well, I'm not going to swear but I promise to tell you the truth." Chapman v. State, 257 Ga. 19, 354 S.E.2d 149, 1987 Ga. LEXIS 698 (1987) (decided under former O.C.G.A. § 24-9-60).

Objection to lack of oath or affirmation. — When a party, without objection, allows a witness to go on the stand and testify against the party without being first sworn, such party cannot, after verdict against the party, urge in this court the failure of the witness to take the oath as a ground for rejecting the brief of the evidence, which has the approval of the trial judge, since such objection was not

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raised in the court below. Neidlinger v. Mobley, 76 Ga. App. 599, 46 S.E.2d 747, 1948 Ga. App. LEXIS 425 (1948) (decided under former Code 1933, § 38-1701).

When a party, without objection, allows a witness to testify against the party without first being sworn, that party, through the party's failure to object, has waived the requirements of an oath. Belcher v. State, 173 Ga. App. 509, 326 S.E.2d 857, 1985 Ga. App. LEXIS 2650 (1985) (decided under former O.C.G.A. § 24-9-60).

Former Georgia witness competency statutes presented a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and did not violate the equal protection clause. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555, 1989 Ga. LEXIS 348 (1989) (decided under former O.C.G.A. § 24-9-5).

State had standing to challenge the former Georgia witness competency statutes. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555, 1989 Ga. LEXIS 348 (1989) (decided under former O.C.G.A. § 24-9-5).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial, the defendant made the defendant's "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7 [now repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204, 1988 Ga. App. LEXIS 691 (1988) (decided under former O.C.G.A. § 24-9-5).

Nothing in the record to indicate witness could not understand trial oath. — Ruling that a witness was incompetent to testify under former O.C.G.A. § 24-9-5(a) (see now O.C.G.A. §§ 24-6-601 and 24-6-603) failed since there was absolutely nothing in the record to demonstrate that the witness could not understand the nature of the trial oath simply because the witness was originally from Somalia and spoke in halting English. Trueblood v. State, 248 Ga. App. 78, 545 S.E.2d 628, 2001 Ga. App. LEXIS 173 (2001) (decided under former O.C.G.A. § 24-9-5).

Role of Court

Trial court determines competency of a witness and jury decides credibility. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606, 1981 Ga. App. LEXIS 2921 (1981) (decided under former O.C.G.A. § 24-9-5).

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Constitutionality. — Former subsection (b) of O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not violate due process; it was not fundamentally unfair to require one accused of child molestation to face one's accuser, even if the accuser was unable to articulate the meaning of an oath, and the defendant had the opportunity to cross-examine the child witness, and test the child's credibility before the jury. Sims v. State, 260 Ga. 782, 399 S.E.2d 924, 1991 Ga. LEXIS 52 (1991) (decided under former O.C.G.A. § 24-9-5).

Subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) applied equally to all those accused of child molestation, and therefore did not violate the equal protection clause of the federal constitution. Sims v. State, 260 Ga. 782, 399 S.E.2d 924, 1991 Ga. LEXIS 52 (1991) (decided under former O.C.G.A. § 24-9-5).

Child "available to testify" in former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) meant one competent to testify under former O.C.G.A. § 24-9-5 (see

now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness was not available to testify and any out-of-court statements were not rendered admissible by former § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790, 1990 Ga. App. LEXIS 319 (1990) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. §§ 24-9-5 and 24-3-16 (see now O.C.G.A. §§ 24-6-601, 24-6-603, and 24-8-820) must be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-9-5); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695, 1994 Ga. App. LEXIS 119 (1994), cert. denied, No. S94C0811, 1994 Ga. LEXIS 506 (Ga. Mar. 25, 1994) (decided under former O.C.G.A. § 24-9-5).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, 1991 Ga. App. LEXIS 530 (1991), cert. denied, No. S91C1028, 1991 Ga. LEXIS 751 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not expand the circumstances under which hearsay statements of a child could be admitted in evidence. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98, 1994 Ga. LEXIS 863 (1994), superseded by statute as stated in Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-9-5).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath as required by subsection (a) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714, 2000 Ga. LEXIS 493 (2000) (decided under former O.C.G.A. § 24-9-5).

No required showing child competent to testify. — For offenses involving child victims occurring after April 19, 1989, a determination that the child victim is competent to testify was not necessary; a child witness was "available" for purposes of the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), as long as the child was physically available to appear at trial. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-9-5).

Statement admissible regardless of child's age or degree of comprehension. — Out-of-court statements of a victim of child molestation are admissible whenever the victim is available to appear at trial, whether or not the child is capable of understanding the nature of an oath and thus regardless of age or degree of comprehension. Lang v. State, 201 Ga. App. 836, 412 S.E.2d 866, 1991 Ga. App. LEXIS 1635 (1991) (decided under former O.C.G.A. § 24-9-5).

Oath not required when child did not comprehend oath's nature. — Under subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603), which provided that in certain limited categories of cases a child was deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by former O.C.G.A. § 24-9-60 had been obviated when the child did not comprehend the oath's nature. The child simply became an unsworn witness, made so because incapable of taking an oath. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. §§ 24-9-5 and 24-9-60).

Children who did not understand nature of oath were incompetent. — Porter v. State, 237 Ga. 580, 229 S.E.2d 384, 1976 Ga. LEXIS 1310 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806, 1977 U.S. LEXIS 1395 (1977) (decided under former Code 1933, § 38-1607).

Mentally retarded children subject to competency challenge. — Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) was construed as subjecting children to a competency challenge based on the allegation that

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children did not understand the nature of an oath. Children, like adults, were also subject to a competency challenge on the ground that the children do not have the use of reason because of mental retardation. Sizemore v. State, 262 Ga. 214, 416 S.E.2d 500, 1992 Ga. LEXIS 504 (1992) (decided under former O.C.G.A. § 24-9-5).

Determining factor in deciding competency of a witness to testify was not age but rather the ability to understand the nature of an oath. Horton v. State, 35 Ga. App. 493, 133 S.E. 647, 1926 Ga. App. LEXIS 936 (1926) (decided under former Penal Code 1910, § 1038); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, § 38-1607).

Standard of intelligence required to qualify child as a witness is not that the child be able to define the meaning of an oath, nor that the child understand the process under which the oath is administered, but rather that the child know and appreciate the fact that as a witness the child assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as the child may be interrogated on, and that if the child violates the obligation the child is subject to be punished by the court. Jones v. State, 219 Ga. 245, 132 S.E.2d 648, 1963 Ga. LEXIS 414 (1963) (decided under former Code 1933, § 38-1607); Smith v. State, 247 Ga. 511, 277 S.E.2d 53, 1981 Ga. LEXIS 767 (1981) (decided under former Code 1933, § 38-1607); Alvin v. State, 253 Ga. 740, 325 S.E.2d 143, 1985 Ga. LEXIS 565 (1985), overruled in part, Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former O.C.G.A. § 24-9-5).

Knowledge of nature of oath. — It is enough if children know the mere nature of an oath, regardless of knowledge of the oath's effects, and whether or not the children have such knowledge is to be determined by the court on a preliminary examination. Peterson v. State, 47 Ga. 524, 1873 Ga. LEXIS 155 (1873) (decided under former law); Moore v. State, 79 Ga. 498, 5 S.E. 51, 1887 Ga. LEXIS 257 (1887) (decided under former Code 1882, § 3856); Young v. State, 122 Ga. 725, 50 S.E. 996, 1905 Ga. LEXIS 307 (1905) (decided under former Penal Code 1895, § 1012); Beebee v. State, 124 Ga. 775, 53 S.E. 99, 1906 Ga. LEXIS 609 (1906) (decided under former Penal Code 1895, § 1012); Young v. State, 125 Ga. 584, 54 S.E. 82, 1906 Ga. LEXIS 228 (1906) (decided under former Penal Code 1895, § 1012); Richardson v. State, 141 Ga. 782, 82 S.E. 134, 1914 Ga. LEXIS 143 (1914) (decided under former Penal Code 1910, § 1038); Reece v. State, 155 Ga. 350, 116 S.E. 631, 1923 Ga. LEXIS 67 (1923) (decided under former Penal Code 1910, § 1038).

Challenge for "understanding truth." — Understanding the truth was one element of understanding the nature of an oath, and as such, subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) excepted a child from a competency challenge brought on such basis. Norton v. State, 263 Ga. 448, 435 S.E.2d 30, 1993 Ga. LEXIS 649 (1993) (decided under former O.C.G.A. § 24-9-5); Jeffries v. State, 272 Ga. 510, 530 S.E.2d 714, 2000 Ga. LEXIS 472 (2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 864, 148 L. Ed. 2d 777, 2001 U.S. LEXIS 754 (2001) (decided under former O.C.G.A. § 24-9-5).

Child should not be held competent when the child does not understand nature of oath. — While questions of this character are to be left largely to the discretion of the trial judge, the judge should not hold a child-witness competent when it does not appear that such witness sufficiently understands the nature and obligation of an oath to testify in the case. Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90, 1981 Ga. App. LEXIS 1862 (1981), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120 (2004) (decided under former Code 1933, § 38-1607).

It was not necessary for child to understand meaning of the word "oath." Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90, 1981 Ga. App. LEXIS 1862 (1981), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120

(2004) (decided under former Code 1933, § 38-1607); Raborn v. State, 192 Ga. App. 99, 383 S.E.2d 650, 1989 Ga. App. LEXIS 905 (1989) (decided under former O.C.G.A. § 24-9-5).

It is not necessary that a child understand the penalties for perjury in order for the trial court to rule the child competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

Age not determinative of competency as a witness. Johnson v. State, 146 Ga. 190, 91 S.E. 42, 1916 Ga. LEXIS 653 (1916) (decided under former Penal Code 1910, § 1038).

Capacity to commit crime not determinative of competency as a witness. Johnson v. State, 61 Ga. 35, 61 Ga. 36, 1878 Ga. LEXIS 11 (1878) (decided under former Code 1873, § 3856).

Testimony of children sufficiently reliable. — Record contained sufficient evidence of indicia of reliability when the two girls, who were 12 and 10 years old, were interviewed separately on at least two different occasions, their statements were consistent with each other over time, the state's witnesses were all professionals trained in interviewing victims of child abuse without asking leading questions, and all three considered the girls credible. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-9-5).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error when the witness is under 14 years of age. Bennett v. State, 145 Ga. App. 56, 243 S.E.2d 265, 1978 Ga. App. LEXIS 1861 (1978) (decided under former Code 1933, § 38-1607).

Examination of child sufficient. — When the principal state's witness against a defendant is a child and on examination by the court to determine the child's competency to testify stated the child knew what it meant to tell a lie and that the child was supposed to tell the truth, such examination was sufficient to determine whether the child understood the nature of an oath as required by law. Turpin v. State, 121 Ga. App. 294, 173 S.E.2d 455, 1970 Ga. App. LEXIS 1202 (1970) (decided under former Code 1933, § 38-1607); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520, 1976 Ga. App. LEXIS 1960 (1976) (decided under former Code 1933, § 38-1607).

Since each child testified that the child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and that the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606, 1981 Ga. App. LEXIS 2921 (1981) (decided under former Code 1933, § 38-1607).

When the record revealed that, during the trial the prosecuting attorney asked the victim, nearly nine years old, a series of questions, the answers to which clearly demonstrated that the child understood both the difference between truth and falsehood and the importance of telling only the truth, and the record further revealed that the defendant's counsel failed to question the witness following the examination by the state, or to object at that time on competency grounds, counsel's conduct amounted to a waiver of the right to raise the issue of the witness's competency on appeal. Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720, 1990 Ga. App. LEXIS 567 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the trial court examined each of three juvenile witnesses at the beginning of his or her testimony to ascertain that the child knew the difference between telling the truth and telling a lie and understood why telling the truth was better than telling a falsehood, and obtained from each witness a promise to tell the truth in response to questions from counsel, it was not an abuse of discretion to allow the children to testify. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746, 1990 Ga. App. LEXIS 579 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the 15-year-old victim of a sexual abuse testified at trial that the victim knew it was bad to tell a lie, that the victim would be punished if the victim did

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so and that the victim also understood the importance of telling the truth, the trial court did not abuse the court's discretion in refusing to strike the victim's testimony. Lott v. State, 206 Ga. App. 886, 426 S.E.2d 667, 1992 Ga. App. LEXIS 1821 (1992) (decided under former O.C.G.A. § 24-9-5).

Defense counsel was not ineffective for falling to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137, 2011 Ga. App. LEXIS 70 (2011) (decided under former O.C.G.A. § 24-9-5).

Presumption not conclusive. — Child over 14 is presumed competent to testify, but to hold that this presumption is so conclusive that the court is inhibited from examining the witness on this point unless objection has been specifically made on one of the grounds stated in this statute would be to circumscribe the authority of the court to elicit the truth, and would seriously impede the administration of justice. Schamroth v. State, 84 Ga. App. 580, 66 S.E.2d 413, 1951 Ga. App. LEXIS 728 (1951) (decided under former Code 1933, § 38-1607).

Trial court determines if child competent. — It is left to sound discretion of trial court to determine whether or not a child of tender years is a competent witness; and when the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, this court will not interfere, if it does not appear that such discretion has been manifestly abused. Gordon v. State, 186 Ga. 615, 198 S.E. 678, 1938 Ga. LEXIS 644 (1938) (decided under former Code 1933, § 38-1607); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321, 1945 Ga. App. LEXIS 709 (1945) (decided under former Code 1933, § 38-1607); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264, 1951 Ga. App. LEXIS 981 (1951) (decided under former Code 1933, § 38-1607); Middleton v. State, 194 Ga. App. 815, 392 S.E.2d 293, 1990 Ga. App. LEXIS 337 (1990) (decided under former O.C.G.A. § 24-9-5).

Competency of a child as a witness is within the sound discretion of the court, and the court's ruling will not be disturbed unless there is a manifest abuse of discretion. Adams v. State, 166 Ga. App. 807, 305 S.E.2d 651, 1983 Ga. App. LEXIS 2338 (1983) (decided under former O.C.G.A. § 24-9-5).

Trial court had sound discretion to determine whether a child was competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326, 1983 Ga. App. LEXIS 2448 (1983) (decided under former O.C.G.A. § 24-9-5).

Testimony admitted erroneously. — When an examination by the court shows that the child has no knowledge of the nature of an oath, it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S.E. 647, 1926 Ga. App. LEXIS 936 (1926) (decided under former Penal Code 1910, § 1038).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70, 1965 Ga. App. LEXIS 656 (1965) (decided under former Code 1933, §§ 38-1601, 38-1607, 38-1610, 38-1611, 38-1612).

No error in refusing to give statute in charge. — Since the question of the competency of a victim's ten-year-old

brother was one of law for the trial court to determine, the court did not err in refusing to give in charge to the jury the requested language contained in former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) which was relevant only to that issue. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, § 38-1607).

Inconsistency in a child's testimony did not render the child incompetent to testify, but went to the child's credibility as a witness. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585, 1983 Ga. App. LEXIS 2724 (1983) (decided under former O.C.G.A. § 24-9-5).

When a four-year-old victim expressed the victim's understanding of the difference between the truth and a lie and of the importance of telling the truth, expressed a fear of punishment if the victim did not tell the truth, and stated that the victim would tell the truth, there was no abuse of the trial court's discretion in the court's determination that the child was competent to testify, even though there may have been some inconsistency in the child's responses. Hutton v. State, 192 Ga. App. 239, 384 S.E.2d 446, 1989 Ga. App. LEXIS 1004 (1989) (decided under former O.C.G.A. § 24-9-5).

Child witness's unresponsiveness to a number of questions as put by the defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-9-5).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111, 1992 Ga. App. LEXIS 840 (1992) (decided under former O.C.G.A. § 24-9-5).

Trial court did not abuse the court's discretion in ruling competent to testify children who witnessed a crime since the children testified that to tell the truth means "to tell what really happened" as opposed to "making something up," and also testified that the children understand the significance of their oath to tell the truth while testifying in court and that if the children lied they would "get in big trouble." Hill v. State, 251 Ga. 430, 306 S.E.2d 653, 1983 Ga. LEXIS 817 (1983) (decided under former O.C.G.A. § 24-9-5).

When a child was examined at length by the court and by counsel, and the court found that the child was inattentive and not responsive, and also found that there were inconsistencies in the testimony of the child, there was no abuse of discretion in the court refusing to allow the child to testify. Batton v. State, 260 Ga. 127, 391 S.E.2d 914, 1990 Ga. LEXIS 184 (1990) (decided under former O.C.G.A. § 24-9-5).

After two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262, 1990 Ga. App. LEXIS 428 (1990), cert. denied, No. S90C1024, 1990 Ga. LEXIS 756 (Ga. May 16, 1990) (Trial held prior to April 19, 1989) (decided under former O.C.G.A. § 24-9-5).

For illustrations of preliminary examination to test a child's competency, see Minton v. State, 99 Ga. 254, 25 S.E. 626, 1896 Ga. LEXIS 330 (1896) (decided under former Penal Code 1895, § 1012); Gaines v. State, 99 Ga. 703, 26 S.E. 760, 1896 Ga. LEXIS 503 (1896) (decided under former Penal Code 1895, § 1012); Miller v. State, 109 Ga. 512, 35 S.E. 152, 1900 Ga. LEXIS 247 (1900) (decided under former Penal Code 1895, § 1012).

Children held competent in the following cases. — See Johnson v. State, 76 Ga. 76, 1885 Ga. LEXIS 24 (1885) (child of

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six) (decided under former Code 1882, § 3856); Marshall v. State, 74 Ga. 26, 1884 Ga. LEXIS 351 (1884) (child of seven) (decided under former Code 1882, § 3856); Minton v. State, 99 Ga. 254, 25 S.E. 626, 1896 Ga. LEXIS 330 (1896) (child of eight) (decided under former Penal Code 1895, § 1012); Hicks v. State, 105 Ga. 627, 31 S.E. 579, 1898 Ga. LEXIS 776 (1898) (child of ten) (decided under former Penal Code 1895, § 1012); Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60, 1929 Ga. App. LEXIS 22 (1929) (child of twelve) (decided under former Civil Code 1910, § 5862); Thurmond v. State, 220 Ga. 227, 138 S.E.2d 372 (1964) (child of eight) (decided under former Code 1933, § 38-1607); Perryman v. State, 244 Ga. 720, 261 S.E.2d 588, 1979 Ga. LEXIS 1386 (1979) (victim's nine-year-old daughter) (decided under former Code 1933, § 38-1607); Brown v. State, 167 Ga. App. 245, 306 S.E.2d 361, 1983 Ga. App. LEXIS 2486 (1983) (child of seven) (decided under former O.C.G.A. § 24-9-5); Aleywine v. State, 169 Ga. App. 805, 315 S.E.2d 35, 1984 Ga. App. LEXIS 1720 (1984) (child of eight) (decided under former O.C.G.A. § 24-9-5); Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, 1988 Ga. App. LEXIS 392 (1988) (child of five) (decided under former O.C.G.A. § 24-9-5); Syfrett v. State, 210 Ga. App. 185, 435 S.E.2d 470, 1993 Ga. App. LEXIS 1073 (1993), cert. denied, No. S93C1993, 1993 Ga. LEXIS 1151 (Ga. Dec. 3, 1993) (child of nine) (decided under former O.C.G.A. § 24-9-5).

Testimony of competent child, not formerly sworn, admitted. — Testimony of a child witness who, in response to questioning by the state, demonstrated that the child was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn, when, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child's testifying. Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784, 1992 Ga. App. LEXIS 797 (1992) (decided under former O.C.G.A. § 24-9-5).

Parent's objection to competency of child rejected. — In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303, 2008 Ga. App. LEXIS 1278 (2008) (decided under former O.C.G.A. § 24-9-5).

Jury judges child's credibility. — Thrust of the child witness statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), was to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who had reported child molestation to an adult permitted to testify to the out-of-court statement at trial, was incapable of reiterating the accusation at trial or was unresponsive or evasive during cross-examination, the jury must decide the child's credibility. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85, 1991 Ga. App. LEXIS 769 (1991) (decided under former O.C.G.A. § 24-9-5).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-1701 are included in the annotations under this Code section.

Affirmations. — Former statute although dealing with oaths as given in the trial of cases, nevertheless substantiated the belief that the word "swear" could be stricken and the word "affirm" used in

loyalty oaths. 1948-49 Ga. Op. Att'y Gen. 565 (decided under former Code 1933, § 38-1701).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 624 et seq.

Am. Jur. Proof of Facts.

Qualifying Child Witness to Testify, 35 POF2d 665.

C.J.S.

98 C.J.S. (Rev), Witnesses, §§ 92, 102, 108 et seq., 124 et seq., 132 et seq., 215, 216, 238, 245, 270, 290, 447.

ALR.

Mental condition as affecting competency of witness, 26 A.L.R. 1491; 148 A.L.R. 1140.

Infant's admissions out of court as evidence in civil cases, 89 A.L.R. 708; 12 A.L.R.3d 1051.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not amounting to unsoundness of mind, 97 A.L.R. 893.

Competency of child as witness as affected by fact that his prosecution for perjury is prohibited, 159 A.L.R. 1102.

Testimony of children as to grounds of divorce of their parents, 2 A.L.R.2d 1329.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 A.L.R.2d 1247.

Competency of young child as witness in civil case, 81 A.L.R.2d 386.

Declarant's age as affecting admissibility as res gestae, 83 A.L.R.2d 1368; 15 A.L.R.4th 1043.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Witnesses: child competency statutes, 60 A.L.R.4th 369.

Validity, construction, and application of child hearsay statutes, 71 A.L.R.5th 637.

Sufficiency, under rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness's testimony, 127 A.L.R. Fed. 207.

24-6-604. Interpreters.

Except as provided in Code Sections 24-6-656 and 24-6-657 or by the rules promulgated by the Supreme Court of Georgia pursuant to Code Section 15-1-14, an interpreter shall be subject to the provisions of Code Section 24-7-702. Interpreters shall be required to take an oath or affirmation to make a true translation.

History.

Code 1981, § 24-6-604, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Interpreter, Fed. R. Evid. 604.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1609 and former O.C.G.A. § 24-9-4 are included in the annotations for this Code section.

Purpose. — If a procedure such as provided for by the former statute were not permissible, the witness unable to communicate in English or otherwise disabled would never be able to give the witness's testimony. Hensley v. State, 228

Ga. 501, 186 S.E.2d 729, 1972 Ga. LEXIS 818 (1972) (decided under former Code 1933, § 38-1609).

Questions for court and jury. — Use of an interpreter, and the extent to which the examination will be allowed to proceed through the interpreter must necessarily lie within the sound discretion of the trial judge. Whether the evidence elicited be credible is a question for the jury who were there and who observed the witness, the witness's behavior on the stand and response to the questions and the manner of communication between the witness and the interpreter. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729, 1972 Ga. LEXIS 818 (1972) (decided under former Code 1933, § 38-1609).

Discretion of trial judge. — Use of an interpreter, and the extent to which the interpreter may be used in the examination of a witness, must necessarily lie within the sound discretion of the trial judge. Reed v. State, 249 Ga. 52, 287 S.E.2d 205, 1982 Ga. LEXIS 1108 (1982) (decided under former O.C.G.A. § 24-9-4).

Court officer as interpreter. — When the witness in a criminal case was unable from the witness's physical condition to speak audibly, the witness's answers may be communicated in the witness's hearing and presence by a sworn officer of the court. Conner v. State, 25 Ga. 515, 1858 Ga. LEXIS 100 (1858) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 634 et seq.

C.J.S.

98 C.J.S. (Rev), Witnesses, § 124.

ALR.

Use of interpreter in court proceedings, 172 A.L.R. 923.

Deaf-mute as witness, 50 A.L.R.4th 1188.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 A.L.R.4th 1102.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

24-6-605. Judge as witness.

The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve this issue.

History.

Code 1981, § 24-6-605, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Judge's competency as a witness, Fed. R. Evid. 605.

24-6-606. Juror as witness.

(a) A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of

anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form.

History.

Code 1981, § 24-6-606, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Action by juror on private knowledge as to facts, witnesses, or parties, § 17-9-20.

Juror's competency as a witness, Fed. R. Evid. 606.

Law reviews.

For article, "Juror's Testimony to Set Aside Verdict in Georgia," see 11 Ga. B.J. 408 (1949).

For article, "Justice and Juror," see 20 Ga. L. Rev. 257 (1986).

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

For note, "Addressing Racial Bias in the Jury System: Another Failed Attempt?," see 35 Ga. St. U.L. Rev. 843 (2019).

For annual survey on evidence, see 71 Mercer L. Rev. 103 (2019).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, §§ 5337, 5338, former Civil Code 1910, § 5933, former Code 1933, §§ 110-108, 110-109, and former O.C.G.A. §§ 9-10-9 and 17-9-41 are included in the annotations for this Code section. The reader is advised to consult the annotations following Code Section 17-9-20, which may also be applicable to this Code section.

Member of jury impaneled to try case is not debarred from testifying in such case as a witness, if otherwise competent. Savannah, F. & W. Ry. v. Quo, 103 Ga. 125, 29 S.E. 607, 1897 Ga. LEXIS 373 (1897) (decided under former Civil Code 1895, § 5337).

Jurors themselves may be sworn as witnesses without disqualifying themselves from serving as jurors in the case. Williams v. Barnes, 181 Ga. 514, 182 S.E. 897, 1935 Ga. LEXIS 147 (1935) (decided under former Code 1933, § 110-108).

Juror cannot impeach verdict, except when Sixth Amendment protections applicable. — As a matter of public policy, a juror cannot be heard to impeach the juror's verdict, either by way of disclosing the incompetency or misconduct of fellow jurors, or by showing the juror's own misconduct or disqualification from any cause. The only exception to the firm application of this rule is when protections provided a criminal defendant by the Sixth Amendment are applicable. Lozynsky v. Hairston, 168 Ga. App. 276,

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308 S.E.2d 605, 1983 Ga. App. LEXIS 2749 (1983) (decided under former O.C.G.A. § 9-10-9).

Verdict cannot be impeached by affidavits of the jurors. Shippen v. Thompson, 45 Ga. App. 736, 166 S.E. 41, 1932 Ga. App. LEXIS 679 (1932) (decided under former Civil Code 1910, § 5933).

When the jury was instructed to return a verdict for the full amount of damages due appellee without deducting the settlement, affidavits from members of the jury (averring that the jury deducted the settlement before making an award) worked to impeach, rather than sustain, the verdict. The trial court's entry of judgment in accordance with the affidavits thus impermissibly added to the jury's verdict. King Cotton, Ltd. v. Powers, 190 Ga. App. 845, 380 S.E.2d 481, 1989 Ga. App. LEXIS 452 (1989) (decided under former O.C.G.A. § 9-10-9).

General partners' (GPs') motion for a new trial was properly denied as the juror affidavits filed by the GPs outlining alleged juror misconduct constituted an attempt to impeach the jury's verdict in the exact manner prohibited by former O.C.G.A. § 9-10-9. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310, 2006 Ga. App. LEXIS 895 (2006) (decided under former O.C.G.A. § 9-10-9).

Affidavits as to statements after dispersing. — Jurors cannot impeach their verdict, and affidavits by members of the jury or of counsel, as to their sayings after dispersing, cannot be received for that purpose. Wade v. State, 12 Ga. 25, 1852 Ga. LEXIS 86 (1852) (decided under former law); Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, 1918 Ga. App. LEXIS 559 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

Jurors' statements upon reassembling cannot alter plain import of verdict. — After the jury has published their verdict and dispersed, their expressions, on being reassembled, as to the intent of the jury's verdict, cannot add to or change the plain import and intent of the verdict. Ryner v. Duke, 205 Ga. 280, 53 S.E.2d 362, 1949 Ga. LEXIS 351 (1949) (decided under former Code 1933, § 110-109).

Jurors using cell phones to look up information. — Parents' motion for a new trial was properly denied because no testimony was elicited regarding the substance of the definitions found by jurors using cellphones, and no showing has been made that the information obtained was prejudicial, or even that the information differed from the trial court's written instructions which went out with the jury. Armstrong v. Gynecology & Obstetrics of DeKalb, P.C., 327 Ga. App. 737, 761 S.E.2d 133, 2014 Ga. App. LEXIS 415 (2014).

Jurors' affidavits which attempted to establish mistake as to the meaning of instructions and in effect impeached their verdict could not be considered. Perryman v. Rosenbaum, 205 Ga. App. 784, 423 S.E.2d 673, 1992 Ga. App. LEXIS 1381 (1992) (decided under former O.C.G.A. § 9-10-9).

Juror's affidavits as to special findings impermissible on motion for new trial of tort action. — Court errs, in a tort case, in allowing and considering, upon the hearing of the defendant's motion for new trial, affidavits of the jurors as to what findings the jurors had made in reaching their verdicts, since the effect of such affidavits is to amend the verdict into special findings of fact, and special verdicts are only permissible in equity cases. Davison-Paxon Co. v. Archer, 91 Ga. App. 131, 85 S.E.2d 182, 1954 Ga. App. LEXIS 880 (1954) (decided under former Code 1933, § 110-109).

Juror's affidavits concerning reenactment of crime. — State death row inmate's claim that the state habeas court should have considered the affidavits of jurors in connection with the inmate's argument that the jury considered nonrecord evidence when the state reenacted the crime at the murder scene failed because considering the affidavits would have violated former O.C.G.A. §§ 9-10-9 and 17-9-41, and the trial judge had specifically precluded the state from reenacting the crime at the jury's viewing of the scene. Crowe v. Terry, 426 F. Supp. 2d 1310, 2005 U.S. Dist. LEXIS 41532 (N.D.

Ga. 2005), aff'd, 490 F.3d 840, 2007 U.S. App. LEXIS 15250 (11th Cir. 2007) (decided under former O.C.G.A. § 9-10-9).

Defendant in error under no duty to produce jurors' affidavits on motion for new trial. — When there is no prima-facie showing that the verdict is a compromise, no duty rests on the defendant in error to produce at the hearing of the motion for a new trial any affidavits of the jurors to uphold the verdict. North British & Mercantile Ins. Co. v. Parnell, 53 Ga. App. 178, 185 S.E. 122, 1936 Ga. App. LEXIS 33 (1936) (decided under former Code 1933, § 110-109).

Required showing for setting aside verdict arrived at by chance. — In order to authorize the setting aside of a verdict upon the ground that it was arrived at by chance, it must affirmatively appear that the jurors bound themselves in advance to arrive at the verdict in this manner, and that the jurors in fact did so. City of Columbus v. Ogletree, 102 Ga. 293, 29 S.E. 749, 1897 Ga. LEXIS 504 (1897) (decided under former Civil Code 1895, § 5338).

Juror will not be heard to claim verdict result of mistake or misunderstanding of evidence. — That a verdict was caused by mistake or a misunderstanding of the evidence, as disclosed by a member of the jury, will not be heard. Bowman v. Bowman, 230 Ga. 395, 197 S.E.2d 372, 1973 Ga. LEXIS 927 (1973) (decided under former Code 1933, § 110-109).

Nothing from juror will be heard to impeach verdict. — Nothing coming from a juror, either directly or indirectly, in the way of a narrative with respect to the manner in which a verdict was arrived at will be heard to impeach the verdict. Southern Ry. v. Sommer, 112 Ga. 512, 37 S.E. 735, 1900 Ga. LEXIS 222 (1900) (decided under former Civil Code 1895, § 5338); Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, 1918 Ga. App. LEXIS 559 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

It is settled beyond all possibility of dispute that a juror will not be heard to impeach the juror's verdict. Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74, 1981 Ga. App. LEXIS 2698 (1981) (decided under former Code 1933, § 110-109).

In a trespass case, a trial court properly refused to consider a juror's affidavit regarding sympathy for an opposing party because such evidence could not have been considered to impeach the verdict. Bullard v. Bouler, 272 Ga. App. 397, 612 S.E.2d 513, 2005 Ga. App. LEXIS 244 (2005) (decided under former O.C.G.A. § 9-10-9).

Including oral testimony at hearing. — Prohibition against the impeachment by a juror of the juror's verdict extends to oral testimony offered at a hearing. Pie Nationwide, Inc. v. Prickett, 189 Ga. App. 77, 374 S.E.2d 837, 1988 Ga. App. LEXIS 1268 (1988) (decided under former O.C.G.A. § 9-10-9); Riddle v. Becker, 232 Ga. App. 393, 501 S.E.2d 893 (decided under former O.C.G.A. § 9-10-9).

After verdict has been received and jury has dispersed, juror will never be heard to say that the juror did not agree to the verdict. Sims v. Sims, 113 Ga. 1083, 39 S.E. 435, 1901 Ga. LEXIS 496 (1901) (decided under former Civil Code 1895, § 5338).

Affidavits showing communication between jury and sheriff not to be considered. — So much of the affidavits of the jurors as tended to show that the deputy sheriff or the bailiff had improper communications with the jury could not be considered by the judge in passing upon the issue as to whether such communications were had with the jury. Tolbirt v. State, 124 Ga. 767, 53 S.E. 327, 1906 Ga. LEXIS 608 (1906) (decided under former Civil Code 1895, § 5338).

Allegations of untruthful answers to voir dire questions. — While allegations that a juror gave untruthful answers to questions propounded on voir dire furnish a valid basis for reversal, such averments must be supported by evidence of probative value. Affidavits by fellow jurors do not meet this requirement. Fidelity Nat'l Bank v. Kneller, 194 Ga. App. 55, 390 S.E.2d 55, 1989 Ga. App. LEXIS 1693 (1989) (decided under former O.C.G.A. § 9-10-9).

Affidavits from third persons not to be considered. — If a verdict may not be

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impeached by an affidavit of one or more of the jurors who found it, certainly it cannot be impeached by affidavits from third persons establishing the utterance by a juror of remarks tending to impeach the juror's verdict; hence, the affidavit of a party that some of the jurors told the party the verdict was caused by a mistake furnishes no cause to set the verdict aside. Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, 1918 Ga. App. LEXIS 559 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933); Ward v. Morris, 159 Ga. 526, 126 S.E. 291, 1925 Ga. LEXIS 10 (1925) (decided under former Civil Code 1910, § 5933).

New trial granted based on affidavit of a nonjuror. — Affiant's testimony as to a juror calling affiant during deliberations to request information about a case did not run afoul of former O.C.G.A. § 9-10-9 because the affiant was neither a juror offering testimony to impeach the affiant's own verdict nor a third-party witness testifying about the hearsay, impeaching statements of the jurors; rather, the affiant was a nonjuror witness to the actual misconduct. Dryman v. Watts, 268 Ga. App. 710, 603 S.E.2d 51, 2004 Ga. App. LEXIS 994 (2004), cert. denied, No. S04C2052, 2004 Ga. LEXIS 974 (Ga. Oct. 25, 2004).

It was not error to exclude an affidavit of a juror as to conduct of the foreman, made for the purpose of impeaching the verdict. Landers v. Cobb, 150 Ga. 80, 102 S.E. 428, 1920 Ga. LEXIS 45 (1920) (decided under former Civil Code 1910, § 5933).

Juror's statements that jury considered matter which was not in evidence will not be received for the purpose of impeaching the verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

Affidavit of juror will not be received to show that the jurors in arriving at their verdict acted upon private knowledge or upon matters which were not in evidence. Central of Ga. R.R. v. Nash, 150 Ga. App. 68, 256 S.E.2d 619, 1979 Ga. App. LEXIS 2097, cert. dismissed, 244 Ga. 495, 260 S.E.2d 909, 1979 Ga. LEXIS 1307 (1979) (decided under former Code 1933, § 110-109); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980) (decided under former Code 1933, § 110-109).

Public policy prohibits jurors from impeaching their verdicts. — As a matter of public policy, a juror cannot be heard to impeach the juror's verdict, either by way of disclosing the incompetency or misconduct of the juror's fellow jurors or by showing the juror's own misconduct or disqualification from any cause. Pope v. State, 28 Ga. App. 568, 112 S.E. 169, 1922 Ga. App. LEXIS 702 (1922) (decided under former Civil Code 1895, § 5933).

Juror's incompetency or disqualification. — Juror will not be heard to impeach the juror's verdict by showing the juror's own incompetency or disqualification. Moore v. Keller, 153 Ga. App. 651, 266 S.E.2d 325, 1980 Ga. App. LEXIS 1934 (1980) (decided under former Code 1933, § 110-109); Worthy v. Kendall, 232 Ga. App. 528, 501 S.E.2d 515, 1998 Ga. App. LEXIS 566 (1998), cert. denied, No. S98C1433, 1998 Ga. LEXIS 975 (Ga. Oct. 2, 1998) (decided under former O.C.G.A. § 9-10-9).

Juror cannot impeach own verdict. — In a defendant's motion for a new trial based on newly discovered evidence, the introduction of a newly discovered witness was not allowed simply because this testimony would have produced a different result at trial because two jurors said that the testimony would have caused a different result; a juror cannot impeach their verdict. Allain v. State, 202 Ga. App. 706, 415 S.E.2d 315, 1992 Ga. App. LEXIS 141 (1992) (decided under former O.C.G.A. § 9-10-9).

It was error for the trial court to fail to qualify the jury in an excess carrier insurance case, and that error was not cured by the post-verdict offhand questioning of the jury as to possible relationships with officers or employees of the insurance company, since stockholders were not included

in the relationships questioning and, more importantly, jurors are unable to impeach their own findings after a verdict by showing their own disqualification. Lewis v. Emory Univ., 235 Ga. App. 811, 509 S.E.2d 635 (decided under former O.C.G.A. § 9-10-9).

Jurors' post-trial questions. — Murder defendant's claim of juror misconduct based on several jurors' post-trial questions as to why the co-defendant had not testified was rejected because neither the attorneys' impressions that the jurors considered the failure to testify during their deliberations nor the jurors' own testimony about their deliberations was admissible under O.C.G.A. § 24-6-606(b). Collins v. State, 308 Ga. 608, 842 S.E.2d 811, 2020 Ga. LEXIS 342 (2020).

Juror's affidavit concerning defendant's mailing the juror's dividends. — When the juror in question stated in an affidavit that the juror had not been influenced by the mailing of dividends to the juror by the defendant and that the juror had not revealed it to the other jurors, the trial court was authorized to conclude that the jury had not been influenced by the conduct of the defendant and that the plaintiff's right to a fair and impartial trial had not been violated. Wright v. Satilla Rural Elec. Coop., 179 Ga. App. 230, 345 S.E.2d 892, 1986 Ga. App. LEXIS 1876 (1986) (decided under former O.C.G.A. § 9-10-9).

Statute had a valid and salutary application in disallowing jurors to impeach the jurors' verdicts on the basis of statements made to one another in the jury room and the effect of those statements upon the minds of the individual jurors. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980) (decided under former Code 1933, § 110-109).

Verdict impeached. — Trial court's decision to grant a motion for new trial based on the testimony of two original jurors that the jury foreperson personally investigated the scene of an accident impeached the verdict which the jurors had returned. Newson v. Foster, 261 Ga. App. 16, 581 S.E.2d 666, 2003 Ga. App. LEXIS 513 (2003) (decided under former O.C.G.A. § 9-10-9).

Purpose of former section was plainly to prohibit after-the-fact picking at the negotiating positions of the jurors and of the jurors attempts to persuade one another. Aguilar v. State, 240 Ga. 830, 242 S.E.2d 620, 1978 Ga. LEXIS 843 (1978) (decided under former Code 1933, § 110-109).

Public policy considerations. — As a matter of public policy, a juror cannot be heard to impeach the juror's own verdict, either by way of disclosing the incompetency or misconduct of fellow jurors, or by showing the juror's own misconduct or disqualification from any cause. Pope v. State, 28 Ga. App. 568, 112 S.E. 169, 1922 Ga. App. LEXIS 702 (1922) (decided under former Civil Code 1910, § 5933); Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238, 1980 Ga. App. LEXIS 1902 (1980), overruled in part, Middleton v. State, 309 Ga. 337, 846 S.E.2d 73, 2020 Ga. LEXIS 476 (2020) (decided under former Code 1933, § 110-109).

It was well settled, as a matter of public policy, that a juror would not be heard to impeach the juror's verdict by showing the juror's own incompetency or disqualification. Reece v. State, 208 Ga. 690, 69 S.E.2d 92, 1952 Ga. LEXIS 314 (1952) (decided under former Code 1933, § 110-109).

There were a number of important public policy considerations underlying the former section. Among those considerations were: the need to keep inviolate the sanctity of juror deliberations; the desirability of promoting the finality of jury verdicts; and the necessity of protecting jurors from posttrial harassment. Watkins v. State, 237 Ga. 678, 229 S.E.2d 465, 1976 Ga. LEXIS 1352 (1976) (decided under former Code 1933, § 110-109).

Fairness and effect of section generally. — Rule of the former section was recognized, regardless of the fairness or unfairness thereof. Its effect was that jurors who contend the jurors were not influenced by the improper remarks may swear to that effect. If the truth was to the contrary, the jurors' lips were sealed. Its further effect was that jurors who were asked the question were called upon either to refuse to answer, which meant the jurors were influenced in violation of the jurors' oaths, or to swear that the jurors

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were not influenced. King v. State, 92 Ga. App. 616, 89 S.E.2d 585, 1955 Ga. App. LEXIS 665 (1955) (decided under former Code 1933, § 110-109).

Exceptions were narrowly permitted. — Exceptions were narrowly permitted to the general rule that affidavits of jurors could be taken to sustain but not to impeach the juror's verdict. Nichols v. State, 234 Ga. App. 553, 507 S.E.2d 793 (decided under former O.C.G.A. § 17-9-41).

Defendant's appellate counsel was not entitled to access to the juror contact information for the purpose of determining whether alleged premature deliberations had an effect on the jury's verdict, convicting defendant of multiple crimes, as defendant failed to request that the jurors be questioned individually at the time that the deliberations were reported to the trial court, and there was no indication that anything had occurred that might effect any juror's ability to be fair and impartial in deliberations; exceptions to the rule that affidavits of jurors may be taken to sustain but not to impeach the jury's verdict, pursuant to former O.C.G.A. § 17-9-41, were not applicable. Rogers v. State, 271 Ga. App. 698, 610 S.E.2d 679, 2005 Ga. App. LEXIS 139 (2005) (decided under former O.C.G.A. § 17-9-41).

Statements by Jurors

Inconsistent statement by jury foreperson following verdict. — Statement made by the jury foreperson following the rendering of the jury verdict of guilty, even assuming that the statement was inconsistent with the verdict of guilty, cannot impeach the verdict. Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874, 1980 Ga. App. LEXIS 2570 (1980) (decided under former Code 1933, § 110-109).

Testimony that the jury foreperson injected improper legal concepts into the jury's deliberation was not admissible to impeach the jury's verdict. Moore v. State, 224 Ga. App. 797, 481 S.E.2d 892 (decided under former O.C.G.A. § 17-9-41).

Trial court's refusal to allow a defendant to impeach the verdict with testimony about alleged juror misconduct was proper because the exceptions to former O.C.G.A. § 17-9-41 did not include the jurors' provision of legal information to other jurors or jurors' misapprehension or confusion regarding the law. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, 2003 Ga. LEXIS 489, rev'd in part, 276 Ga. 839, 584 S.E.2d 253, 2003 Ga. LEXIS 625 (2003) (decided under former O.C.G.A. § 17-9-41).

Verdict based on private knowledge or matters not in evidence. — Affidavit of a juror will not be received to show that the jurors in arriving at their verdict acted upon private knowledge or upon matters which were not in evidence. Alley v. State, 99 Ga. App. 322, 108 S.E.2d 282, 1959 Ga. App. LEXIS 846 (1959) (decided under former Code 1933, § 110-109); Emmett v. State, 243 Ga. 550, 255 S.E.2d 23, 1979 Ga. LEXIS 986 (1979) (decided under former Code 1933, § 110-109).

Juror's statements to the effect that the jury considered matter not in evidence will not be received for the purpose of impeaching the juror's verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

Jury foreperson's testimony that the jury considered an unsupported comment made by the state's attorney during the attorney's opening statement did not entitle defendants to a new trial. Stokes v. State, 232 Ga. App. 232, 501 S.E.2d 599 (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit in which juror claimed the juror only voted on one count of indictment did not suffice to impeach verdict. Dansby v. State, 165 Ga. App. 41, 299 S.E.2d 579, 1983 Ga. App. LEXIS 3105 (1983) (decided under former O.C.G.A. § 17-9-41).

Post-verdict letter stating that juror felt coerced during deliberations. — Juror's post-verdict letter to the trial judge stating that the juror felt coerced during deliberations by the court's Allen charge was incompetent to impeach a verdict of guilt presented by the jurors in open court. Wilson v. State, 211 Ga. App. 457, 439 S.E.2d 685, 1993 Ga. App. LEXIS

1541 (1993), cert. denied, No. S94C0449, 1994 Ga. LEXIS 543 (Ga. Feb. 28, 1994) (decided under former O.C.G.A. § 17-9-41).

Trial court did not abuse discretion giving Allen charge. — Defendant's convictions on numerous child-sex offenses was upheld because the fact that the defendant was not acquitted of any of the charged offenses was not enough to establish that the trial court abused the court's discretion in giving the Allen charge. Marshall v. State, 361 Ga. App. 357, 864 S.E.2d 469, 2021 Ga. App. LEXIS 488 (2021).

Coercion of jury members by other jury members. — Trial court properly refused to consider testimony from a juror who claimed that the juror's vote for a guilty verdict resulted from coercive pressure applied by other members of the jury; the proffered testimony was not within any exception to the general rule that jurors were incompetent to impeach their own verdict. Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651, 2003 Ga. LEXIS 795 (2003) (decided under former O.C.G.A. § 17-9-41).

Juror affidavit as to jury's own investigation. — Although a defendant complained that the court failed to instruct the jury not to conduct an investigation of their own, no request for such a charge was made when the jury dispersed for the night; thus, the defendant's attempt to show this extracurricular activity by the affidavit of a juror was not permitted. Lord v. State, 194 Ga. App. 749, 392 S.E.2d 17, 1990 Ga. App. LEXIS 299 (1990) (decided under former O.C.G.A. § 17-9-41).

Juror's personal knowledge of the crime scene. — Alleged irregular conduct was not so prejudicial so as to have rendered the trial fundamentally unfair and to have contributed to the conviction since: (1) even if the court were to assume that one or more jurors related personal knowledge of the crime scene to the jury, there was no evidence regarding exactly what that information was or how it related to the jury's deliberations regarding any particular defendant; (2) there was no evidence that the jurors who allegedly provided this extrajudicial information attempted to sway other jurors with the information; and (3) two witnesses said that such information did not contribute to the verdict, and one juror merely raised the possibility that the information might have contributed to the juror's verdict, but this was only after stating that the juror was not sure it had an impact on the juror's verdict. Butler v. State, 270 Ga. 441, 511 S.E.2d 180 (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit concerning reenactment of crime. — State death row inmate's claim that the state habeas court should have considered the affidavits of jurors in connection with the inmate's argument that the jury considered nonrecord evidence when the state reenacted the crime at the murder scene failed because considering the affidavits would have violated former O.C.G.A. §§ 9-10-9 and 17-9-41, and the trial judge had specifically precluded the state from reenacting the crime at the jury's viewing of the scene. Crowe v. Terry, 426 F. Supp. 2d 1310, 2005 U.S. Dist. LEXIS 41532 (N.D. Ga. 2005), aff'd, 490 F.3d 840, 2007 U.S. App. LEXIS 15250 (11th Cir. 2007).

In a case in which an inmate asserted that during the sentencing trial there was an improper reenactment of the murder when the jury viewed the crime scene, the inmate could not establish prejudice because the affidavits of three jurors were inadmissible in a Georgia court pursuant to former O.C.G.A. §§ 9-10-9 and 17-9-41; the affidavits of jurors could be taken to sustain, but not to impeach the jury's verdict. Crowe v. Hall, 490 F.3d 840, 2007 U.S. App. LEXIS 15250 (11th Cir. 2007), cert. denied, 553 U.S. 1007, 128 S. Ct. 2053, 170 L. Ed. 2d 798, 2008 U.S. LEXIS 3642 (2008) (decided under former O.C.G.A. § 17-9-41).

Intentional gathering and communication of extrajudicial information by jurors. — Former section had a valid and salutary application in disallowing jurors to impeach their verdicts on the basis of statements made to one another in the jury room and the effect of those statements on the minds of the individual jurors. However, the intentional gathering of extrajudicial evidence, highly prejudicial to the accused, by members of the jury

Statements by Jurors (Cont'd)

and the communication of that information to the other jurors in the closed jury room was inimical to the present jury trial system. Watkins v. State, 237 Ga. 678, 229 S.E.2d 465, 1976 Ga. LEXIS 1352 (1976) (decided under former Code 1933, § 110-109).

Juror misconduct or irregularity. — Limited discussion among jurors concerning a news story about the murder of a state's witness, which occurred during an unrelated drug transaction on the evening following the witness' testimony at the trial, did not warrant an exception to the rule that jurors are not permitted to impeach the jury's own verdict. Oliver v. State, 265 Ga. 653, 461 S.E.2d 222, 1995 Ga. LEXIS 723 (1995) (decided under former O.C.G.A. § 17-9-41).

Jurors' testimony that the jurors were confused about the definition of knowledge and participation with regard to being a party to a crime was inadmissible to impeach the jury's verdict. Ross v. State, 231 Ga. App. 506, 499 S.E.2d 351 (decided under former O.C.G.A. § 17-9-41).

Trial court did not err in refusing to allow a juror to testify at the hearing on defendant's motion for new trial regarding a juror's alleged misunderstanding of the law, and a juror's alleged assertion during deliberations that the defendant would get probation if convicted. Lewis v. State, 249 Ga. App. 812, 549 S.E.2d 732, 2001 Ga. App. LEXIS 592 (2001), cert. denied, No. S01C1427, 2001 Ga. LEXIS 889 (Ga. Nov. 5, 2001), overruled in part, Miller v. State, 285 Ga. 285, 676 S.E.2d 173, 2009 Ga. LEXIS 143 (2009) (decided under former O.C.G.A. § 17-9-41).

Habeas petitioner alleged facts showing grounds for relief which could not reasonably have been raised in the petitioner's original habeas petition and which could not have been discovered by diligence including a juror's misconduct in visiting the scene and the state's failure to disclose ballistic evidence, satisfying O.C.G.A. §§ 9-14-42(c)(4) and 9-14-51. Watkins v. Ballinger, 308 Ga. 387, 840 S.E.2d 378, 2020 Ga. LEXIS 177 (2020).

After two jurors testified that they looked up the difference between first and second degree homicide by vehicle, which one was a felony and which one was a misdemeanor, and conveyed that information to the other jurors, the trial court and the court of appeals erred in their rulings on the defendant's juror-misconduct claim because the trial court erred in concluding that O.C.G.A. § 24-6-606(b) displaced the presumption of prejudice arising from a showing of juror misconduct and in not requiring the state to prove beyond a reasonable doubt that the misconduct was non-prejudicial; and the court of appeals erred in concluding that a juror's obtaining extrajudicial sentencing information was always harmless beyond a reasonable doubt. Harris v. State, 314 Ga. 51, 875 S.E.2d 649, 2022 Ga. LEXIS 171 (2022).

Manner of arriving at verdict. — Nothing coming from a juror, either directly or indirectly, in the way of a narrative with respect to the manner in which a verdict was arrived at will be heard to impeach the verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

Extrajudicial and prejudicial information exception to former O.C.G.A. § 17-9-41 was inapplicable, since the defendant relied on the affidavit of a jury foreperson to assert that the verdict was based solely on the victim's testimony that the defendant had a drug problem, non-jurors did not interfere with jury deliberations, and the information at issue was not extrajudicial. Young v. State, 258 Ga. App. 238, 573 S.E.2d 487, 2002 Ga. App. LEXIS 1405 (2002) (decided under former O.C.G.A. § 17-9-41).

Improper communication with deputy sheriff or bailiff. — Affidavits which tend to show that the deputy sheriff or the bailiff had improper communications with the jury cannot be considered by the judge in passing upon the issue as to whether such communications were had with the jury. Tolbirt v. State, 124 Ga. 767, 53 S.E. 327, 1906 Ga. LEXIS 608 (1906) (decided under former Civil Code 1895, § 5338).

Inmate's 28 U.S.C. § 2254 habeas petition challenging a death sentence was improperly denied because an improper bailiff-jury communication during the

penalty phase violated the inmate's Sixth Amendment right to a fair trial and defendant's Fourteenth Amendment due process right to have the jury decide the punishment based on the evidence presented in court, in accordance with the rules and instructions of the court and with the full knowledge of the parties. The state habeas court erroneously determined that the affidavits of three jurors were inadmissible under former O.C.G.A. § 17-9-41 after ruling that a bailiff's comments to a juror concerning a defendant's parole eligibility constituted an exception to former § 17-9-41's rule prohibiting the use of jurors' affidavits to impeach their verdict; the inmate was actually prejudiced by the improper bailiff-jury communication because the jurors indicated that the jurors imposed the death sentence based on the bailiff's communication to the jurors that life without parole was not a sentencing option. Ward v. Hall, 592 F.3d 1144, 2010 U.S. App. LEXIS 80 (11th Cir.), cert. denied, 562 U.S. 1082, 131 S. Ct. 647, 178 L. Ed. 2d 513, 2010 U.S. LEXIS 9407 (2010); 178 L. Ed. 2d 513 (2010) (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit of racial remarks by other jurors. — Trial court did not err in refusing to consider a juror's post-trial affidavit stating the juror overheard two white jurors making racially derogatory comments about the defendant, since there was no other evidence that racial bias materially affected the jury's decision to convict the defendant and to impose a death sentence. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179, 1990 Ga. LEXIS 445 (1990), cert. denied, 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727, 1991 U.S. LEXIS 3251 (1991) (decided under former O.C.G.A. § 17-9-41).

Affidavit which impeaches verdict cannot be ground for new trial. — Ground for a motion for a new trial based upon an affidavit of a juror impeaching the verdict was without merit. Stanley v. State, 25 Ga. App. 461, 103 S.E. 689, 1920 Ga. App. LEXIS 6 (1920) (decided under former Civil Code 1910, § 5933).

Juror's unsworn statement cannot impeach verdict. — Since a juror's affidavit will not be taken to impeach the jury verdict, the unsworn statement of a juror cannot impeach the verdict. Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874, 1980 Ga. App. LEXIS 2570 (1980) (decided under former Code 1933, § 110-109).

Affidavits of third persons. — If a verdict may not be impeached by an affidavit of one or more of the jurors who found the verdict, certainly the verdict cannot be impeached by affidavits from third persons, establishing the utterance by a juror of remarks tending to impeach the juror's verdict. The affidavit of a party that some of the jurors told the party the verdict was caused by a mistake furnishes no cause to set the verdict aside. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749, 1922 Ga. App. LEXIS 414 (1922) (decided under former Civil Code 1910, § 5933).

Verdict may not be impeached by the affidavit of a third person establishing the utterance by a juror of remarks which may impeach the juror's verdict. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118, 1983 Ga. App. LEXIS 3228 (1983) (decided under former O.C.G.A. § 17-9-41).

No misconduct established. — With regard to a defendant's convictions for incest and child molestation, the defendant was not denied a fair trial when allegedly extrajudicial evidence was introduced to the jury through juror misconduct about the requirement upon a school teacher to report abuse as the defendant not only failed to establish that the verdict lacked due process, the defendant neglected to show that any statement by the juror in question amounted to misconduct as the only juror who arguably alleged improper conduct admitted that the juror could barely hear the statement in question and could not remember what it was. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436, 2009 Ga. App. LEXIS 357 (2009), cert. denied, No. S09C1250, 2009 Ga. LEXIS 583 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 17-9-41).

Practice and Procedure

Denial of new trial where only ground is affidavit that some jurors were disqualified. — Court does not err in refusing to grant a new trial upon the alleged ground that some of the jurors who tried the case were disqualified as the

Practice and Procedure (Cont'd)

only attempted proof in support of such alleged disqualification consists of affidavits of the jurors themselves since the verdict which the jurors returned cannot be impeached by the jurors. Gossett v. State, 203 Ga. 692, 48 S.E.2d 71, 1948 Ga. LEXIS 389 (1948) (decided under former Code 1933, § 110-109).

Trial court properly declined to consider affidavit. — With regard to a defendant's murder conviction, the trial court did not abuse the court's discretion by declining to consider a juror affidavit in ruling on the defendant's motion for new trial, which alleged that the jury was ready to acquit the defendant until one of the jurors reported seeing the defendant driving in the same vehicle that was alleged to have been involved in the murder as well as was seen responding to a nickname of "Blood" in the hallway of the courthouse, which was the name the victim's sibling indicated was used by the defendant. The trial court properly determined that the affidavit contained significant credibility issues and that it was fatal that the defense did not have the affiant testify in open court where the state could cross-examine the affiant so that the affiant's credibility could be more readily and definitely evaluated by the trial court. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, 2009 Ga. LEXIS 301, cert. denied, 558 U.S. 1076, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 17-9-41).

New trial warranted due to ex parte communication with jury in civil case. — In a medical malpractice case, plaintiffs were entitled to a new trial because the communication between the court and the jury was not disclosed to the plaintiffs or the plaintiffs' counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. Phillips v. Harmon, 328 Ga. App. 686, 760 S.E.2d 235, 2014 Ga. App. LEXIS 569 (2014), aff'd in part and rev'd in part, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015), vacated in part, 335 Ga. App. 450, 780 S.E.2d 914, 2015 Ga. App. LEXIS 777 (2015).

Petition by jurors for new trial. — If jurors petition the trial judge to grant a new trial and the trial judge declines so to do, no meritorious question of law is presented to the Supreme Court authorizing a judgment of reversal as under Ga. Const. 1877, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III) the Supreme Court is a court only for the correction of errors of law. Myrick v. State, 199 Ga. 244, 34 S.E.2d 36, 1945 Ga. LEXIS 302 (1945), overruled in part, Dunagan v. State, 269 Ga. 590, 502 S.E.2d 726, 1998 Ga. LEXIS 751 (1998), overruled in part, Dunagan v. State, No. S98A0421, 1998 Ga. LEXIS 626 (Ga. June 8, 1998) (decided under former O.C.G.A. § 17-9-41).

Request to poll jury. — Request to poll the jury must be made at the time the jury renders the jury's verdict, that is, right after the jury has returned a verdict of guilty or right after a jury has rendered the sentence to be imposed. Plummer v. State, 229 Ga. 749, 194 S.E.2d 419, 1972 Ga. LEXIS 764 (1972) (decided under former Code 1933, § 110-109).

Exclusion of evidence of jury "perjury". — As defendant failed to present any jurors' testimony and could not impeach the verdict by showing the jury did not understand or misapplied the law, the trial court properly excluded evidence of jury "perjury" and denied the motion for new trial on this basis. Williams v. State, 255 Ga. App. 177, 564 S.E.2d 759, 2002 Ga. App. LEXIS 467 (2002) (decided under former O.C.G.A. § 17-9-41).

Matter remanded for trial court to apply new evidentiary rule to defendant's new trial claim. — When the defendant claimed that the defendant was denied a fair trial because the jurors considered extrajudicial information during deliberations in reaching a verdict, the parties erred in not briefing or arguing the meaning of this new rule at the motion for new trial hearing, and the trial court did not apply it when addressing the jury-

misconduct claim raised in the defendant's motion as the trial court made no finding about a juror's credibility and made no finding as to whether extraneous prejudicial information was, in fact, brought before the jurors; thus, the denial of the motion for new trial was vacated and the matter was remanded for the trial court to apply the new evidentiary rule to the defendant's new trial claim. Beck v. State, 305 Ga. 383, 825 S.E.2d 184, 2019 Ga. LEXIS 131 (2019).

RESEARCH REFERENCES

C.J.S.

89 C.J.S., Trial, § 1087 et seq.

ALR.

Right of juror who has agreed to verdict to dissent on poll, 49 A.L.R. 1301.

Admissibility of testimony or affidavits of members of jury to show communications or other improper acts of third person, 90 A.L.R. 249; 146 A.L.R. 514.

Testimony or affidavit by one other than a juror, who overheard jury's deliberations, as receivable to impeach verdict, 129 A.L.R. 803.

Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror, 30 A.L.R.2d 914.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict, 40 A.L.R.2d 1119.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 A.L.R.2d 556.

Quotient verdicts, 8 A.L.R.3d 335.

Competency of juror's statement or affidavit to show that verdict in a civil case was not correctly recorded, 18 A.L.R.3d 1132.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room, 32 A.L.R.3d 1356.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror, 39 A.L.R.4th 800.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

Prejudicial effect of juror misconduct arising from internet usage, 48 A.L.R.6th 135.

24-6-607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

History.

Code 1981, § 24-6-607, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Mode and order of witness interrogation and presentation, § 24-6-611.

Who may impeach a witness, Fed. R. Evid. 607.

Law reviews.

For article, "Character Evidence in the Civil Setting," see 26 Ga. St. B.J. 20 (Dec. 2020).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3869, former Code 1882, § 3869, former Ga. L. 1890-91, p. 78, § 1, former Civil Code 1895, § 5290, former Penal Code 1895, § 1024, former Civil Code 1910, § 5879, former Penal Code 1910, § 1050, former Code 1933, § 38-1801, and former O.C.G.A. § 24-9-81 are included in the annotations for this Code section.

Neither the arrest nor the indictment of a witness was impeaching, since, until proof of conviction, the witness was protected by the legal presumption of innocence. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867, 1986 Ga. App. LEXIS 2626 (1986) (decided under former O.C.G.A. § 24-9-81).

Failure to charge former statute was not error in absence of a timely written request. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of Own Witness

1. In General

Former statute prohibited a party from impeaching the party's own witness. — See Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650, 1977 Ga. LEXIS 894 (1977) (decided under former Code 1933, § 38-1801).

Even if a trial court erred by allowing the state to impeach the state's own witness with a prior statement when the witness could not vouch for the statement's accuracy pursuant to former O.C.G.A. § 24-9-81, no harm resulted due to the overwhelming evidence of defendant's guilt. Coleman v. State, 278 Ga. 486, 604 S.E.2d 151, 2004 Ga. LEXIS 845 (2004), superseded by statute as stated in Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018) (decided under former O.C.G.A. § 24-9-81).

Broad construction. — Right to impeach one's own witness was broadly construed. Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690, 1978 Ga. App. LEXIS 2879 (1978) (decided under former Code 1933, § 38-1801); Robinson v. State, 150 Ga. App. 642, 258 S.E.2d 294, 1979 Ga. App. LEXIS 2235 (1979) (decided under former Code 1933, § 38-1801).

Strict construction. — Party may be "misled" but not "entrapped," since the former statute, which was in derogation of the common law and must be construed strictly, used the word "entrapped" and not "misled." Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055, 1915 Ga. LEXIS 44 (1915) (decided under former Civil Code 1910, § 5879); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230, 1946 Ga. App. LEXIS 350 (1946) (decided under former Code 1933, § 38-1801).

Applicability to state. — Former statute applied to the state as well as to the defendant. Dixon v. State, 86 Ga. 754, 13 S.E. 87, 1891 Ga. LEXIS 55 (1891) (decided under former Ga. L. 1890-91, p. 78, § 1).

Treatment as hostile witness. — Trial court did not err in declaring that defendant's cousin, who had earlier pled guilty to the theft for which the defendant was on trial, was a hostile witness and in allowing the state to ask the cousin leading questions because the trial court had great latitude to allow the state to treat a person as a hostile witness and propound leading questions, and allowing it in the present case was proper because the state was not aware that the cousin would change the cousin's testimony at trial from earlier statements the cousin had made about the theft. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432, 2002 Ga. App. LEXIS 1378 (2002) (decided under former O.C.G.A. § 24-9-81).

Effect of exercising constitutional privilege. — After defendant's counsel pled entrapment but when called upon to testify, the defendant took advantage under oath of the constitutional privilege of refusing to answer on the ground that to answer might tend to incriminate the defendant, and thereafter counsel attempted to cross-examine the witness as to what this witness told counsel about the circumstances surrounding this mat-

ter, the court erred in refusing to allow a thorough and sifting cross-examination of the witness as to the entrapment. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, § 38-1801).

Entrapment referred to the right of a party to impeach the party's own witness after the party testified to matters which were contradictory to statements previously made, authorizing a thorough and sifting cross-examination of the party's own witness. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, § 38-1801).

Testimony cannot be withdrawn. — Witness who delivered testimony hurtful to the party introducing the witness cannot be withdrawn; but if the party was entrapped by the witness, the law permitted the witness's impeachment by the party introducing the witness. Zipperer v. Mayor of Savannah, 128 Ga. 135, 57 S.E. 311, 1907 Ga. LEXIS 48 (1907) (decided under former Civil Code 1895, § 5290).

Showing contradictions of facts. — Although a party may not impeach the party's own witness, unless entrapped by the party, the party may show that the facts are different from the statement of the witness. Cronan v. Roberts & Co., 65 Ga. 678, 1880 Ga. LEXIS 295 (1880) (decided under former Code 1873, § 3869); Hollingsworth v. State, 79 Ga. 605, 4 S.E. 560, 1887 Ga. LEXIS 274 (1887) (decided under former Code 1882, § 3869); McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359, 1890 Ga. LEXIS 216 (1890) (decided under former Code 1882, § 3869); Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923, 1904 Ga. LEXIS 538 (1904) (decided under former Civil Code 1895, § 5290); Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S.E. 143, 1904 Ga. LEXIS 691 (1904) (decided under former Civil Code 1895, § 5290); Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055, 1907 Ga. LEXIS 323 (1907) (decided under former Civil Code 1895, § 5290); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5290); Sessions v. State, 6 Ga. App. 336, 64 S.E. 1101 (1909) (decided under former Civil Code 1895, § 5290); Carter & Martin v. Carter, 7 Ga. App. 216, 66 S.E. 630, 1909 Ga. App. LEXIS 599 (1909) (decided under former Civil Code 1895, § 5290); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, 1924 Ga. App. LEXIS 548 (1924) (decided under former Civil Code 1910, § 5879 former Penal Code 1910, § 1050); Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729, 1969 Ga. App. LEXIS 1148 (1969) (decided under former Code 1933, § 38-1801).

Refusal to respond to questions in discovery proceedings was not tantamount to making a statement or giving testimony contradictory to testimony on trial. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729, 1969 Ga. App. LEXIS 1148 (1969) (decided under former Code 1933, § 38-1801).

Putting witness up merely for purpose of discrediting the witness, or merely to lay a foundation for the witness to be contradicted on a material point and thereby rendered unworthy of belief, was reversible error. Eberhart v. State, 121 Ga. App. 663, 175 S.E.2d 73, 1970 Ga. App. LEXIS 1301 (1970) (decided under former Code 1933, § 38-1801).

Proof of bad character. — One who knows the general bad character of a witness by reason of previous felony convictions should not be allowed first to impliedly accredit the witness by offering the witness before a jury as worthy of belief, and then, when entrapped by the witness's testimony, prove, in addition to the contradictory statements by which the witness was surprised and deceived, the general bad character which neither surprised nor misled the witness. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920, 1967 Ga. App. LEXIS 684 (1967) (decided under former Code 1933, § 38-1801).

Use of misdemeanor convictions to impeach. — Trial court did not err by refusing to allow the defendant to impeach the defendant's own witness, who had not been declared hostile, by proof of convictions of misdemeanors involving moral turpitude. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497, 1994 Ga.

In General (Cont'd)

App. LEXIS 198 (1994) (decided under former O.C.G.A. § 24-9-81).

Either party could waive the former statutory requirements and allow a party to impeach the party's own witness without first having shown the court that the witness had entrapped the party. O'Dell v. State, 120 Ga. 152, 47 S.E. 577, 1904 Ga. LEXIS 474 (1904) (decided under former Penal Code 1895, § 1024).

Directing witness to time and place of previous testimony. — Witness cannot be impeached by proof of contradictory statement until the witness's attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5290).

Admission for impeachment only. — When impeachment is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of prior testimony. — Trial court did not err in allowing one of the state's witnesses to testify that another state witness told the witness immediately before the shooting that the witness saw the defendant get a gun from the car in which the defendant was a passenger that night because the statement was offered and admitted to impeach the other witness's prior testimony that the witness had never witnessed the defendant retrieve anything from the car after the concert. Anderson v. State, 286 Ga. 57, 685 S.E.2d 716, 2009 Ga. LEXIS 676 (2009) (decided under former O.C.G.A. § 24-9-81).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-607, 24-6-608, and 24-6-613), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284, 2006 Ga. LEXIS 987 (2006), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-81).

Deposition admitted for impeachment. — When it appeared that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. Parker & Co. v. Glenn, 90 Ga. App. 500, 83 S.E.2d 263, 1954 Ga. App. LEXIS 744 (1954) (decided under former Code 1933, § 38-1801).

Admission of repudiated statement. — It was not erroneous to admit written statement later repudiated by a witness, over the objection made to the state's admission, since the repudiation would tend to impeach the witness. Fincher v. State, 211 Ga. 89, 84 S.E.2d 76, 1954 Ga. LEXIS 509 (1954) (decided under former Code 1933, § 38-1801).

When, on direct examination, a witness testified that the witness lied in a statement the witness gave the police, the trial court did not err in allowing the state to impeach the state's own witness by admitting the witness's prior inconsistent statement as substantive evidence. Willis v. State, 214 Ga. App. 659, 448 S.E.2d 755, 1994 Ga. App. LEXIS 1018 (1994) (decided under former O.C.G.A. § 24-9-81).

Former statute inapplicable to witness who must explain or deny contradictory statement. — First sentence of former O.C.G.A. § 24-9-81 was applicable to impeachment of witnesses by prior contradictory statements, but since a prior contradictory statement of a witness was admissible as substantive evidence, the first sentence was inapplicable to a witness who must be given an opportunity to explain or deny the prior contra-

dictory statement. Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497, 1983 Ga. App. LEXIS 3232 (1983) (decided under former O.C.G.A. § 24-9-81).

Inconsistent statement admissible for impeachment purposes only. — When impeachment of one's own witness is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only and not to prove the truth of the prior statement. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118, 1983 Ga. App. LEXIS 3228 (1983) (decided under former O.C.G.A. § 24-9-81).

Use of prior inconsistent statements. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes. Ranger v. State, 249 Ga. 315, 290 S.E.2d 63, 1982 Ga. LEXIS 1126 (1982) (decided under former O.C.G.A. § 24-9-81); Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497, 1983 Ga. App. LEXIS 3232 (1983) (decided under former O.C.G.A. § 24-9-81); Jackson v. Ensley, 168 Ga. App. 822, 310 S.E.2d 707, 1983 Ga. App. LEXIS 2932 (1983) (decided under former O.C.G.A. § 24-9-81).

In defendant's trial on a charge that the defendant molested his 13-year-old stepdaughter by touching her "private area" and placing his hands under her shirt, the record did not support defendant's claim that the state called the stepdaughter's mother solely for the purpose of impeaching her, and the trial court properly allowed the state to call two investigators to testify that the mother gave them a statement that was not the same as her testimony at trial. Black v. State, 261 Ga. App. 263, 582 S.E.2d 213, 2003 Ga. App. LEXIS 605 (2003) (decided under former O.C.G.A. § 24-9-81).

Witness's testimony that the witness did not recall details included in a prior statement given to police was inconsistent with the prior statement about those details, and thus, the requirements of former O.C.G.A. § 24-9-81 were met; a trial court thus properly allowed the state to impeach the state's own witness who denied having previously identified the defendant as the shooter in a murder incident. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152, 2006 Ga. LEXIS 464 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant as witness for state. — Introduction by state in a criminal prosecution of defendant's statement to police did not make defendant a witness for the state. Wiley v. State, 250 Ga. 343, 296 S.E.2d 714, 1982 Ga. LEXIS 1244 (1982) (decided under former O.C.G.A. § 24-9-81).

When counsel elicits testimony unfavorable to a client, counsel will not be heard to object to the testimony, no matter how prejudicial the testimony may be, if the testimony is a direct and pertinent response to the question propounded. Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757, 1981 Ga. App. LEXIS 2180 (1981) (decided under former Code 1933, § 38-1801).

2. What Must Be Shown

Statement made to party or attorney. — Party may not impeach party's own witness by proof of a previous contradictory statement, even if the party claims to have been surprised and entrapped, unless the statement was made directly to the party or the party's attorney, or was made to some third person with instruction to communicate it or for the purpose of being communicated to the party or the party's counsel. Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055, 1915 Ga. LEXIS 44 (1915) (decided under former Civil Code 1910, § 5879); Carter v. State, 17 Ga. App. 244, 86 S.E. 413, 1915 Ga. App. LEXIS 316 (1915) (decided under former Penal Code 1910, § 1050); Burns v. State, 20 Ga. App. 77, 92 S.E. 548, 1917 Ga. App. LEXIS 718 (1917) (decided under former Penal Code 1910, § 1050); Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107, 1944 Ga. App. LEXIS 143 (1944) (decided under former Code 1933, § 38-1801); Sparks v. State, 209 Ga. 250, 71 S.E.2d 608, 1952 Ga. LEXIS 462 (1952) (decided under former Code 1933, § 38-1801).

Statements made to others. — Prior inconsistent statements made by a witness called by the state were not limited to those given to police investigators or prosecuting attorneys. Park v. State, 230 Ga.

What Must Be Shown (Cont'd)

App. 274, 495 S.E.2d 886 (decided under former O.C.G.A. § 24-9-81).

Showing of entrapment required. — Prosecutor must show to the court that the prosecutor has been entrapped by the witness by a previous contradictory statement. Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230, 1946 Ga. App. LEXIS 350 (1946) (decided under former Code 1933, § 38-1801).

One's own witness may be impeached when one can show the court that one has been entrapped by that witness by a previous contradictory statement. James v. State, 157 Ga. App. 763, 278 S.E.2d 696, 1981 Ga. App. LEXIS 2008 (1981) (decided under former Code 1933, § 38-1801).

Party may not impeach party's own witness without a showing of entrapment. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867, 1986 Ga. App. LEXIS 2626 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment error absent entrapment. — Admittance of a certified copy of a witness's prior felony conviction was harmful error if it was for the purpose of impeachment, no announcement having been made by the state that this witness was being called for the purpose of cross-examination and no entrapment on the part of the witness having been shown. Hicks v. State, 204 Ga. App. 232, 418 S.E.2d 794, 1992 Ga. App. LEXIS 772 (1992) (decided under former O.C.G.A. § 24-9-81).

Surprise and prejudice. — Term "entrapment" required that one desiring to impeach one's own witness show both surprise and prejudice by the actual testimony as opposed to the earlier statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

While a defendant was entitled to cross-examine a state's witness about pending criminal charges to show the witness's bias, that right did not extend to the defendant's own witness when the defendant failed to show surprise or entrapment by the witness's previous contradictory statement. Arnold v. State, 284 Ga. App. 598, 645 S.E.2d 68, 2007 Ga. App. LEXIS 371 (2007) (decided under former O.C.G.A. § 24-9-81).

Total surprise unnecessary. — To establish entrapment, it is not required that the witness's testimony be a total surprise or that it be affirmatively damaging. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801); Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650, 1977 Ga. LEXIS 894 (1977) (decided under former Code 1933, § 38-1801); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22, 1979 Ga. App. LEXIS 2333 (1979) (decided under former Code 1933, § 38-1801); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707, 1979 Ga. App. LEXIS 3025 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904, 1980 Ga. App. LEXIS 2720 (1980) (decided under former Code 1933, § 38-1801); Andrews v. State, 156 Ga. App. 734, 275 S.E.2d 782, 1980 Ga. App. LEXIS 3185 (1980) (decided under former Code 1933, § 38-1801); Young v. State, 156 Ga. App. 865, 275 S.E.2d 804, 1981 Ga. App. LEXIS 1630 (1981) (decided under former Code 1933, § 38-1801); Ingram v. State, 161 Ga. App. 5, 288 S.E.2d 842, 1982 Ga. App. LEXIS 1738 (1982) (decided under former O.C.G.A. § 24-9-81); Davis v. State, 249 Ga. 309, 290 S.E.2d 273, 1982 Ga. LEXIS 1127 (1982) (decided under former O.C.G.A. § 24-9-81).

Prior showing of surprise unnecessary. — Since it is not error for the trial judge to allow an attorney to cross-examine and lead the witness without first subjecting the attorney personally to an examination, any rule under which a showing of surprise and prejudice must first be made is wrong. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

What constitutes surprise. — Even though the state in a criminal case knows of a repudiation of an earlier statement by one of the state's witnesses before one testifies at trial, if it only goes to the details of the defendant's alleged confession, there is still sufficient "surprise" to admit into evidence the witness's prior statement for impeachment purposes

only. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Showing of surprise was no longer required before a party was allowed to impeach the party's own witness. Davis v. State, 249 Ga. 309, 290 S.E.2d 273, 1982 Ga. LEXIS 1127 (1982) (decided under former O.C.G.A. § 24-9-81); Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402, 1982 Ga. App. LEXIS 2160 (1982) (decided under former O.C.G.A. § 24-9-81).

Showing of surprise was no longer required under former O.C.G.A. § 24-9-81. Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402, 1982 Ga. App. LEXIS 2160 (1982) (decided under former O.C.G.A. § 24-9-81).

Surprise or prejudice unnecessary. — To meet the requirement of establishing entrapment before one might impeach one's own witness, a showing of prejudice or surprise was no longer necessary. Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447, 1983 Ga. App. LEXIS 2308 (1983) (decided under former O.C.G.A. § 24-9-81).

Refusing party opportunity to introduce further testimony. — There is no abuse of discretion if the trial court refuses party opportunity to introduce further evidence which would impeach the party's previous testimony absent surprise or entrapment. Gorrell v. Fowler, 248 Ga. 801, 286 S.E.2d 13, 1982 Ga. LEXIS 1085 (1982) (decided under former Code 1933, § 38-1801).

Belief of prosecutor. — To establish entrapment, it was sufficient that the prosecutor believed the witness would testify consistently with the earlier testimony. Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22, 1979 Ga. App. LEXIS 2333 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904, 1980 Ga. App. LEXIS 2720 (1980) (decided under former Code 1933, § 38-1801).

Statement by district attorney that the district attorney was surprised by the testimony was sufficient, in the absence of a showing to the contrary, to show entrapment. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888, 1977 Ga. LEXIS 1314 (1977) (decided under former Code 1933, § 38-1801); James v. State, 157 Ga. App. 763, 278 S.E.2d 696, 1981 Ga. App. LEXIS 2008 (1981) (decided under former Code 1933, § 38-1801); Foskey v. State, 229 Ga. App. 209, 493 S.E.2d 595 (decided under former O.C.G.A. § 24-9-81).

Testimony failing to bolster case. — Trial court did not err in allowing the district attorney to impeach the state's own witness by introducing prior inconsistent statements, even though the witness's testimony did not damage the state's case save by failing to bolster the case as hoped. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Inconsistent testimony. — Impeachment is allowed when the testimony is merely "inconsistent" with a prior written statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Although the requirements of surprise and prejudice have been removed from the element of entrapment, the plain language of former O.C.G.A. § 24-9-81 still required as a threshold matter a showing that the witness made a statement inconsistent with the witness's testimony at trial. Jones v. State, 270 Ga. 25, 505 S.E.2d 749 (decided under former O.C.G.A. § 24-9-81).

No entrapment shown. — Evidence did not show that the prosecutor was entrapped by a witness. King v. State, 166 Ga. 10, 142 S.E. 160, 1928 Ga. LEXIS 204 (1928) (decided under former Code 1933, § 38-1801).

Examination of Opposite Party

Balancing of rights. — Former Code 1933, § 38-1801, providing for the right of thorough and sifting cross-examination, must be balanced with former Code 1933, § 38-1704 (see now O.C.G.A §§ 24-9-611 and 24-6-623), protecting the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492, 1978 Ga. App. LEXIS

Examination of Opposite Party (Cont'd)

1710 (1978) (decided under former Code 1933, § 38-1801).

Calling opposite party for purposes of impeachment. — When defendant was not permitted to recall the victim as the defendant's own witness for purposes of impeachment, since there was no showing of entrapment, this was not permitted. Mingo v. State, 195 Ga. App. 438, 394 S.E.2d 104, 1990 Ga. App. LEXIS 586 (1990) (decided under former O.C.G.A. § 24-9-81).

There was no prohibition about the prior inconsistent statement being lengthier than the in-court testimony; also, the fact that a witness admitted to making the inconsistent pre-trial statement did not render the statement inadmissible. Warner v. State, 281 Ga. 763, 642 S.E.2d 821, 2007 Ga. LEXIS 253 (2007) (decided under former O.C.G.A. § 24-9-81).

Testimony of deceased party. — Defendant can introduce former testimony of deceased plaintiff, and then impeach the testimony by the defendant's own testimony. McLendon v. Baldwin, 166 Ga. 794, 144 S.E. 271, 1928 Ga. LEXIS 406 (1928) (decided under former Civil Code 1910, § 5879).

Defendant's mother questioned about prior inconsistent statement. — State properly questioned the defendant's mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother's prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that defendant was involved in gang activity, pursuant to former O.C.G.A. §§ 24-9-81 and 24-9-83. Garrett v. State, 280 Ga. 30, 622 S.E.2d 323, 2005 Ga. LEXIS 824 (2005) (decided under former O.C.G.A. § 24-9-81).

Examination of Own Witness

Use of inconsistent prior statements. — Because a state witness, who was also one of defendant's cohorts, was evasive concerning the facts stated in the witness's prior interview and also testified to facts that were inconsistent with those previously stated in the interview, the trial court did not err in permitting the state to ask leading questions or in allowing the taped interview to be introduced into evidence. Johnson v. State, 279 Ga. App. 489, 631 S.E.2d 720, 2006 Ga. App. LEXIS 617 (2006) (decided under former O.C.G.A. § 24-9-81).

Because the prosecuting attorney laid a proper foundation for a witness's prior inconsistent statement by questioning the witness about the circumstances of the witness's earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the court's discretion when the court admitted the witness's earlier statement. Edwards v. State, 293 Ga. 612, 748 S.E.2d 870, 2013 Ga. LEXIS 710 (2013).

Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290, 2014 Ga. App. LEXIS 845 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 770 et seq.

ALR.

Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party, 5 A.L.R. 1505.

Impeaching witness examined by both parties, 54 A.L.R. 1374.

Right of party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements, 74 A.L.R. 1042.

Proper practice and relief on development of hostility by party's own witness, 117 A.L.R. 326.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 158 A.L.R. 820.

Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 A.L.R.2d 756.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 A.L.R.2d 1239.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses, 53 A.L.R.2d 1229.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 A.L.R.2d 1108.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 A.L.R.5th 277.

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness, 3 A.L.R.6th 269.

24-6-608. Evidence of character and conduct of witness.

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness's character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of

another witness as to which character the witness being cross-examined has testified.

(c) The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

History.

Code 1981, § 24-6-608, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

A witness's character for truthfulness or untruthfulness, Fed. R. Evid. 608.

Law reviews.

For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Character Evidence in the Civil Setting," see 26 Ga. St. B.J. 20 (Dec. 2020).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, §§ 3871, 3872, 3873, 3874, 3875, former Code 1882, §§ 3871, 3872, 3873, 3874, 3875, former Civil Code 1895, §§ 5292, 5293, former Penal Code 1895, §§ 1026, 1027, former Civil Code 1910, §§ 5881, 5882, former Penal Code 1910, §§ 1052, 1053, former Code 1933, §§ 38-1803, 38-1804, and former O.C.G.A. §§ 24-9-83 and 24-9-84 are included in the annotations for this Code section.

In general. — General character of a witness, when that character was put in issue, was a proper mode of ascertaining that weight that should be attached to the witness's testimony. Simpson v. State, 78 Ga. 91, 1886 Ga. LEXIS 178 (1886) (decided under former Code 1882, §§ 3871, 3873, 3874).

Any witness, other than an accused, could be discredited by evidence of bad character and by convictions involving moral turpitude. Beasley v. State, 168 Ga. App. 255, 308 S.E.2d 560, 1983 Ga. App. LEXIS 2740 (1983) (decided under former O.C.G.A. § 24-9-84); Nelson v. State, 190 Ga. App. 142, 378 S.E.2d 186, 1989 Ga. App. LEXIS 106 (1989) (decided under former O.C.G.A. § 24-9-84).

Former statute specified the questions to be propounded and "impliedly excludes all others." Barnwell v. Hannegan, 105 Ga. 396, 31 S.E. 116, 1898 Ga. LEXIS 523 (1898) (decided under former Civil Code 1895, § 5293); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007, 1914 Ga. LEXIS 197 (1914) (decided under former Civil Code 1910, § 5882); Rudolph v. State, 16 Ga. App. 353, 85 S.E. 365, 1915 Ga. App. LEXIS 625 (1915) (decided under former Civil Code 1910, § 5882); Taylor v. State, 17 Ga. App. 787, 88 S.E. 696, 1916 Ga. App. LEXIS 934 (1916) (decided under former Civil Code 1910, § 5882); Cameron v. State, 66 Ga. App. 414, 18 S.E.2d 16, 1941 Ga. App. LEXIS 219 (1941) (decided under former Code 1933, § 38-1804).

Criminal defendant, when a witness, stands before the court as any other witness. Klug v. State, 77 Ga. 734, 1886 Ga. LEXIS 393 (1886) (decided under for-

mer Code 1882, §§ 3871, 3872, 3875); Coleman v. State, 141 Ga. 731, 82 S.E. 228, 1914 Ga. LEXIS 129 (1914) (decided under former Penal Code 1910, § 1052).

Prosecutor, when a witness, stands before the court as any other witness. Womack v. State, 72 Ga. 215, 1883 Ga. LEXIS 111 (1883) (decided under former Code 1882, §§ 3871, 3872, 3875).

Former O.C.G.A. § 24-9-84 prescribed a specific progression of questions to be asked when inquiring into the general reputation of a witness for impeachment purposes. Harper v. State, 157 Ga. App. 480, 278 S.E.2d 28, 1981 Ga. App. LEXIS 1874 (1981) (decided under former Code 1933, § 38-1804).

Former O.C.G.A. § 24-9-84 required that the impeaching witness should be first asked as to the impeaching witness's knowledge of the general character of the witness, and next as to what that character was, and lastly the impeaching witness may be asked if, from that character, the impeaching witness would believe the witness on the witness's oath. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804).

Character means reputation. — Person's character was not to be proved by asking a witness what kind of a man that person was but the person's "character," as used in legal parlance, was to be proved by asking about the person's "reputation." P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413, 1979 Ga. App. LEXIS 2739 (1979) (decided under former Code 1933, § 38-1804).

Evidence as to character was irrelevant and inadmissible unless it was used to show the character of the witness for veracity or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266, 1970 Ga. App. LEXIS 717 (1970) (decided under former Code 1933, § 38-1804).

Contradictory statements as to reputation as affecting witness's credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. Hudson v. State, 163 Ga. App. 845, 295 S.E.2d 123, 1982 Ga. App. LEXIS 2675 (1982) (decided under former O.C.G.A. § 24-9-84).

Limitation of question. — Direct examination to prove the character of the accused must be limited to questions concerning the accused's general reputation in the community in which the accused lives. Overby v. State, 125 Ga. App. 759, 188 S.E.2d 910, 1972 Ga. App. LEXIS 1463 (1972) (decided under former Code 1933, § 38-1804).

Fact that the witness's "neighborhood" was the penal institution in which the witness was incarcerated and which was composed of the witness's fellow inmates did not negate the fact that the penal institution was the place where people had the best opportunity to form a correct estimate of the witness's character. Martinez v. State, 189 Ga. App. 69, 375 S.E.2d 123, 1988 Ga. App. LEXIS 1285 (1988) (decided under former Code 1933, § 38-1804).

Nothing in former O.C.G.A. § 24-9-84 indicated that the impeaching testimony is limited solely to the reputation of the challenged witness in a neighborhood composed of law abiding citizens. Martinez v. State, 189 Ga. App. 69, 375 S.E.2d 123, 1988 Ga. App. LEXIS 1285 (1988) (decided under former Code 1933, § 38-1804).

Community was not community at large. — "Classroom community" comprised of students who were removed from the general school population because of special educational needs may not be the "community at large" contemplated by former O.C.G.A. § 24-9-84. Clark v. State, 225 Ga. App. 851, 485 S.E.2d 543 (decided under former O.C.G.A. § 24-9-84).

Testimony based on personal opinion. — If, under the entire testimony of a witness, it appeared that the witness's testimony as to the character and reputation of a party was based entirely on the witness's personal opinion, the trial judge could properly have excluded the witness's testimony. Gravitt v. State, 220 Ga. 781,

General Consideration (Cont'd)

141 S.E.2d 893, 1965 Ga. LEXIS 632 (1965) (decided under former Code 1933, § 38-1804).

Admission for jury to consider conflicts in evidence. — Expired decal authorizing defendant's use of the wrecker's emergency rotational lights was relevant as going to the likelihood of defendant's pre-collision activation of those lights, as claimed; thus, the evidence was admissible for whatever weight the jury wished to give it in resolving conflicts in the evidence. Crowe v. State, 259 Ga. App. 780, 578 S.E.2d 134, 2003 Ga. App. LEXIS 151 (2003), rev'd in part, 277 Ga. 513, 591 S.E.2d 829, 2004 Ga. LEXIS 25 (2004), vacated in part, 266 Ga. App. 264, 596 S.E.2d 757, 2004 Ga. App. LEXIS 358 (2004) (decided under former O.C.G.A. § 24-9-84).

Character witness gave nonexpert opinion testimony and on cross-examination had the right of all such witnesses to give reasons for the witnesses's opinions. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415, 1966 Ga. App. LEXIS 1167 (1966) (decided under former Code 1933, § 38-1804).

Admission of testimony that does not speak directly to eyewitness's truthfulness. — On redirect, the trial court did not commit plain error by allowing the state to elicit testimony from an investigator, in which the investigator stated that the information that the investigator obtained from an eyewitness during the investigation was more consistent with other evidence collected than the information that the investigator obtained from the defendant, because the investigator's testimony did not speak directly to the eyewitness's truthfulness, but, rather, the testimony was elicited in direct response to questions raised about the manner in which the investigator conducted the investigation, and involved whether aspects of that investigation lined up with information provided by the eyewitness. Jones v. State, 299 Ga. 40, 785 S.E.2d 886, 2016 Ga. LEXIS 353 (2016).

Jury may believe witness. — Question of credibility is always for the jury, and though a witness swore falsely on the other trial, the witness's contention that it was under duress may cause the jury to believe the witness. Williams v. State, 69 Ga. 11, 1882 Ga. LEXIS 173 (1882) (decided under former Code 1873, §§ 3871, 3872, 3875).

Failure to impeach not grounds for reversal. — Even assuming defense counsel's failure to impeach a prison rape victim with proof of general bad character as evinced by prior felony convictions fell below a presumed level of competence, the omission did not require reversal and a new trial. Scott v. State, 223 Ga. App. 479, 477 S.E.2d 901 (decided under former O.C.G.A. § 24-9-84).

Failure to show ineffective assistance of counsel. — Trial counsel was not ineffective for failing to obtain and introduce evidence of the victim's mother's arrest for perjury, which charges were later dismissed, because the defendant did not call the mother to testify at the new trial hearing so there was no evidence as to what the testimony would have been regarding the arrest, thus, the defendant failed to make an affirmative showing that, had trial counsel attempted to cross-examine the mother regarding the arrest, the testimony would have been allowed. Gilmer v. State, 339 Ga. App. 593, 794 S.E.2d 653, 2016 Ga. App. LEXIS 668 (2016), cert. denied, No. S17C0734, 2017 Ga. LEXIS 480 (Ga. May 30, 2017).

Trial court did not err by refusing to allow counsel to ask the victim whether the victim always told the truth or told the truth to figures of authority as those questions were so broadly phrased as to have no other effect than to prove a general character trait for untruthfulness; and the questions did not seek to investigate any specific act probative of untruthfulness; thus, counsel was not ineffective in failing to elicit testimony on that subject. Gonzales v. State, 345 Ga. App. 334, 812 S.E.2d 638, 2018 Ga. App. LEXIS 206 (2018), cert. denied, No. S18C1070, 2018 Ga. LEXIS 752 (Ga. Nov. 15, 2018).

Alternate objection raised first on appeal. — When defendant contended that the testimony exceeded the proper scope of good character evidence permissible under former O.C.G.A. § 24-9-84, but at trial the defendant objected to the

testimony only on the ground that the testimony was irrelevant, the testimony was not excluded because an alternate objection may not be raised for the first time on appeal. Reed v. State, 248 Ga. App. 107, 545 S.E.2d 655, 2001 Ga. App. LEXIS 178 (2001) (decided under former O.C.G.A. § 24-9-84).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

Testimony on attempt to bribe witness to change testimony. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because, assuming without deciding that the so-called brutal cross-examination to which the victim was subjected opened the door to rehabilitation, the testimony at issue was not the type of rehabilitative evidence allowed, which included testimony by a different witness regarding opinion or reputation of the victim's truthfulness. Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018).

Proof of Bad Character

Bad character meant bad moral character. — General bad character, as a ground of impeachment, referred to general bad moral character, the word "moral" being used in the word's broadest sense. Sparks v. Bedford, 4 Ga. App. 13, 60 S.E. 809, 1908 Ga. App. LEXIS 183 (1908) (decided under former Civil Code 1895, § 5293); see also Allred v. State, 126 Ga. 537, 55 S.E. 178, 1906 Ga. LEXIS 436 (1906).

Bad character did not render a witness incompetent; but the witness's credibility was for the jury, who could find a verdict on the sole testimony of such witness, unless the Code expressly required corroboration. Stone v. State, 118 Ga. 705, 45 S.E. 630, 1903 Ga. LEXIS 665 (1903) (decided under former Penal Code 1895, § 1027); see also Franklin v. State, 69 Ga. 36, 1882 Ga. LEXIS 174 (1882).

Bad character evidence properly excluded when witness had not yet testified. — Trial court did not err in not allowing a defendant to impeach an inmate witness by showing the inmate's bad character for truthfulness when the inmate had not yet testified; furthermore, the jail shift supervisor through whom the defendant sought to introduce the impeachment testimony testified that the supervisor did not know about the inmate's general character or reputation within the jail community. Felder v. State, 286 Ga. App. 271, 648 S.E.2d 753, 2007 Ga. App. LEXIS 741 (2007) (decided under former O.C.G.A. § 24-9-84).

How state may prove bad character. — When defendant, in the trial of a criminal case, puts defendant's character in issue, the state (a) may cross-examine the witnesses offered by the defendant in order to test the witness's knowledge of the defendant's character; (b) may also offer witnesses to prove defendant's general bad character; and (c) the state may, when the defendant has been previously convicted of a crime involving moral turpitude, introduce the record of such conviction in the manner provided by law. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804); Cunningham v. State, 182 Ga. App. 591, 356 S.E.2d 542, 1987 Ga. App. LEXIS 1749 (1987) (decided under former O.C.G.A. § 24-9-84).

Conviction of an offense involving moral turpitude or a felony was a proper method of showing bad character and tended to impeach the credibility of that witness. McNeely v. Wal-Mart Stores, Inc., 246 Ga. App. 852, 542 S.E.2d 575, 2000 Ga. App. LEXIS 1378 (2000) (decided under former O.C.G.A. § 24-9-84).

General bad character of a witness could be shown for the purpose of impeachment, but specific acts cannot be shown for that purpose. Andrews v. State, 118 Ga. 1, 43 S.E. 852, 1903 Ga. LEXIS

Proof of Bad Character (Cont'd)

412 (1903) (decided under former Penal Code 1895, § 1027); Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261, 1942 Ga. App. LEXIS 473 (1942) (decided under former Code 1933, § 38-1804); Security Life Ins. Co. v. Newsome, 122 Ga. App. 137, 176 S.E.2d 463, 1970 Ga. App. LEXIS 808 (1970) (decided under former Code 1933, § 38-1804); McCarty v. State, 139 Ga. App. 101, 227 S.E.2d 898, 1976 Ga. App. LEXIS 1697 (1976) (decided under former Code 1933, § 38-1804); Colvin v. State, 155 Ga. App. 736, 272 S.E.2d 516, 1980 Ga. App. LEXIS 2767 (1980) (decided under former Code 1933, § 38-1804); Johnson v. State, 61 Ga. 305, 1878 Ga. LEXIS 112 (1878); Black v. State, 119 Ga. 746, 47 S.E. 370, 1904 Ga. LEXIS 351 (1904) (decided under former Penal Code 1895, § 1027); Rudolph v. State, 16 Ga. App. 353, 85 S.E. 365, 1915 Ga. App. LEXIS 625 (1915) (decided under former Penal Code 1910, § 1053); Taylor v. State, 17 Ga. App. 787, 88 S.E. 696, 1916 Ga. App. LEXIS 934 (1916) (decided under former Penal Code 1910, § 1053); Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804); Heaton v. State, 214 Ga. App. 460, 448 S.E.2d 49, 1994 Ga. App. LEXIS 934 (1994) (decided under former O.C.G.A. § 24-9-84); Wetta v. State, 217 Ga. App. 128, 456 S.E.2d 696, 1995 Ga. App. LEXIS 352 (1995), cert. denied, No. S95C1257, 1995 Ga. LEXIS 913 (Ga. July 14, 1995), cert. denied, 516 U.S. 1046, 116 S. Ct. 707, 133 L. Ed. 2d 662, 1996 U.S. LEXIS 69 (1996) (decided under former O.C.G.A. § 24-9-84); Venson v. Georgia, 74 F.3d 1140, 1996 U.S. App. LEXIS 2045 (11th Cir. 1996); (decided under former O.C.G.A. § 24-9-84); Jones v. State, 226 Ga. App. 420, 487 S.E.2d 56 (decided under former O.C.G.A. § 24-9-84); Johnson v. State, 244 Ga. App. 128, 534 S.E.2d 480, 2000 Ga. App. LEXIS 563 (2000) (decided under former O.C.G.A. § 24-9-84).

In response to defendant's claim of self-defense, although evidence of one victim's prior violent acts were excluded because the victim was not the aggressor, the other victim's general reputation for violence was admitted in accordance with former O.C.G.A. § 24-9-84. Quillian v. State, 279 Ga. 698, 620 S.E.2d 376, 2005 Ga. LEXIS 637 (2005) (decided under former O.C.G.A. § 24-9-84).

In a child molestation case, the trial court erred in denying the defendant's motion for new trial because it was an abuse of discretion to allow the prosecution to question the victim's mother listing the defendant's prior arrests for four offenses after the mother had already testified that the mother was aware of the defendant's prior arrests and that the arrests did not change the mother's opinion of the defendant's character; further, the admission of specific instances of conduct was not harmless as the victim's description of the defendant's improper conduct varied over time, and the appellate court could not say that the defendant's prior arrests did not enter into the jury's evaluation of the defendant's testimony and credibility. Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426, 2015 Ga. App. LEXIS 725 (2015).

Trial court correctly excluded cross-examination about a detective's involvement with a website, "Uncle Wiggy's Secret Guide to Dealing With the Police;" statements as to the untruthfulness of police in the Guide were not untrue because, within limits, police could lie to or trick a suspect to obtain admissions; further, the Guide was not probative of the detective's own truthfulness or the detective's character for truthfulness as required for cross-examination under O.C.G.A. § 24-6-608(b)(1). Williams v. State, 332 Ga. App. 546, 774 S.E.2d 126, 2015 Ga. App. LEXIS 353 (2015).

Images of child pornography. — Trial court did not err in limiting the defendant's cross-examination of the co-defendant as to images of child pornography found on the co-defendant's phone because the trial court permitted the defendant's counsel to question the co-defendant as to whether the co-defendant was testifying against the defendant in an attempt to curry favor with the state immediately after the defendant asked the co-defendant about the images. Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561, 2019 Ga. App. LEXIS 69 (2019).

Personnel reports of law enforcement. — Trial court did not err by not

disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621); (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under former O.C.G.A. § 24-9-83; (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under former O.C.G.A. § 24-9-84. Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898, 2004 Ga. App. LEXIS 563 (2004) (decided under former O.C.G.A. § 24-9-84).

Questioning on prior drug offense. — Trial court did not commit reversible error under former O.C.G.A. § 24-9-84 in prohibiting defense counsel from asking the state's witness specifically about a prior drug offense when the witness testified that the witness had not previously been in trouble; generally, questioning a witness about a crime unrelated to the case was impermissible, and the defendant was afforded ample avenues for portraying the witness as biased and motivated to lie. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773, 2006 Ga. App. LEXIS 1301 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-9-84).

Failure of other jury to return guilty verdict. — Former Code 1933, § 38-1803 did not allow the impeachment of a witness by the mere showing that a jury which had previously heard the same testimony in another context in another trial failed to return a verdict of guilty. An acquittal merely exempts a defendant from punishment and from another prosecution. It did not necessarily show that defendant was innocent and that, therefore, the state's witnesses did not testify truthfully. Jones v. State, 159 Ga. App. 634, 284 S.E.2d 651, 1981 Ga. App. LEXIS 2781 (1981) (decided under former Code 1933, § 38-1803).

Testimony of sheriff's department investigator admitted. — Sheriff's department investigator's explanation of the nature of the interview was highly relevant to whether the statement defendant gave was voluntary. Therefore, the trial court did not abuse the court's discretion in admitting the waiver certificate, even if the admission incidentally placed the defendant's character in issue under former O.C.G.A. § 24-9-83. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330, 2009 Ga. App. LEXIS 1111 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. Mar. 29, 2010), overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS 793 (2015) (decided under former O.C.G.A. § 24-9-83).

Use of term "bad guys." — Defendant's motion for a mistrial was properly denied as a witness's use of the term "bad guys" in explaining undercover operations did not improperly inject defendant's character into evidence; even assuming the comment was improper, the error was harmless in light of the overwhelming evidence of defendant's guilt. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417, 2004 Ga. App. LEXIS 827 (2004) (decided under former O.C.G.A. § 24-9-83).

Extrinsic evidence not admissible. — When the defendant was convicted of incest, rape, aggravated child molestation, child molestation, and reckless conduct, as the connection between the victim's sexual assault allegations and the victim's testimony regarding the victim's purported video sharing channel was extremely attenuated, the trial court did not abuse the court's discretion in excluding the defendant's extrinsic evidence on that issue as irrelevant and on a matter collateral to the issues at trial. Campbell v. State, 362 Ga. App. 337, 868 S.E.2d 471, 2022 Ga. App. LEXIS 34 (2022).

Evidence of gang membership admissible. — Because evidence of defendant's gang membership was admissible both as part of the res gestae of the crime and to show motive, the trial court properly denied defendant's motions in limine and for a new trial, even though the evi-

Proof of Bad Character (Cont'd)

dence implicated defendant's character. Garibay v. State, 275 Ga. App. 170, 620 S.E.2d 424, 2005 Ga. App. LEXIS 919 (2005) (decided under former O.C.G.A. § 24-9-83).

Foundation. — References to the impeaching witness's "personal knowledge" of or "association" with the witness that was being impeached serve only to develop a foundation upon which to base the witness's statement as to reputation. Such a foundational line of questioning was not only permitted, but was mandated by statute. Ballenger Corp. v. Dresco Mechanical Contractors, 156 Ga. App. 425, 274 S.E.2d 786, 1980 Ga. App. LEXIS 3054 (1980) (decided under former Code 1933, § 38-1804).

Knowledge of impeaching witness. — It was error to exclude testimony of a witness introduced for the purpose of impeaching another witness when the impeaching witness testifies that the impeaching witness knew that the witness's general reputation, and that that reputation was not good, and, from the impeaching witness's knowledge of the witness's reputation, the impeaching witness would not believe the witness upon the witness's oath. Dent v. State, 14 Ga. App. 269, 80 S.E. 548, 1914 Ga. App. LEXIS 205 (1914) (decided under former Penal Code 1910, § 1053).

Opinion based on personal observation inadmissible. — Witness's opinion of a party's character which is based solely upon the witness's personal observation of the party is not an approved mode of character evidence and is subject to being struck. Gresham v. State, 169 Ga. App. 525, 314 S.E.2d 111, 1984 Ga. App. LEXIS 1623 (1984) (decided under former O.C.G.A. § 24-9-84).

Trial court properly excluded testimony of probation officer's personal opinion as to the victim's reputation for general character based upon personal observation coupled with unspecified reports received from unidentified law enforcement officials rendered under undisclosed circumstances. Bogan v. State, 206 Ga. App. 696, 426 S.E.2d 392, 1992 Ga. App. LEXIS 1750 (1992), cert. denied, No. S93C0526, 1993 Ga. LEXIS 295 (Ga. Mar. 18, 1993) (decided under former O.C.G.A. § 24-9-84).

Opinion of single individuals not sufficient. — Person's general bad character and reputation cannot be proved on the opinions of single individuals. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261, 1942 Ga. App. LEXIS 473 (1942) (decided under former Code 1933, § 38-1804).

Trial court did not err in striking the testimony of a character witness in an assistant professor's action against the Board of Regents (BOR) of the University System of Georgia for breach of an employment contract because there was no abuse of discretion in determining that the testimony that the witness did not know whether the witness would believe the professor under oath did not meet the requirements of former O.C.G.A. § 24-9-84; the BOR's counsel acquiesced in the trial court's final ruling on the matter. Bd. of Regents of the Univ. Sys. of Ga. v. Ambati, 299 Ga. App. 804, 685 S.E.2d 719, 2009 Ga. App. LEXIS 983 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. Jan. 12, 2010) (decided under former O.C.G.A. § 24-9-84).

Dying declaration not used to show violent character. — While dying declaration of the person slain may be subject to impeachment, where under the facts of the case the evidence that deceased "brought" a witness some liquor on the day of the killing was not relevant for that purpose; nor was it admissible to show the violent character of the deceased. Green v. State, 195 Ga. 759, 25 S.E.2d 502, 1943 Ga. LEXIS 556 (1943) (decided under former Code 1933, § 38-1803).

Ill feeling will not impeach. — Witness can be impeached only by proof of general bad character, such as would cause the impeaching witness to disbelieve the witness on oath. A witness cannot be impeached on the ground that the impeaching witness had an ill feeling toward the witness it sought to impeach because the latter owed the former money and would not pay the impeaching witness. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261, 1942 Ga. App. LEXIS 473 (1942) (decided under former Code 1933, § 38-1804).

Reputation at place of employment. — When it was sought to impeach a wit-

ness by proof of bad character by means of the statutory questions as set forth in the former statute, a witness who was familiar with the witness's reputation in the place where the witness pursued the witness's regular daily vocation or work may testify as to the witness's reputation in such place, although not familiar with the community in which the witness lived. Pethel v. State, 89 Ga. App. 8, 78 S.E.2d 428, 1953 Ga. App. LEXIS 883 (1953) (decided under former Code 1933, § 38-1804); Bennett v. George, 105 Ga. App. 527, 125 S.E.2d 122, 1962 Ga. App. LEXIS 969 (1962) (decided under former Code 1933, § 38-1804).

Even though a rebuttal witness had stopped working at the General Motors plant ten years before the trial took place, the trial court did not abuse the court's discretion in allowing the witness to testify regarding a party's reputation at that plant because the witness worked there for 42 years, and kept in touch with the General Motors community since the witness retired by continuing to attend union meetings. MacGibbon v. Akins, 245 Ga. App. 871, 538 S.E.2d 793, 2000 Ga. App. LEXIS 1068 (2000) (decided under former O.C.G.A. § 24-9-84).

Testimony on why victim left job properly excluded. — Trial court properly refused to allow the defendant to use extrinsic evidence of the prior statement to attack the victim's character for truthfulness because further inquiry into why the victim left the victim's job was not mandated. Daniels v. State, 349 Ga. App. 681, 824 S.E.2d 754, 2019 Ga. App. LEXIS 152 (2019), cert. denied, No. S19C1070, 2019 Ga. LEXIS 909 (Ga. Dec. 23, 2019), cert. denied, 141 S. Ct. 299, 208 L. Ed. 2d 52, 2020 U.S. LEXIS 4263 (2020).

Doctor's false note in patient chart. — In a medical malpractice case arising out of a mother's premature delivery of her baby, the trial court did not err in admitting the doctor's note on the mother's chart that the doctor had examined her, which was later marked through with a note "patient not seen, out of room," was probative of the doctor's untruthfulness under O.C.G.A. § 24-6-608(b)(1), given that the mother had not left her room that day. The note was not unduly prejudicial under O.C.G.A. § 24-6-403. Cent. Ga. Women's Health Ctr., LLC v. Dean, 342 Ga. App. 127, 800 S.E.2d 594, 2017 Ga. App. LEXIS 202 (2017), cert. denied, No. S17C1952, 2018 Ga. LEXIS 119 (Ga. Feb. 19, 2018).

No evidence of bad character. — When there was no evidence before the court which attacked the witness for the defendant either for bad character or for contradictory statements, it was not error for the court to refuse to allow the defendant's witness to testify as to the witness's own character for veracity. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413, 1979 Ga. App. LEXIS 2739 (1979) (decided under former Code 1933, § 38-1804).

Admission of first offender record. — In both civil and criminal cases, unless there was an adjudication of guilt, a witness could not be impeached on general credibility grounds by evidence of a first offender record. Matthews v. State, 268 Ga. 798, 493 S.E.2d 136, 1997 Ga. LEXIS 732 (1997) (decided under former O.C.G.A. § 24-9-84).

Copy of record of conviction must be introduced. — Witness cannot be discredited even by the witness's own testimony that the witness was convicted of a crime involving moral turpitude, rather, it was necessary that a copy of the record of conviction be introduced; accordingly, the testimony of a witness that the witness did some act that the law made a crime was not a legal method of impeachment. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63, 1981 Ga. App. LEXIS 1928 (1981) (decided under former Code 1933, § 38-1804).

Because admission of booking photograph did not suggest guilt of prior crime or enflame jury, the admission did not place defendant's character into evidence or deprive defendant of a fair trial. Hunter v. State, 273 Ga. App. 52, 614 S.E.2d 179, 2005 Ga. App. LEXIS 406 (2005) (decided under former O.C.G.A. § 24-9-83).

Testimony by investigating officer. — When the defendant placed the defendant's character in issue, the investigating police officer, though not a member of the defendant's community, could be an impeaching witness since the officer testi-

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fied that the officer possessed personal knowledge of the defendant's character and reputation in the community. Catchings v. State, 256 Ga. 241, 347 S.E.2d 572, 1986 Ga. LEXIS 809 (1986) (decided under former O.C.G.A. § 24-9-84).

Conviction could be introduced even though appeal pending. — Prior conviction of a witness for a crime involving moral turpitude was admissible for impeachment purposes when, at the time of the proffer thereof, the judgment of conviction was the subject of a pending appeal. James v. State, 160 Ga. App. 185, 286 S.E.2d 506, 1981 Ga. App. LEXIS 3024 (1981) (decided under former Code 1933, § 38-1804).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than evidence of bad character since defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." Walker v. State, 260 Ga. App. 241, 581 S.E.2d 295, 2003 Ga. App. LEXIS 336 (2003), cert. denied, No. S03C1067, 2003 Ga. LEXIS 673 (Ga. July 14, 2003) (decided under former O.C.G.A. § 24-9-84).

Victim's false accusation of sexual abuse improperly barred. — Georgia Supreme Court overruled Smith v. State, 259 Ga. 135 (1989) and similar holdings, which held that Georgia's Rape Shield statute (now O.C.G.A. § 24-4-412), as it then existed, did not prohibit testimony of previous false allegations by the victim as the court held that although Smith's bright-line test was not unworkable, neither was the alternative of applying familiar and usual rules of evidence, which trial courts routinely do every day. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Lower appellate court properly reversed the ruling excluding the victim's admittedly false statement of sex because the false allegation plainly described the event involving someone else at a separate time; thus, there was no basis for confusion and, as such, O.C.G.A. § 24-4-403 did not pose a bar to the jury learning about the victim's false statement. State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019).

Conviction of misdemeanor. — Proof of conviction of a misdemeanor, if it was a crime of moral turpitude, was a proper method of showing "bad character." Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804).

Misdemeanor crime not involving moral turpitude. — Witnesses could not be impeached by proof of convictions for simple battery and for misdemeanor possession of marijuana which were not crimes involving moral turpitude. Ely v. State, 272 Ga. 418, 529 S.E.2d 886, 2000 Ga. LEXIS 385 (2000) (decided under former O.C.G.A. § 24-9-84).

Misdemeanor issuance of bad checks was crime of moral turpitude as a matter of law. Carruth v. Brown, 202 Ga. App. 656, 415 S.E.2d 470, 1992 Ga. App. LEXIS 147 (1992), cert. denied, No. S92C0618, 1992 Ga. LEXIS 398 (Ga. Apr. 30, 1992) (decided under former O.C.G.A. § 24-9-84).

Offense of simple assault was not a crime involving moral turpitude. Polk v. State, 202 Ga. App. 738, 415 S.E.2d 506, 1992 Ga. App. LEXIS 160 (1992) (decided under former O.C.G.A. § 24-9-84).

Conviction for giving false name admissible to negate good character. — Certified copy of an accusation which showed that the defendant pled guilty to having given a false name to a law enforcement officer was admissible as impeachment evidence against the defendant when the defendant placed the defendant's character in issue by presentation of evidence of good character. Hicks v. State, 169 Ga. App. 542, 314 S.E.2d 113, 1984 Ga. App. LEXIS 1631 (1984) (decided under former O.C.G.A. § 24-9-84).

Crime of moral turpitude. — Misdemeanor of issuing a bad check in violation of O.C.G.A. § 16-9-20(a) was a crime of moral turpitude and the jury may consider evidence of a witness's guilty plea to such a crime as proof of general bad moral character which tends to impeach the credibility of that witness within the

meaning of former O.C.G.A. § 24-9-84. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497, 1994 Ga. App. LEXIS 198 (1994) (decided under former O.C.G.A. § 24-9-84).

When a codefendant was not a witness in the case, the codefendant was not subject to impeachment, and the trial court did not err in refusing to permit another codefendant to impeach the codefendant by a previous conviction of a crime involving moral turpitude. Moss v. State, 275 Ga. 96, 561 S.E.2d 382, 2002 Ga. LEXIS 245 (2002) (decided under former O.C.G.A. § 24-9-84).

Prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove the defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. Kraus v. State, 169 Ga. App. 54, 311 S.E.2d 493, 1983 Ga. App. LEXIS 2976 (1983) (decided under former O.C.G.A. § 24-9-84).

Defendant's status as "drunk". — Victim advocate's testimony that a domestic abuse victim had told the advocate that the defendant was drunk when the defendant hit the victim was hearsay and not admissible as a prior inconsistent statement of the victim, because the victim did not testify as to whether or not the defendant was drunk. However, counsel's failure to object was not ineffective assistance because there was no showing of a reasonable probability that the result would have been different if the jury thought defendant was drunk or not at the time of the incident. Miller v. State, 300 Ga. App. 652, 686 S.E.2d 302, 2009 Ga. App. LEXIS 1237 (2009) (decided under former O.C.G.A. § 24-9-83).

Juvenile arrest records were not admissible to show general bad character, but could be used to impeach defendant's testimony that the defendant had never been in trouble before. Williams v. State, 171 Ga. App. 927, 321 S.E.2d 423, 1984 Ga. App. LEXIS 3018 (1984) (decided under former O.C.G.A. § 24-9-84).

Whether victim was a "bad" person was irrelevant because it was as unlawful to commit a crime against a "bad" person as against a "good" one. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804).

In a prosecution for aggravated assault, to the extent that the defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of cross-examination to the issues directly related to the incidents. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706, 2006 Ga. App. LEXIS 313 (2006) (decided under former O.C.G.A. § 24-9-84).

Impeachment of the victim. — Jury instruction on impeachment of the victim by evidence of bad character was properly refused under former O.C.G.A. § 24-9-84 because there was no testimony as to the victim's general reputation for truthfulness in the community or whether the witness would believe the victim under oath, so the victim's credibility was not impeached. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780, 2002 Ga. App. LEXIS 927 (2002), cert. denied, No. S02C1766, 2002 Ga. LEXIS 895 (Ga. Sept. 30, 2002) (decided under former O.C.G.A. § 24-9-84).

Trial court properly denied defendant's motion to introduce evidence of the victim's reputation for violence; defendant failed to make a prima facie showing that shooting the victim, defendant's supervisor, was justified or in self-defense; the evidence revealed that the initial altercation had been over for at least ten minutes before defendant initiated the chase which ended with the victim's shooting. Bryant v. State, 283 Ga. App. 295, 641 S.E.2d 277, 2007 Ga. App. LEXIS 43 (2007) (decided under former O.C.G.A. § 24-9-84).

Defense counsel's failure to redact bad character evidence from a defense exhibit was deficient performance and based on the evidence against

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the defendant, as well as the prejudice caused by the unredacted defense exhibit, there was a reasonable probability that the outcome of the defendant's trial would have been different but for counsel's deficiency, and therefore the conviction was reversed. Whitaker v. State, 276 Ga. App. 226, 622 S.E.2d 916, 2005 Ga. App. LEXIS 1212 (2005) (decided under former O.C.G.A. § 24-9-84).

Sexual offenses. — Impeachment evidence of prior bad acts of victims in a child abuse prosecution was properly excluded. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (decided under former O.C.G.A. § 24-9-84).

Letters indicating lack of enjoyment of sexual activities. — Letters defendant wrote to other inmates were improperly admitted as impeachment evidence because the state claimed that the letters were admissible to impeach defendant's testimony that defendant did not have an extramarital affair and that because the husband had raped defendant, defendant did not enjoy sexual intercourse; the letters did not contain any statements regarding the alleged affair or rape, were not inconsistent with defendant's testimony, and did not address issues in the trial. Sammons v. State, 279 Ga. 386, 612 S.E.2d 785, 2005 Ga. LEXIS 341 (2005) (decided under former O.C.G.A. § 24-9-83).

Victim need not be shown to be assailant before victim can be impeached. — Former O.C.G.A. § 24-9-84 did not require that before a victim-witness in a battery case may be impeached by evidence of the victim's bad character there must be a prima-facie showing that the victim was the assailant. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804).

In an appeal from the defendant's convictions for aggravated sexual battery and child molestation, the defendant's trial counsel was ineffective for failing to ask the victim's mother the mother's opinion about the victim's truthfulness because trial counsel was mistaken about being unable to question the mother about the victim's untruthfulness as it was admissible, regardless of whether the victim testified about the victim's own truthfulness; and there was a reasonable probability that the outcome would have been different absent trial counsel error as the victim's credibility was a critical point as to all of the counts, and the evidence was not overwhelming. Gonzales v. State, 345 Ga. App. 334, 812 S.E.2d 638, 2018 Ga. App. LEXIS 206 (2018), cert. denied, No. S18C1070, 2018 Ga. LEXIS 752 (Ga. Nov. 15, 2018).

Cross-examination scope limited. — Witness who was impeached by the introduction of a certified copy of a previous felony conviction, but who had not attempted to rehabilitate the witness's character by explaining the circumstances of the conviction, could not be cross-examined concerning the facts surrounding the conviction. Vincent v. State, 264 Ga. 234, 442 S.E.2d 748, 1994 Ga. LEXIS 417 (1994) (decided under former O.C.G.A. § 24-9-84).

State was properly held not to be entitled to question an expert witness about matters that bore no relation to the scientific issues about which the witness testified at trial in order to show that the witness's professional credentials were in jeopardy. King v. State, 273 Ga. 258, 539 S.E.2d 783, 2000 Ga. LEXIS 886 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834, 2002 U.S. LEXIS 4925 (2002), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former O.C.G.A. § 24-9-84).

Cross-examination concerning specific facts. — It was not permissible to prove specific facts, except on cross-examination for the purposes of testing the knowledge of the witness and of impeaching knowingly false statements. Mimbs v. State, 189 Ga. 189, 5 S.E.2d 770, 1939 Ga. LEXIS 694 (1939) (decided under former Code 1933, § 38-1804); Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261, 1942 Ga. App. LEXIS 473 (1942) (decided under former Code 1933, § 38-1804); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1804).

In the defendant's trial for child molestation arising out of viewing a porno-

graphic video with the defendant's four-year-old daughter, the trial court did not err in refusing to allow the defendant to cross-examine the child's mother pursuant to O.C.G.A. § 24-6-608 regarding her own accusations of molestation against her stepfather, who had been acquitted, because the charges were not shown to be false. Further, any error was harmless. Douglas v. State, 340 Ga. App. 168, 796 S.E.2d 893, 2017 Ga. App. LEXIS 33 (2017).

Cross-examination as to agreement between witness and state. — When defendant failed to prove either that there had been a deal or that the witness had any expectation of a deal, the trial court did not impermissibly abridge the defendant's Sixth Amendment rights by limiting defendant's crossexamination concerning charges against the witness. Wright v. State, 266 Ga. 887, 471 S.E.2d 883 (decided under former O.C.G.A. § 24-9-84).

Redirect examination. — When on cross-examination the impeaching witness was questioned as to the impeaching witness's feeling toward the witness it sought to impeach and testified that the impeaching witness entertained ill feelings toward the witness, the impeaching witness could be questioned on redirect examination as to why the impeaching witness entertains such feeling toward the other witness. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261, 1942 Ga. App. LEXIS 473 (1942) (decided under former Code 1933, § 38-1804).

Indictment against witness. — After a witness testified, an indictment charging the witness with embezzlement was inadmissible in evidence for the purpose of impeaching the witness. Gardner v. State, 81 Ga. 144, 7 S.E. 144, 1888 Ga. LEXIS 78 (1888) (decided under former Code 1882, §§ 3871, 3873, 3874); McCray v. State, 134 Ga. 416, 68 S.E. 62, 1910 Ga. LEXIS 222 (1910) (decided under former Penal Code 1895, § 1027); Beach v. State, 138 Ga. 265, 75 S.E. 139, 1912 Ga. LEXIS 278 (1912), overruled in part, Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975).

While a witness may be discredited by proof of general bad character or conviction of a crime involving moral turpitude, it was not competent to discredit the witness by showing that the witness had committed, been arrested for, confined for, or even indicted for such an offense, and neither may general bad character be proved by individual acts. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63, 1981 Ga. App. LEXIS 1928 (1981) (decided under former Code 1933, § 38-1804).

Error to consider testimony of witness as to conviction of crime in sentencing defendant. — Although it was harmless error to admit, erroneously, a witness's own testimony that the witness was convicted of a crime involving moral turpitude, it was error for the trial court to consider such testimony in determining an appropriate sentence for the defendant. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63, 1981 Ga. App. LEXIS 1928 (1981) (decided under former Code 1933, § 38-1804).

Secondary evidence admitted without objection. — When two witnesses testified that the witnesses pled guilty to the larceny for which the defendant was on trial, and while, over proper objection, this would not have been sufficient proof of bad character of itself to impeach the witnesses since there was no objection on the ground that the record of conviction would be the highest and best evidence of this fact, the secondary evidence admitted without objection could be considered by the jury, which would, under the circumstances, have a right to disbelieve that part of the testimony tending to exonerate the defendant from complicity in the theft. Roach v. State, 90 Ga. App. 44, 81 S.E.2d 886, 1954 Ga. App. LEXIS 623 (1954) (decided under former Code 1933, § 38-1804).

Failure to object to prior conviction waived. — Defendant's failure to object to proof of a prior conviction introduced by defendant's testimony in response to a prosecutorial cross-examination waived any "best evidence rule" objections to this testimony on appeal. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181, 1992 Ga. App. LEXIS 1723 (1992) (decided under former O.C.G.A. § 24-9-84).

Attacked witness may be believed. — Witness who was attacked for general bad character may be believed by the jury

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regardless of whether there was any evidence to sustain the witness's good character or any corroborating evidence. Rowe v. State, 68 Ga. App. 161, 22 S.E.2d 210, 1942 Ga. App. LEXIS 72 (1942) (decided under former Code 1933, § 38-1804).

Questioning of witness about nolle prossed crime. — Trial court did not commit reversible error under former O.C.G.A. § 24-9-84 in declining to allow defense counsel to question the state's witness about the specific crime that was nolle prossed in exchange for the witness's testimony against the defendant; defense counsel was permitted to bring out that a charge against the witness had been dismissed and that the witness had faced 10 years in prison on the charge. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773, 2006 Ga. App. LEXIS 1301 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-9-84).

Proof of witness's reputation for violence was not a proper method of impeachment. Peters v. State, 55 Ga. App. 870, 192 S.E. 84, 1937 Ga. App. LEXIS 534 (1937) (decided under former Code 1933, § 38-1804).

Character evidence inadmissible in the following cases: Long v. State, 22 Ga. 40, 1857 Ga. LEXIS 106 (1857) (gambling) (decided under former law); Smithwick v. Evans, 24 Ga. 461, 1858 Ga. LEXIS 234 (1858) (prostitution) (decided under former law); McDowell v. Preston, 26 Ga. 528, 1858 Ga. LEXIS 356 (1858) (drug addiction) (decided under former law); Weathers v. Barksdale, 30 Ga. 888, 1860 Ga. LEXIS 225 (1860) (bastardy) (decided under former law); Pulliam v. Cantrell, 77 Ga. 563, 3 S.E. 280, 1887 Ga. LEXIS 136 (1887) (embezzlement) (decided under former Code 1882, §§ 3871, 3873, 3874); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007, 1914 Ga. LEXIS 197 (1914) (character as to truthfulness) (decided under former Civil Code 1910, § 5882).

Proof of Good Character

Evidence of good character admissible when the general character of a witness is impeached. Stamper v. Griffin, 12 Ga. 450, 1853 Ga. LEXIS 13 (1853) (decided under former law).

Evidence of good character inadmissible. — When not impeached otherwise than by disproving the truth of the witness's evidence, or by testimony tending to disprove the evidence, the witness cannot be supported by proof of the witness's general good character. Miller v. Western & Atl. R.R., 93 Ga. 480, 21 S.E. 52, 1893 Ga. LEXIS 461 (1893) (decided under former Code 1882, §§ 3871, 3873, 3874).

When evidence of good character admissible. — When it was sought to impeach a witness by proof of contradictory statements, this rendered admissible in the witness's favor testimony as to the witness's general good character. Bell Bros. v. Aiken, 1 Ga. App. 36, 57 S.E. 1001, 1907 Ga. App. LEXIS 140 (1907) (decided under former Civil Code 1895, § 5292); Georgia Life Ins. Co. v. McCranie, 12 Ga. App. 855, 78 S.E. 1115, 1913 Ga. App. LEXIS 775 (1913) (decided under former Civil Code 1910, § 5881); Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303, 1943 Ga. App. LEXIS 321 (1943) (decided under former Code 1933, § 38-1803).

Reputation for truth and veracity. — When evidence of contradictory statements by a witness is offered by way of impeaching the witness's veracity, general evidence that the witness is a man of truth and veracity may be admitted, controverted, and denied. Stamper v. Griffin, 12 Ga. 450, 1853 Ga. LEXIS 13 (1853) (decided under former law).

Proof of good character. — See Price v. State, 72 Ga. 441, 1884 Ga. LEXIS 277 (1884) (decided under former Code 1882, §§ 3871, 3873, 3874); Clark v. State, 117 Ga. 254, 43 S.E. 853, 1903 Ga. LEXIS 206 (1903) (decided under former Penal Code 1895, § 1026); Gordon v. State, 10 Ga. App. 35, 72 S.E. 544, 1911 Ga. App. LEXIS 632 (1911) (decided under former Penal Code 1910, § 1052); Haywood v. State, 12 Ga. App. 240, 76 S.E. 1077, 1913 Ga. App. LEXIS 513 (1913) (decided under former Penal Code 1910, § 1052).

Testimony under oath from witness who accepted plea bargain. — With regard to defendant's conviction for trafficking in methamphetamine, the trial

court properly denied defendant's motion for a new trial, and did not err by allowing the testimony of a defense witness taken under oath when that witness entered into a plea agreement as, although the trial court initially determined that some of the defense witness's statements were inadmissible, the statements regarding prior drug dealings between the defense witness and defendant became admissible for impeachment purposes since the defense witness personally contradicted the witness's own testimony. Corn v. State, 290 Ga. App. 792, 660 S.E.2d 782, 2008 Ga. App. LEXIS 342 (2008), cert. denied, No. S08C1356, 2008 Ga. LEXIS 712 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-83).

Rebuttal by proof of good character. — When, in order to discredit a witness, the witness's reputation was assailed, the party by whom the witness was introduced had the right to introduce rebutting evidence to show that the witness's character and reputation were good, even though the attempt to discredit was made on examination of the witness personally. Gazaway v. State, 15 Ga. App. 467, 83 S.E. 857, 1914 Ga. App. LEXIS 298 (1914) (decided under former Penal Code 1910, § 1053); see also Suddeth v. State, 112 Ga. 407, 37 S.E. 747, 1900 Ga. LEXIS 176 (1900).

Character for veracity irrelevant. — When the statutory questions were asked to sustain the character of a witness sought to be impeached by evidence of general bad character, other questions, such as the character of the witness for veracity, may not be asked. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266, 1970 Ga. App. LEXIS 717 (1970) (decided under former Code 1933, § 38-1804).

Evidence of veracity when credibility not attacked. — Until the adverse party attacked the credibility of a witness, either for bad character or because of contradictory statements, the party calling the witness cannot introduce evidence in support of the witness's character for veracity. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413, 1979 Ga. App. LEXIS 2739 (1979) (decided under former Code 1933, § 38-1803).

Direct and cross-examination. — Witness, in testifying as to the defendant's good character, must categorically answer the questions impliedly included in the former statute and no others. On cross-examination, the solicitor (now district attorney) may bring out specific facts for the purpose of testing the witness's knowledge, and may ask as a hypothetical question whether, if the witness knew certain facts, the witness's opinion would still be that the defendant's character was good. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415, 1966 Ga. App. LEXIS 1167 (1966) (decided under former Code 1933, § 38-1804).

Cross-examination of defendant's character witness in a child molestation case, that consisted of questions inquiring whether witness was aware defendant pled guilty to practicing law without a license, was admissible for the purpose of testing the witness's familiarity with the defendant. Davidson v. State, 231 Ga. App. 605, 499 S.E.2d 697 (decided under former O.C.G.A. § 24-9-84).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when the court held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-9-84).

Evidence not in compliance with former statute. — When the only evidence in any way tending to sustain a witness was the testimony of another witness that the impeaching witness knew the witness to be honest, industrious, and well-liked by the customers of the latter witness, such evidence was not a compliance with the requirement that an impeached witness may be sustained by proof of general good character. Jackson v.

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Middlebrooks, 86 Ga. App. 259, 71 S.E.2d 462, 1952 Ga. App. LEXIS 927 (1952) (decided under former Code 1933, § 38-1804).

Evidence in mitigation of capital punishment. — Constitution required that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment, rather, the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule, and in close cases the doubt should be resolved in favor of admissibility. Collier v. State, 244 Ga. 553, 261 S.E.2d 364, 1979 Ga. LEXIS 1336 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled in part, Thompson v. State, 263 Ga. 23, 426 S.E.2d 895, 1993 Ga. LEXIS 320 (1993); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895, 1993 Ga. LEXIS 320 (1993), overruled in part, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82, 2002 Ga. LEXIS 155 (2002).

Failure to charge concerning character. — Proper instruction should be given in every case when the accused puts the accused's character in issue; but, in the absence of a timely request, an omission to give a specific charge on the subject would not require a new trial. It was only in exceptional cases where the court failed to charge relative to the good character of the accused that a new trial should be granted. Taylor v. State, 83 Ga. App. 735, 64 S.E.2d 598, 1951 Ga. App. LEXIS 952 (1951) (decided under former Code 1933, § 38-1804).

Character witnesses excluded. — Trial court did not err by refusing to allow two of defendant's character witnesses to explain their answers since the transcript showed that the testimony sought exceeded the permissible scope of former O.C.G.A. § 24-9-84. Collar v. State, 206 Ga. App. 448, 426 S.E.2d 43, 1992 Ga. App. LEXIS 1673 (1992) (decided under former O.C.G.A. § 24-9-84).

Pastor testifying to truthfulness of parties. — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under oath because the character for truthfulness of the husband and wife had not been attacked since the pastor testified during the case-in-chief of the husband and wife, before any defense witnesses had testified; the error was not harmless because the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570, 2011 Ga. App. LEXIS 191 (2011) (decided under former O.C.G.A. § 24-9-84).

Instructions

No evidence of good character. — Charge could omit the part of the former statute which related to sustaining the witness by proof of general good character since there was no such evidence of general good character of a witness thus attacked. Reeves v. State, 22 Ga. App. 628, 97 S.E. 115, 1918 Ga. App. LEXIS 641 (1918) (decided under former Penal Code 1910, § 1052); Geer v. State, 184 Ga. 805, 193 S.E. 776, 1937 Ga. LEXIS 648 (1937) (decided under former Code 1933, § 38-1803); Jones v. State, 193 Ga. 449, 18 S.E.2d 844, 1942 Ga. LEXIS 419 (1942) (decided under former Code 1933, § 38-1803); Knight v. State, 92 Ga. App. 785, 90 S.E.2d 46, 1955 Ga. App. LEXIS 714 (1955) (decided under former Code 1933, § 38-1803).

Charge on impeachment by bad character. — When plaintiff introduced evidence as to the bad character of a witness for the defendant to show the witness unworthy of belief and when the court charged the jury that a witness could be impeached by bad character, it was error for the court to fail to charge without request that a witness could be sustained by proof of good character, there being evidence of the witness's good character. Haynes v. Phillips, 69 Ga. App. 524, 26 S.E.2d 186, 1943 Ga. App. LEXIS 129 (1943) (decided under former Code 1933, § 38-1804).

If a defendant wished to have the jury charged that the defendant would not be subject to impeachment pursuant to former O.C.G.A. § 24-9-84, the defendant

should request such a charge. Absent such a request, the appellate court need not decide whether the defendant was entitled to a jury charge on that issue. King v. State, 195 Ga. App. 865, 395 S.E.2d 1, 1990 Ga. App. LEXIS 738 (1990) (decided under former O.C.G.A. § 24-9-84).

Trial court did not err in refusing to instruct the jury regarding impeachment by general bad character pursuant to former O.C.G.A. § 24-9-84 since neither side relied on that method of impeachment at defendant's trial. Kirkland v. State, 67 Ga. App. 256, 19 S.E.2d 787, 1942 Ga. App. LEXIS 358 (1942) (decided under former O.C.G.A. § 24-9-84).

Charge in connection with conviction of crime. — Charge of the trial court was not error requiring reversal because of the use of the term "general bad character" in connection with the charge of impeachment of certain witnesses because of convictions of crimes involving moral turpitude. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843, 1954 Ga. App. LEXIS 866 (1954) (decided under former Code 1933, § 38-1804).

Failure to charge statute. — It was not reversible error to fail to charge the law of credibility of witnesses without a written request. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698, 1981 Ga. App. LEXIS 2659 (1981) (decided under former Code 1933, § 38-1804).

Court's reference to offense involving moral turpitude. — Trial court's inclusion in the court's general charge on the various methods of impeachment of a reference to impeachment by proof of a witness's conviction of an offense involving moral turpitude was erroneous since the defendant had not put the defendant's own character in issue; however, the charge was harmless when, immediately following the reference to impeachment pursuant to former O.C.G.A. § 24-9-84, the jury was given extensive instructions as to impeachment by other methods. Francis v. State, 266 Ga. 69, 463 S.E.2d 859, 1995 Ga. LEXIS 886 (1995) (decided under former O.C.G.A. § 24-9-84).

Curative instruction. — Trial court properly denied the defendant's motion for a mistrial based on a claim that a friend's testimony improperly interjected character evidence as a curative instruction given by the trial court was an adequate remedy. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62, 2006 Ga. App. LEXIS 1184 (2006) (decided under former O.C.G.A. § 24-9-83).

Trial court erred in denying the defendant's motion for a mistrial after a state's witness impermissibly interjected the defendant's character into evidence by referring to the defendant's prior arrest record. Although the trial court gave the jury a curative instruction informing the jury that the testimony regarding the defendant's prior arrest history was improper, could not be considered in determining guilt or innocence in the case, and was required to be disregarded; the trial court further polled the jury to determine whether the jury could abide by the curative instructions and render a verdict based upon the competent evidence duly admitted, and all of the jurors indicated that the jurors could follow the curative instructions. Kohler v. State, 300 Ga. App. 692, 686 S.E.2d 328, 2009 Ga. App. LEXIS 1253 (2009) (decided under former O.C.G.A. § 24-9-83).

Curative instruction advising not to consider improper character evidence. — Trial court erred in admitting evidence of a prior conviction and defendant's involvement in other drug deals because the defendant offered no evidence in support of the entrapment defense and the state had no basis on which to admit the character evidence; however, the denial of the defendant's motion for mistrial was not an abuse of discretion in light of the overwhelming evidence of the defendant's guilt and a detailed curative instruction advising the jury not to consider the improperly-admitted evidence. Nettles v. State, 276 Ga. App. 259, 623 S.E.2d 140, 2005 Ga. App. LEXIS 1211 (2005) (decided under former O.C.G.A. § 24-9-83).

Lack of convictions insufficient for charge. — Merely having no convictions or a clean record was insufficient for the defendant to invoke good character; consequently, the trial court did not err by refusing to give the defendant's requested charge. Godsey v. State, 271 Ga. App. 663, 610 S.E.2d 634, 2005 Ga. App. LEXIS 128

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(2005) (decided under former O.C.G.A. § 24-9-83).

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29 Am. Jur. 2d, Evidence, §§ 350, 353 et seq. 81 Am. Jur. 2d, Witnesses, § 917 et seq.

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Right to impeach accused as a witness by proof of general bad moral character or reputation, 90 A.L.R. 870.

Instruction regarding good or bad character of witnesses as affecting their credibility, 120 A.L.R. 1442.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 A.L.R.2d 1258.

Impeachment of witness with respect to intoxication, 8 A.L.R.3d 749.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Admissibility of testimony as to general reputation at place of employment, 82 A.L.R.3d 525.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 A.L.R.3d 967.

Admissibility of evidence of character of or reputation of party to civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 A.L.R.4th 468.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 A.L.R.4th 796.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case — modern state cases, 30 A.L.R.4th 414.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 A.L.R.4th 985; 59 A.L.R.4th 1000.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases, 58 A.L.R.4th 1229.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 A.L.R.5th 277.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule-nonviolent crimes, 84 A.L.R.5th 487.

Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of the Federal Rules of Evidence, in civil cases, 171 A.L.R. Fed. 483.

Impeachment of federal trial witness with respect to intoxication, 106 A.L.R. Fed. 371.

24-6-609. Impeachment by evidence of conviction of a crime.

(a) **General rule.** For the purpose of attacking the character for truthfulness of a witness:

(1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and evidence that an accused has been

convicted of such a crime shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; or

(2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

(b) **Time limit.** Evidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program.** Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness and evidence of a conviction shall not be admissible under this Code section if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Nolo contendere pleas and juvenile adjudications.** A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications shall not generally be admissible under this Code section. The court may, however, in a criminal proceeding allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence of the accused.

(e) **Pendency of appeal.** The pendency of an appeal shall not

render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible.

History.

Code 1981, § 24-6-609, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Impeachment by evidence of a criminal conviction, Fed. R. Evid. 609.

Law reviews.

For annual survey on the death penalty, see 64 Mercer L. Rev. 109 (2012).

For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012).

For article, "The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence," see 54 Ga. L. Rev. 927 (2020).

For article, "Character Evidence in the Civil Setting," see 26 Ga. St. B.J. 20 (Dec. 2020).

For article, "Violent Videos: Criminal Defense in a Digital Age," see 37 Ga. St. U.L. Rev. 305 (2021).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-84.1 are included in the annotations for this Code section.

Constitutionality. — Based on the slight probative value of over-age convictions, the fact that former O.C.G.A. § 24-9-84.1(b) permitted use of such convictions on a showing of specific facts and circumstances establishing the probative value of the particular conviction, and the fact that former § 24-9-84.1 did not preclude all inquiry on a subject with respect to which a defendant was entitled to a reasonable cross examination, former § 24-9-84.1 was not unconstitutional as a violation of the confrontation clause. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365, 2006 Ga. LEXIS 390 (2006) (decided under former O.C.G.A. § 24-9-84.1).

Defendant's constitutional attack on former O.C.G.A. § 24-9-84.1(a)(2), which allowed impeachment of the defendant with defendant's prior convictions if defendant chose to testify, was meritless. The constitutional right to testify did not carry with it a right to prohibit impeachment by prior convictions. Childs v. State, 287 Ga. 488, 696 S.E.2d 670, 2010 Ga. LEXIS 517 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Construction of former provisions. — Former O.C.G.A. § 24-9-84.1(a)(2), by the statute's own terms, applied to the admissibility of prior convictions for the purpose of impeaching a testifying defendant, and the statute did not apply when the prior conviction was admitted as a similar transaction for non-impeachment purposes because the analyses for each purpose were treated differently in case law; for example, when a conviction was admitted for impeachment, it was impermissible to use the prior conviction to show a criminal propensity or as substantive evidence of the offense at issue, and likewise, similar transactions were admissible not for impeachment but for the purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct. Robertson v. State, 306 Ga. App. 721,

703 S.E.2d 343, 2010 Ga. App. LEXIS 1038 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Supreme Court of Georgia adopted the date the witness testified or the evidence of the prior conviction was introduced as the end point for determining whether a conviction fell within the ten-year limit prescribed by former O.C.G.A. § 24-9-84.1(b). Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of ten year limitation. — In a matter of first impression, the Georgia Supreme Court looked to the decisions of federal courts in Trindle v. Sonat Marine, 697 F. Supp. 879 (E.D. Pa. 1988), and United States v. Cathey, 591 F.2d 268 (5th Cir. 1979), interpreting Fed. R. Evid. 609(b), in adopting the date that the witness testifies or that the evidence of the prior conviction is introduced as the end point for determining whether a conviction falls within the ten-year limit prescribed by former O.C.G.A. § 24-9-84.1(b). Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

On-the-record finding required. — Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relied in determining that the probative value of a prior conviction that was more than ten years old substantially outweighed the prejudicial effect before admitting evidence of the conviction for impeachment purposes under former O.C.G.A. § 24-9-84.1(b). To the extent Treadwell v. State, 285 Ga. 736 (2009) and Wilkes v. State, 293 Ga. App. 724 (2008) could be interpreted to hold otherwise, those decisions were overruled. Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Trial court erred by failing to make an on-the-record finding of whether the probative value of admitting the defendant's 1991 conviction substantially outweighed its prejudicial effect, and to enter express findings as to whether the probative value of defendant's 1987 conviction substantially outweighed its prejudicial effect. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287, 2014 Ga. App. LEXIS 143 (2014).

Trial court is required to make a different determination regarding a prior felony conviction that is older than ten years and evidence of such a conviction is not admissible unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287, 2014 Ga. App. LEXIS 143 (2014).

Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect before admitting evidence of the conviction for impeachment purposes. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287, 2014 Ga. App. LEXIS 143 (2014).

In considering the admissibility of prior convictions less than ten years old, a trial court must make an on-the-record finding that the probative value of admitting the conviction substantially outweighs its prejudicial effect, but is not required to list the specific factors the court considered in making the court's decision. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287, 2014 Ga. App. LEXIS 143 (2014).

In an action decided under former O.C.G.A. § 24-9-84.1(a)(2), the trial court erred when the court did not make an on-the-record finding of the specific facts and circumstances on which the court relied in determining that the probative value of the 32-year-old convictions substantially outweighed their prejudicial effect, but only found on the record that despite the fact of their age, the convictions' probative value insofar as impeachment goes outweighed the prejudicial factor to the defendant. Peak v. State, 330 Ga. App. 528, 768 S.E.2d 275, 2015 Ga. App. LEXIS 5 (2015) (decided under former O.C.G.A. § 24-9-84.1(a)(2)).

Redaction not required. — Neither case law nor former O.C.G.A. § 24-9-84.1(a)(2) required redaction of portions of a validly admitted felony conviction. Wil-

General Consideration (Cont'd)

kes v. State, 293 Ga. App. 724, 667 S.E.2d 705, 2008 Ga. App. LEXIS 1063 (2008), overruled in part, Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Credibility determination for trier of fact. — Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871, 2010 Ga. App. LEXIS 809 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of confinement. — Because former O.C.G.A. § 24-9-84.1 does not define 'confinement', and the Georgia appellate courts had not had the opportunity to construe that portion of the statute, and because the language of former § 24-9-84.1(b) mirrors that of Rule 609(b) of the Federal Rules of Evidence and the statutes based on Rule 609 (b) that have been enacted by several other states, the Georgia Supreme Court cited United States v. Rogers, 542 F.3d 197 (7th Cir. 2008), United States v. Lorenzo, 43 F.3d 1303 (9th Cir. 1995), United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992), and the courts of states that have enacted statutes modeled on Rule 609(b) and that have followed the lead of the federal courts in holding that 'confinement' does not include that portion of a sentence served while on probation or parole, in concluding that probation does not qualify as confinement under former § 24-9-84.1(b). Allen v. State, 286 Ga. 392, 687 S.E.2d 799, 2010 Ga. LEXIS 82 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Notice to the state was insufficient. — There was no error in refusing to admit a victim's prior conviction for purposes of impeachment because under the circumstances, which included very little, if any, "advance" notification and the state's claim that the state did not have time to prepare, the trial court did not abuse the court's discretion in finding that the notice to the state was not sufficient when the defendant's counsel served the state with the notice of intent to introduce the victim's conviction the day after the jury had been selected but before the presentation of evidence to the jury; given the lack of any facts and circumstances, absent speculation, that illegal drugs were involved in the altercation at issue, the trial court did not abuse the court's discretion in determining that irrespective of the timeliness of the notice, the prejudicial effect of the victim's prior conviction outweighed any probative value and that the evidence of the conviction was therefore inadmissible. Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642, 2010 Ga. App. LEXIS 777 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not abuse the court's discretion in finding that a time period that the parties disputed but that was, at most, 11 business hours before the start of trial was insufficient to meet the notice requirement for use of the victim's old conviction for deposit account fraud. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156, 2016 Ga. App. LEXIS 608 (2016).

Balancing Test

Federal interpretation of balancing tests. — Looking for guidance from federal courts and state courts interpreting Fed. R. Evid. 609(b) or analogous state evidentiary rules regarding impeachment by convictions older than ten years, and citing the Eleventh Circuit opinion of United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992), the Georgia Supreme Court adopted a five-factor analysis for weighing a prior conviction's probity regarding the accused's veracity against the

prejudice to the accused: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider that conviction as evidence that the defendant committed the crime for which the defendant is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Balancing test should have applied in burglary case. — In determining whether to admit a prior conviction against a defendant for impeachment purposes, a court should consider: (1) the impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287, 2014 Ga. App. LEXIS 143 (2014).

Trial court erred by permitting the state to impeach the defendant with evidence of a prior conviction from 1985 for impersonating a police officer without conducting the proper balancing tests under O.C.G.A. § 24-9-84.1(b) as the record showed that the trial court failed to make express findings in determining whether the 1985 conviction was admissible. Robinson v. State, 332 Ga. App. 240, 771 S.E.2d 751, 2015 Ga. App. LEXIS 208 (2015).

Trial court abused the court's discretion by allowing the state to impeach the defendant with evidence of the burglary absent engaging in the balancing test required to admit such evidence because no Georgia cases had found that burglary constituted a crime of dishonesty and there was no evidence that the defendant completed the burglary using deceitful means or false statements. Robinson v. State, 359 Ga. App. 38, 856 S.E.2d 712, 2021 Ga. App. LEXIS 155 (2021).

Balancing required. — Supreme Court of Georgia adopted the application of the following five factors in conducting the balancing required under former O.C.G.A. § 24-9-84.1(b): (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction did not create an unacceptable risk that the jury would consider it as evidence that the defendant committed the crime for which the defendant was on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. While this list was not exhaustive and a trial court had the discretion to consider other factors as the court may deem appropriate in a particular case, these five factors outline the basic concerns relevant to the required balancing. Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Trial court erred by admitting two prior convictions as impeachment evidence when they were over ten years old because the trial court did not make express findings that the probative value outweighed any prejudice either at trial or in its order denying the defendant's motion for new trial. Johnson v. State, 364 Ga. App. 44, 873 S.E.2d 704, 2022 Ga. App. LEXIS 251 (2022).

Trial court must establish that it balanced use of defendant's prior conviction against risk of prejudice. — With regard to defendant's conviction for aggravated assault, which was reversed on appeal as a result of the trial court erring in recharging the jury on a question it asked, the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors of the evidence of defendant's prior felony conviction for possession of cocaine or whether the trial court balanced the probative value against the prejudicial effect to the accused. In the event of retrial, the trial court was directed to balance the probative value of defendant's prior felony conviction against its prejudicial effect and to make a finding on the record as to whether the former substantially out-

Balancing Test (Cont'd)

weighed the latter, subject to appellate review for an abuse of discretion. Quiroz v. State, 291 Ga. App. 423, 662 S.E.2d 235, 2008 Ga. App. LEXIS 524 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Trial court failed to enter express findings on the record as to whether the probative value of a defendant's 1981 bail-jumping conviction substantially outweighed the conviction's prejudicial effect. If on remand, the trial court determined that the prior conviction was inadmissible after engaging in the balancing test required under former O.C.G.A. § 24-9-84.1(b), then a new trial was required. But, if the trial court determined that the prior conviction was admissible, a new trial was not mandated, subject to appellate review for an abuse of discretion. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601, 2011 Ga. App. LEXIS 1038 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Defendant's convictions for rape, kidnapping, and armed robbery were vacated because the trial court failed to make express findings in determining whether the defendant's 1985 conviction for impersonating a police officer was admissible for impeachment purposes and the court failed to do so again in the court's order denying the defendant's motion for new trial. Robinson v. State, 332 Ga. App. 240, 771 S.E.2d 751, 2015 Ga. App. LEXIS 269 (2015), cert. denied, No. S15C1292, 2015 Ga. LEXIS 625 (Ga. Sept. 8, 2015).

Trial court did not abuse the court's discretion by admitting the defendant's prior burglary and armed robbery convictions, older than 10 years, for impeachment purposes because the trial court specifically addressed each Clay factor, finding that both felony convictions involved stealing of which the impeachment value was high. Peak v. State, 337 Ga. App. 441, 787 S.E.2d 792, 2016 Ga. App. LEXIS 353 (2016), cert. denied, No. S16C1773, 2017 Ga. LEXIS 121 (Ga. Feb. 27, 2017).

Probative value did not outweigh prejudicial impact. — Pretermitting whether trial counsel performed deficiently by not providing advance notice of counsel's intent to introduce a witness's 15-year-old conviction, the witness's conviction was inadmissible because its probative value did not sufficiently outweigh its prejudicial impact; further, the defendant did not show that trial counsel's failure to provide advance notice of the witness's prior conviction would have changed the trial court's decision to exclude that evidence, and the defendant did not establish a reasonable probability that the result of the trial would have been different. Dobbins v. State, 309 Ga. 163, 844 S.E.2d 814, 2020 Ga. LEXIS 449 (2020).

Balancing test applied during motion for new trial sufficient. — Trial court engaged in the required balancing test and made express findings in accordance with former O.C.G.A. § 24-9-84.1(a)(2), which supported the admission of a defendant's prior conviction for enticing a child for indecent purposes in an aggravated assault trial. The statute was satisfied even though these findings were not made until the hearing on the defendant's motion for new trial. Carter v. State, 303 Ga. App. 142, 692 S.E.2d 753, 2010 Ga. App. LEXIS 302 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Prior convictions properly admitted for both impeachment and sentencing purposes. — Trial court properly admitted certified copies of the defendant's two prior convictions of aggravated assault and possession of a firearm during the commission of a felony as: (1) it carefully balanced the competing interests; (2) the prior offenses had a substantial probative value which outweighed their prejudicial effect; and (3) nothing prevented the use of a defendant's convictions for both impeachment and sentencing purposes. Moreover, the court rejected the defendant's claim that by adding the word "substantially" to the balancing test, the Georgia legislature meant to incorporate the standard for admissibility embodied in Fed. R. Evid. 609(b). Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540, 2008 Ga. App. LEXIS 56 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. June 2, 2008) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of balancing for admissibility of previous conviction. — Citing the Eleventh Circuit hold-

ing construing Fed. R. Evid. 609(a)(2) in United States v. Chilcote, 724 F2d 1498 (11th Cir. 1984), the Georgia Court of Appeals held that, under former O.C.G.A. § 24-9-84.1(a)(2), when evaluating the admissibility of a prior conviction, the trial court's balancing properly focused on whether the previous conviction indicated a probable lack of veracity for purposes of impeaching the defendant's credibility rather than a propensity to commit the crime of which the defendant was charged. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531, 2008 Ga. App. LEXIS 12 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. Apr. 21, 2008) (decided under former O.C.G.A. § 24-9-84.1).

Because the language of former O.C.G.A. § 24-9-84.1(b) mirrors that of Fed. R. Evid. 609(b) and the statutes based on Rule 609(b) that have been enacted by several other states, in determining the end point for the 10-year period specified in former § 24-9-84.1(b), requiring a stricter balancing test for the admission of prior convictions older than ten years for impeachment purposes, it is proper to look for guidance to the judicial decisions of the federal courts construing Rule 609(b) and the courts of sister states construing their statutes modeled on Rule 609(b) in interpreting that provision. Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Failure to apply balancing test was harmless error. — During a defendant's trial for obstruction of a police officer and other related crimes, a trial court erred by failing to consider the balancing test required under former O.C.G.A. § 24-9-84.1(a)(1) with regard to allowing the state to impeach all of the defendant's defense witnesses with prior convictions, However, the error was harmless since the convictions involved moral turpitude and were admissible regardless. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510, 2009 Ga. App. LEXIS 75 (2009) (decided under former O.C.G.A. § 24-9-84.1).

No duty to conduct balancing test absent objection. — Absent an objection by the defendant, the trial court had no duty to conduct the balancing test of former O.C.G.A. § 24-9-84.1(a)(1) sua sponte. Moreover, since the jury was authorized to believe the testimony of officers over that of the witnesses in question, there was no reasonable probability that the verdict would have been different had the trial court conducted the balancing test. Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849, 2008 Ga. App. LEXIS 646 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Listing specific factors considered in weighing probative value of prior conviction against risk of prejudice not required. — While under former O.C.G.A. § 24-9-84.1(a)(2), a trial court must make an on-the-record finding that the probative value of admitting a prior conviction substantially outweighed its prejudicial effect, there was no requirement in the language of former § 24-9-84.1(a)(2) that the trial court must list the specific factors the court considered in ruling on the probity of convictions that were not more than ten years old. To the extent that Abercrombie v. State, 297 Ga. App. 522 (2009), and Dozier v. State, 311 Ga. App. 713 (2011), hold otherwise, those cases are overruled. Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Dishonesty

Crimes involving dishonesty. — For impeachment purposes, crimes of "dishonesty" were limited to those crimes that bear upon a witness's propensity to testify truthfully; accordingly, misdemeanor theft by receiving stolen property was not a crime involving dishonesty within the meaning of former O.C.G.A. § 24-9-84.1(a)(3). Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426, 2007 Ga. App. LEXIS 363 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of crimes of dishonesty. — Noting that the General Assembly, in enacting former O.C.G.A. 24-9-84.1(a)(2), had chosen to use the language of Fed. R. Evid. 609(a)(2), and citing the Eleventh Circuit precedent of United States v. Sellers, 906 F.2d 597 (11th Cir. 1990), and the Fifth Circuit precedent of United States v. Ashley, 569 F.2d 975 (1978), and other federal circuits construe

Dishonesty (Cont'd)

ing Rule 609(a)(2), as well as some state appellate courts with evidence rules similar to Rule 609(a)(2), the Court of Appeals held that, for impeachment purposes, crimes of "dishonesty" are limited to those crimes that bear upon a witness's propensity to testify truthfully, and not to crimes such as misdemeanor theft by receiving stolen property or shoplifting. Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426, 2007 Ga. App. LEXIS 363 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Impeachment for conviction in civil tort action. — In an intentional tort action against a retailer and one of the retailer's employees, the employee could be impeached with a conviction under O.C.G.A. § 16-10-24 which occurred after that employee gave a deposition as the length of punishment that could be imposed thereunder satisfied the requirements of former O.C.G.A. § 24-9-84.1(a)(1) for impeachment with a conviction, and no other evidence was presented which prohibited the employee's impeachment. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652, 2006 Ga. App. LEXIS 1512 (2006), cert. denied, No. S07C0633, 2007 Ga. LEXIS 372 (Ga. May 14, 2007), overruled in part, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7, 2008 Ga. App. LEXIS 1330 (2008) (decided under former O.C.G.A. § 24-9-84.1); Chandler v. State, 281 Ga. 712, 642 S.E.2d 646, 2007 Ga. LEXIS 230 (2007) (decided under former O.C.G.A. § 24-9-84.1).

In a personal injury suit filed by a car driver against a truck driver, because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new trial was ordered. Laukaitis v. Basadre, 287 Ga. App. 144, 650 S.E.2d 724, 2007 Ga. App. LEXIS 808 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Convictions did not show dishonesty. — In a trial for aggravated assault, the trial court did not err in barring the defendant from introducing evidence about a third person's misdemeanor convictions for criminal trespass and family violence battery; the convictions did not involve dishonesty and did not support the defendant's self-defense theory as the third person remained behind as the defendant advanced on the victim. Fields v. State, 285 Ga. App. 345, 646 S.E.2d 326, 2007 Ga. App. LEXIS 515 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Because defendant made no effort to show that the conviction defendant intended to use to impeach an accomplice who testified involved fraud or deceit, the trial court did not err in excluding that conviction for use for impeachment purposes under former O.C.G.A. § 24-9-84.1(a)(3). Clements v. State, 299 Ga. App. 561, 683 S.E.2d 127, 2009 Ga. App. LEXIS 904 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Prior Convictions of Defendant

Conviction did not show fraud and deceit. — Because the defendant did not show that a misdemeanor shoplifting conviction involved fraud and deceit, the trial court properly refused to allow the defendant to use the conviction to impeach a witness under former O.C.G.A. § 24-9-84.1(a)(3). Martin v. State, 300 Ga. App. 39, 684 S.E.2d 111, 2009 Ga. App. LEXIS 1033 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not abuse the court's discretion in preventing the defendant from cross-examining a witness regarding the fact that the witness was on probation because the witness was on probation for misdemeanor shoplifting and the defendant failed to show that such a conviction involved fraud or deceit. Campbell v. State, 329 Ga. App. 317, 764 S.E.2d 895, 2014 Ga. App. LEXIS 676 (2014).

Federal interpretation on defendant's failure to testify and impact upon utilization of prior conviction. — The Georgia Supreme Court turned to Luce v. United States, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), and its progeny in holding that, by choosing not to testify at trial, defendant rendered the record inadequate for meaningful review of the preliminary ruling that defendant's prior conviction constituted impeachment

evidence under former O.C.G.A. § 24-9-84.1; for the record to have been adequate for review, defendant had to testify, as even a proffer would be insufficient because defendant's trial testimony could differ. Because it was an issue of first impression, and recognizing that the language of former § 24-9-84.1 mirrors that of Rule 609(b) of the Federal Rules of Evidence and the statutes based on Rule 609(b) that have been enacted by several other states, it was proper to look for guidance to the judicial decisions of the federal courts construing Rule 609(b), and the courts of other states construing their statutes modeled on Rule 609(b), in interpreting that provision. Warbington v. State, 316 Ga. App. 614, 730 S.E.2d 90, 2012 Ga. App. LEXIS 627 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Remand required to address admissibility of prior convictions. — There was sufficient evidence to support a defendant's conviction for manufacturing methamphetamine as it was for the jury to reject the defendant's defense that others had equal access to the contraband found in the defendant's home and vehicle. However, the conviction was conditionally affirmed and the case was remanded to the trial court for the court to set forth an express ruling on the record as to whether the probative value of the evidence of the defendant's prior conviction substantially outweighed the prejudicial effect of the evidence as the record failed to contain any such findings. Miller v. State, 298 Ga. App. 792, 681 S.E.2d 225, 2009 Ga. App. LEXIS 789 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction properly admitted to impeach defendant's credibility. — Trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for the admission of the evidence. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531, 2008 Ga. App. LEXIS 12 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. Apr. 21, 2008) (decided under former O.C.G.A. § 24-9-84.1).

In a prosecution for entering an automobile with the intent to commit theft, the trial court allowed the state to impeach the defendant's testimony with evidence of a burglary conviction that was over 10 years old. Admission of this evidence did not violate former O.C.G.A. § 24-9-84.1 as the defendant testified on direct examination about the sentence the defendant served for that crime. Love v. State, 293 Ga. App. 499, 667 S.E.2d 656, 2008 Ga. App. LEXIS 988 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Given that a defendant's defense to charges of burglary and criminal trespass was that the defendant believed the defendant had permission to remove a television and DVD player from an apartment, the trial court did not abuse the court's discretion in admitting two prior convictions for burglary and attempted burglary, which indicated a probable lack of veracity by the defendant. Love v. State, 302 Ga. App. 106, 690 S.E.2d 246, 2010 Ga. App. LEXIS 62 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in admitting the defendant's prior felony conviction because the court did not abuse the court's discretion in concluding that the probative value of admitting the evidence substantially outweighed its prejudicial effect since the prior conviction's probative value went to the defendant's credibility and the likelihood or not that someone convicted of a felony would disregard the duty to testify truthfully; the trial court instructed the jury that the prior felony conviction was to be considered only for impeachment purposes, and, because the defendant testified and denied knowledge that the co-defendant had a gun, the defendant's credibility was highly relevant to the jury's decision. Cobb v. State, 302 Ga. App. 821, 692 S.E.2d 65, 2010 Ga. App. LEXIS 240 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to show that the trial court abused the court's discretion in admitting the defendant's prior conviction for burglary, O.C.G.A. § 16-7-1(a), as impeachment evidence under former O.C.G.A. § 24-9-84.1 because the defendant's credibility as to intent was highly relevant to the jury's decision; observing

Prior Convictions of Defendant (Cont'd)

that both the charged offense and the burglary offense for which the defendant was previously convicted involved an intent to commit a theft, the trial court found that the defendant's burglary conviction had sufficient probative value for the purpose of impeachment on whether the defendant intended to commit the charged theft and that the probative value of the burglary conviction substantially outweighed the conviction's prejudicial effect. Hopkins v. State, 309 Ga. App. 298, 709 S.E.2d 873, 2011 Ga. App. LEXIS 305 (2011), cert. denied, No. S11C1303, 2011 Ga. LEXIS 704 (Ga. Sept. 12, 2011) (decided under former O.C.G.A. § 24-9-84.1).

Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82, 2011 Ga. App. LEXIS 606 (2011) (decided under former O.C.G.A. § 24-9-84.1).

In a forgery prosecution, the trial court properly admitted for impeachment purposes the defendant's prior conviction for felony cocaine possession as the court correctly applied the standard set forth in former O.C.G.A. § 24-9-84.1(a)(2) and expressly found that the probative value of the prior conviction substantially outweighed the prejudicial effect. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597, 2011 Ga. App. LEXIS 482 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in admitting the defendant's prior felony convictions to impeach the defendant pursuant to former O.C.G.A. § 24-9-84.1(a)(2) because the trial court conducted the proper balancing test when the court admitted the prior felony convictions, and the trial court did not abuse the court's discretion in determining that the probative value of evidence of the prior convictions substantially outweighed their prejudicial effect; former § 24-9-84.1(a)(2), which applied to prior felony convictions, did not require that the crimes involve dishonesty or making a false statement. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430, 2012 Ga. App. LEXIS 56 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not abuse the court's discretion in admitting three of the defendant's prior convictions for the purpose of impeaching the defendant, even though two of the prior convictions were more than 10 years old, as the defendant's credibility was central to the defense because the defendant did not deny firing the gun but stated that the defendant did so to defend the defendant's family and the defendant; and the defendant's descriptions of the altercations with the defendant's girlfriend and the girlfriend's brother and of the shooting that followed differed significantly from the testimony of several other trial witnesses. Bashir v. State, 350 Ga. App. 852, 830 S.E.2d 353, 2019 Ga. App. LEXIS 372 (2019).

Trial court did not abuse the court's discretion in admitting defendant's prior convictions into evidence for the purpose of generally attacking his credibility because the trial court instructed the jury that his prior convictions were only being admitted for impeachment purposes, and during its jury charge, the court further instructed that credibility and whether a witness was impeached was solely for the jury to decide. Lawson v. State, 365 Ga. App. 87, 877 S.E.2d 616, 2022 Ga. App. LEXIS 389 (2022).

Prior conviction improperly admitted. — No independent ground pursuant to the impeachment rules of former O.C.G.A. § 24-9-84.1(a)(2) authorized the introduction of evidence that the defendant was previously convicted of aggravated assault since defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the admission of those statements, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529, 2010 Ga. App. LEXIS 861

(2010) (decided under former O.C.G.A. § 24-9-84.1).

Prior acts discharged under first offender status excluded. — Trial court did not abuse the court's discretion in excluding impeachment evidence, prior bad acts by a deputy that were discharged under the first offender status, which were not pertinent to the traffic stop or the deputy's subsequent investigation. Anderson v. State, 338 Ga. App. 171, 789 S.E.2d 363, 2016 Ga. App. LEXIS 448 (2016), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

First offender guilty plea not conviction. — There was no error in the trial court's refusal to give an instruction on impeachment by prior conviction since the defendant's first offender guilty plea was not a conviction for purposes of O.C.G.A. § 24-6-609. Manner v. State, 302 Ga. 877, 808 S.E.2d 681, 2017 Ga. LEXIS 959 (2017).

Erroneous admission of prior conviction harmless. — While the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors or balanced the probative value of the admission of the defendant's prior burglary conviction against the prejudicial effect to the defendant, any error was harmless because there was no reasonable probability that the results of the trial would have differed if the evidence of the defendant's burglary conviction had been excluded given that the defendant's DNA was obtained from blood on a screwdriver inside the victim's home and the broken window in the victim's bedroom. Crosby v. State, 319 Ga. App. 459, 735 S.E.2d 588, 2012 Ga. App. LEXIS 1065 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Prior convictions admitted when defendant placed character in evidence. — Trial court properly admitted impeachment evidence of the defendant's convictions of vehicular homicide that were over 10 years old. Defendant's testimony regarding the defendant's charitable activities resulted in the defendant's placing the defendant's character into issue. McNabb v. State, 292 Ga. App. 395, 664 S.E.2d 800, 2008 Ga. App. LEXIS 783 (2008), cert. denied, No. S08C1910, 2008 Ga. LEXIS 927 (Ga. Oct. 27, 2008) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction properly admitted. — Defendant impeached a plumbing contractor's testimony to the fullest extent allowed by former O.C.G.A. § 24-9-84.1 by introducing and reading into the record a certified copy of the felony conviction of the witness. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85, 2010 Ga. App. LEXIS 1016 (2010), cert. denied, No. S11C0454, 2011 Ga. LEXIS 237 (Ga. Mar. 7, 2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under former O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by former § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the former statute itself contained no distinction between defendants and witnesses when more than ten years had passed since the applicable conviction or release. Dozier v. State, 311 Ga. App. 713, 716 S.E.2d 802, 2011 Ga. App. LEXIS 827 (2011), overruled in part, Clay v. State, 290 Ga. 822, 725 S.E.2d 260, 2012 Ga. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to prove that defense counsel was ineffective for failing to ask an inmate witness about the witness's numerous prior convictions because the record showed that the defendant's lawyer did ask the inmate about convictions that were not too old to be admitted pursuant to former O.C.G.A. § 24-9-84.1 and the defendant did not come forward with any legal theory under which the remaining convictions about which the defendant's lawyer did not ask would have been admissible. Sears v. State, 292 Ga. 64, 734 S.E.2d 345, 2012 Ga. LEXIS 948 (2012)

Prior Convictions of Defendant (Cont'd)

(decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in refusing to allow the defendant to impeach a state's witness with a prior drug conviction that was over 10 years old and was not relevant to the witness's capacity as an eyewitness to an automobile accident. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153, 2012 Ga. App. LEXIS 1048 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in admitting the defendant's prior theft-by-receiving convictions because that evidence was admissible, implicating a perpetrator's honesty. Stroud v. State, 301 Ga. 807, 804 S.E.2d 418, 2017 Ga. LEXIS 690 (2017).

Failure to object to admission. — Defendant waived any objection to the admission of the certified copies of the defendant's prior convictions by responding that the defendant had "no objection" when the convictions were tendered into evidence. McAllister v. State, 351 Ga. App. 76, 830 S.E.2d 443, 2019 Ga. App. LEXIS 385 (2019), cert. denied, No. S19C1489, 2020 Ga. LEXIS 115 (Ga. Feb. 10, 2020).

Questioning defendant about convictions allowed. — Trial court did not err by denying defendant's motion in limine, which sought to prevent the state, for the purpose of impeachment, from questioning defendant, if defendant testified at trial, regarding defendant's prior convictions for burglary, statutory rape, and failure to register as a sex offender as former O.C.G.A. § 24-9-84.1 specifically applied to the situation and permitted the questioning regarding defendant's prior convictions. Whitaker v. State, 283 Ga. 521, 661 S.E.2d 557, 2008 Ga. LEXIS 429 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Prior Convictions and Testimony of Witnesses

Obstructing or hindering law enforcement officers. — In a parent's tort action arising from an accusation by store employees that the parent's child stole from the store, the trial court properly refused to strike evidence of an employee's conviction for violating O.C.G.A. § 16-10-24 by obstructing or hindering law enforcement officers submitted in the parent's motion for summary judgment response even though the conviction was not used to impeach the employee at the employee's deposition. The conviction could be used for impeachment at trial under former O.C.G.A. § 24-9-84.1(a)(1) because the violation was a felony punishable by imprisonment for not less than one nor more than five years and similarly may be submitted in the summary judgment motion even though it was not presented to the witness at the deposition. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652, 2006 Ga. App. LEXIS 1512 (2006), cert. denied, No. S07C0633, 2007 Ga. LEXIS 372 (Ga. May 14, 2007), overruled in part, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7, 2008 Ga. App. LEXIS 1330 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Indictment is not a conviction. — Trial court did not err by only allowing into evidence the certified convictions of the state's witness and by not allowing the indictments associated with those convictions to be admitted into evidence as well because the indictments should not have been admitted into evidence along with the witness's convictions; an indictment represented only accusations against a defendant, and was not in itself a conviction. Carter v. State, 289 Ga. 51, 709 S.E.2d 223, 2011 Ga. LEXIS 253 (2011) (decided under former O.C.G.A. § 24-9-84.1).

First offender plea of witness inadmissible. — In the defendant's murder trial, the trial court did not err in excluding an eyewitness's first offender plea to forgery because the eyewitness had completed the eyewitness's probation and been discharged; even if a first offender plea was probative of bias in favor of the state, the defendant made no proffer explaining a relationship between the witness's prior discharge and the eyewitness's testimony in the defendant's case. Jones v. State, 305 Ga. 653, 827 S.E.2d 254, 2019 Ga. LEXIS 235 (2019).

Prior conviction of witness improperly admitted. — Trial court did not err when the court failed to give the defen-

dant's requested charge on impeachment by a prior conviction because the statutory requirements had not been met, and the witness's 1988 conviction should not have been admitted, so the fact that the defendant was allowed to use the prior conviction evidence at all, inured to the defendant's benefit; the trial court's failure to give the charge requested was harmless error as it was not highly probable that the error contributed to the verdict; the jury was properly instructed on impeachment in general; and, during closing argument, defense counsel was able to use the prior conviction and other evidence to argue to the jury that the witness's testimony was not worthy of belief. Cannon v. State, 302 Ga. 327, 806 S.E.2d 584, 2017 Ga. LEXIS 876 (2017).

Because Georgia's new rules of evidence applied and the defendant's prior felony conviction was not more than 10 years old, the trial court was not required to list the specific factors the court considered in ruling that the prior conviction was admissible for the purpose of generally attacking the defendant's credibility; nevertheless, the trial court did list the factors the court considered, including the fact that the defendant's credibility would be a substantial factor in the case, the probative value of the conviction, the nature of the prior crime of burglary as making it less likely to serve as improper propensity evidence of a drug possession offense, and the age of the prior conviction as mitigating an improper propensity inference. Smith v. State, 331 Ga. App. 296, 771 S.E.2d 8, 2015 Ga. App. LEXIS 162 (2015), overruled in part, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

Admission of evidence of the defendant's prior aggravated assault conviction for impeachment purposes was not erroneous as the defendant's credibility was under attack by the state since the defendant claimed that the defendant was justified in the shooting death of the victim. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407, 2012 Ga. App. LEXIS 858 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

Prior conviction of witness properly excluded. — In convictions of child molestation, aggravated child molestation, and aggravated sexual battery, a trial court properly excluded for impeachment purposes prior convictions of a motel clerk, who testified that the clerk recalled renting a room to defendant and the victim, since the prior convictions were more than 10 years old. Woods v. State, 304 Ga. App. 403, 696 S.E.2d 411, 2010 Ga. App. LEXIS 539 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction of witness improperly excluded. — Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative value; however, the error was harmless because the admission of the victim's prior conviction would have been cumulative of the victim's own damaging testimony. Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261, 2014 Ga. App. LEXIS 596 (2014).

Probation did not qualify as confinement. — Trial court did not err when the court declined to permit the defendant to impeach a witness under former O.C.G.A. § 24-9-84.1 with prior convictions because more than ten years had elapsed since the witness was released from the confinement resulting from the convictions, and defense counsel did not provide specific facts and circumstances demonstrating that the probative value of the convictions outweighed their prejudicial effect; probation did not qualify as confinement under former § 24-9-84.1(b),

Prior Convictions and Testimony of Witnesses (Cont'd)

and the legislature distinguished "confinement" from release on parole and suspended and probated sentences. Allen v. State, 286 Ga. 392, 687 S.E.2d 799, 2010 Ga. LEXIS 82 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Actions of Counsel

Counsel not ineffective in failing to object to use of old convictions. — Despite the age of the defendant's three prior convictions, trial counsel reasonably did not object to the convictions' use for impeachment purposes. Newman v. State, 309 Ga. 171, 844 S.E.2d 775, 2020 Ga. LEXIS 457 (2020).

Effective assistance of counsel. — Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of defendant's conviction for giving false information that was less than 10 years old because former O.C.G.A. § 24-9-84.1(a)(3) and (b) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. Habersham v. State, 289 Ga. App. 718, 658 S.E.2d 253, 2008 Ga. App. LEXIS 190 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the defendant by showing the minor nature of one of the violations, were objectively reasonable. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. Noellien v. State, 298 Ga. App. 47, 679 S.E.2d 75, 2009 Ga. App. LEXIS 582 (2009) (decided under former O.C.G.A. § 24-9-84.1).

With regard to a defendant's conviction for aggravated assault, although the prosecutor was impermissibly permitted to impeach a defense witness by asking the witness about a recent guilty plea to two counts of theft by taking, which was not a felony or a crime which involved dishonesty or making a false statement, the defendant failed to establish that defense counsel's failure to object rendered defense counsel ineffective. At the hearing on the defendant's motion for a new trial, defense counsel was not questioned on whether the failure to object was strategic and, given the overwhelming evidence of the defendant's guilt, the defendant failed to show that there was a reasonable probability that the verdict would have been different if defense counsel had objected. Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64, 2009 Ga. App. LEXIS 885 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to former O.C.G.A. § 24-9-84.1(b) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141, 2010 Ga. LEXIS 815 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Defendant did not show a reasonable probability that the trial would have ended differently if trial counsel had uncovered all the details about the victim's first offender plea and cross-examined the victim about the victim's possible bias toward the state because five witnesses separately testified that the defendant assaulted the victims with a gun; thus, even if the jury decided to completely disregard the victim's testimony based on successful cross-examination, the testimony of four other eyewitnesses remained. Strong v.

State, 308 Ga. App. 558, 707 S.E.2d 914, 2011 Ga. App. LEXIS 237 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court's conclusion that trial counsel's failure to obtain certified copies of the victim's prior felony convictions and first offender plea, which the defendant asserted would have been admissible to impeach the victim and show bias under former O.C.G.A. § 24-9-84.1, did not constitute ineffective assistance was not clearly erroneous because counsel made a strategic decision not to expend the limited resources of the office to obtain the certified copies, choosing instead to focus on other avenues of defense. Strong v. State, 308 Ga. App. 558, 707 S.E.2d 914, 2011 Ga. App. LEXIS 237 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial counsel did not erroneously fail to impeach a state's witness under former O.C.G.A. § 24-9-84.1(a)(3) with evidence of the witness's prior misdemeanor convictions for theft by receiving stolen property and theft by taking because the defendant failed to show that the theft convictions would have been admitted for impeachment purposes at trial; the evidence the defendant presented at the motion for new trial hearing did not show that the misdemeanor theft convictions involved fraud or deceit within the meaning of former § 24-9-84.1(a)(3). Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158, 2011 Ga. App. LEXIS 172 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial counsel was not ineffective for failing to impeach the victim with felony convictions under former O.C.G.A. § 24-9-84.1 because the defendant did not show that, but for counsel's failure to introduce the victim's earlier convictions, there was a reasonable probability that the outcome of the trial would have been different; the victim was referred to as "not trustworthy" and "a thief" during the trial, and the victim's conviction for burglary was admitted and referenced repeatedly during the trial. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925, 2011 Ga. App. LEXIS 652 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial counsel was not ineffective for failing to object when the prosecuting attorney offered certified copies of the defendant's prior felony conviction to impeach the defendant's testimony under former O.C.G.A. § 24-9-84.1(a) because the trial court properly could have concluded that the probative value of the conviction substantially outweighed any prejudicial effect so the failure to object was not unreasonable; the prior conviction was recent, probative of the defendant's credibility as a testifying witness, and involved conduct dissimilar to the burglary for which the defendant was on trial. Robinson v. State, 312 Ga. App. 110, 717 S.E.2d 694, 2011 Ga. App. LEXIS 908 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Counsel was not ineffective in failing to move to exclude the defendant's statement to police because counsel's strategy was to put the defendant's version of the events forward without calling the defendant to the stand where the defendant would have been impeached with several prior felony convictions. Welch v. State, 298 Ga. 320, 781 S.E.2d 768, 2016 Ga. LEXIS 67 (2016) (decided under former O.C.G.A. § 24-9-84.1(a)(2)).

Trial counsel was not ineffective for failing to impeach a neighbor with a prior murder conviction because the prior conviction was beyond the 10-year time limit. Williams v. State, 302 Ga. 474, 807 S.E.2d 350, 2017 Ga. LEXIS 922 (2017).

Counsel was not ineffective for failing to impeach the woman who saw the shootings because, at the hearing on the motion for new trial, the defendant never asked counsel why counsel did not impeach the woman with the woman's prior conviction for giving a false name to a police officer, and the supreme court assumed that counsel declined to do so as a matter of strategy; and a competent lawyer could have concluded reasonably that it was better to portray the woman as well-meaning-but-mistaken, rather than attempting to portray the woman as dishonest by impeaching the woman with a prior conviction. Wofford v. State, 305 Ga. 694, 827 S.E.2d 652, 2019 Ga. LEXIS 278 (2019).

Appellant's felony murder conviction was upheld because decision of appellant's trial counsel to take it easy on sympathetic witness that counsel did not want to be seen as attacking was strategic deci-

Actions of Counsel (Cont'd)

sion and did not constitute ineffective assistance of counsel. Patterson v. State, 314 Ga. 167, 875 S.E.2d 771, 2022 Ga. LEXIS 184 (2022).

Counsel not ineffective. — While trial counsel might have been deficient by failing to contend that the probative value of admitting the defendant's prior convictions for impeachment purposes did not substantially outweigh the prejudicial effect of the evidence, given that the defendant failed to show prejudice, this claim failed. Miller v. State, 283 Ga. 412, 658 S.E.2d 765, 2008 Ga. LEXIS 264 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Defense counsel properly advised a defendant in the defendant's prosecution for, inter alia, malice murder that, if the defendant testified at trial, the state could attempt to introduce prior convictions into evidence as the state was permitted to do so under former O.C.G.A. § 24-9-84.1(a)(2), even if the defendant's character was not placed in issue, so long as the probative value of admitting the evidence substantially outweighed the prejudicial effect of the evidence. Brooks v. State, 285 Ga. 246, 674 S.E.2d 871, 2009 Ga. LEXIS 82 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to demonstrate ineffective assistance of counsel in the defendant's prosecution for, inter alia, robbery by force because it was a reasonable strategy to agree to the admission under former O.C.G.A. § 24-9-84.1(b) of a prior 1992 Texas conviction for possession of cocaine, even though the conviction was over 10 years old, as the defendant testified on the defendant's own behalf and wanted to put it all out there. Everett v. State, 297 Ga. App. 351, 677 S.E.2d 394, 2009 Ga. App. LEXIS 429 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Jury Charge

Limiting instruction on prior convictions not required. — In a defendant's prosecution for malice murder and armed robbery, the trial court did not err in failing to instruct the jury without request that the jurors limit their consideration of the defendant's prior convictions to the purpose of impeachment only under former O.C.G.A. § 24-9-84.1(a) as information regarding the defendant's prior convictions was not obtained in violation of the defendant's constitutional rights against self-incrimination under U.S. Const., amend. 5. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1, 2009 Ga. LEXIS 44 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Jury charge not required if impeached witness was not primary witness. — Trial court did not err in refusing a defendant's requested charge on impeachment of an accomplice witness by proof of a crime of moral turpitude pursuant to former O.C.G.A. § 24-9-84.1(a)(1), although an instruction on impeachment by proof of a prior conviction was warranted. Any failure to give such an instruction was harmless because the witnesses were not "primary" witnesses; the defendant was the primary witness. Stewart v. State, 286 Ga. 669, 690 S.E.2d 811, 2010 Ga. LEXIS 240 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Appeals

Issue waived on appeal. — Defendant waived for purposes of appeal defendant's claim that the defendant did not have to provide advance written notice to the state of defendant's intent to introduce the victim's prior conviction to impeach the victim since the conviction was not more than ten years old for purposes of former O.C.G.A. § 24-9-84.1 because the defendant's trial counsel did not present that argument to the trial court but told the trial court that the defendant filed the notice of intent for the reason that the conviction was more than ten years in age; counsel then argued that defendant's advance written notice to the state was sufficient, but the defendant did not argue that the notice did not need to be given under former § 24-9-84.1(b), and in light of trial counsel's actions, the defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of former § 24-9-84.1(b). Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642, 2010 Ga. App. LEXIS 777

(2010) (decided under former O.C.G.A. § 24-9-84.1).

Supreme court was precluded from reviewing on appeal the defendant's claim that the trial court violated former O.C.G.A. § 24-9-84.1 by admitting into evidence the defendant's prior convictions for drug offenses and by failing to enter express findings in the record because although the defendant testified and admitted the drug convictions on direct examination, the record did not contain any previous motion in limine, objection, hearing, or ruling regarding the admissibility of those prior convictions; those omissions were not cured by trial counsel's testimony that, although counsel was not looking at the transcripts and was speaking strictly from memory, counsel had been under the impression that the prior convictions would come in, and even if the defendant had previously moved for exclusion of the prior convictions and a hearing had been held, the absence of any ruling on the record would take the case out of the usual rule that the record was preserved and the defendant was not required to object to the evidence during trial. Collier v. State, 288 Ga. 756, 707 S.E.2d 102, 2011 Ga. LEXIS 178 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of former O.C.G.A. § 24-9-84.1(b) because the trial court held that evidence of the victim's three older convictions was inadmissible since the convictions were more than ten years old, and the defendant had not provided written notice within ten days of trial; no objection was made to the trial court's ruling, and the defendant did not at any point argue that the convictions were less than ten years old. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925, 2011 Ga. App. LEXIS 652 (2011) (decided under former O.C.G.A. § 24-9-84.1).

RESEARCH REFERENCES

ALR.

Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

24-6-610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion shall not be admissible for the purpose of proving that by reason of the nature of the beliefs or opinions the witness's credibility is impaired or enhanced.

History.

Code 1981, § 24-6-610, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Religious beliefs or opinions, Fed. R. Evid. 610.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5268 and former Code 1933, § 38-1602 are included in the annotations for this Code section.

Belief in supreme being. — Although desirable, it was not essential to the witness's competency that the witness believe in a supreme being, or that the witness be aware of God's existence. Smith v. State, 247 Ga. 511, 277 S.E.2d 53, 1981 Ga. LEXIS 767 (1981) (decided under former Code 1933, § 38-1602).

Individual acts of witness. — It was not competent to take up individual acts of a witness and inquire of the witness as to the significance of such acts when viewed from a religious standpoint. Otherwise, practically every act of a man's life might be taken up and examined into. Eugee v. State, 159 Ga. 604, 126 S.E. 471, 1925 Ga. LEXIS 32 (1925) (decided under former Civil Code 1910, § 5268).

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, § 628.
C.J.S.
98 C.J.S. (Rev), Witnesses, § 191 et seq.
ALR.
Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it, 76 A.L.R.3d 539.

24-6-611. Mode and order of witness interrogation and presentation.

(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(b) A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

(c) Leading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

History.
Code 1981, § 24-6-611, enacted by Ga. L. 2011, p. 99, § 2/HB 24.
Cross references.
Cross-examination of defendant at pretrial proceedings, § 17-7-28.

Privilege against self-incrimination and testimony of an accused in a criminal case, § 24-5-506.

Mode and order of examining witnesses and presenting evidence, Fed. R. Evid. 611.

Law reviews.

For comment on Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for rape, see 19 Ga. B.J. 95 (1956).

For comment discussing the use of treatises in cross-examining an expert, in light of Hopkins v. Gromovsky, 198 Va. 389, 94 S.E.2d 190 (1956), see 20 Ga. B.J. 109 (1957).

For article, "The Right of Confrontation: Its History and Modern Dress," see 8 J. of Pub. L. 381 (1959).

For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

For comment on Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968), see 5 Ga. St. B.J. 377 (1969).

For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to probe relationship of a witness to a party, see 21 Mercer L. Rev. 347 (1969).

For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969), see 6 Ga. St. B.J. 294 (1970).

For note, "Impeachment of One's Own Witness in Georgia," see 9 Ga. St. B.J. 355 (1973).

For comment on Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 973 (1974).

For note discussing party's right to impeach own witness in light of Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975), see 28 Mercer L. Rev. 389 (1976).

For article discussing cross-examination techniques, see 16 Ga. St. B.J. 117 (1980).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Code 1873, §§ 3864, 3865, 3869, former Code 1882, §§ 3864, 3865, 3869, former Ga. L. 1890-91, p. 78, § 1, former Civil Code 1895, §§ 5281, 5282, 5283, 5290, former Penal Code 1895, §§ 1018, 1019, 1024, former Civil Code1910, §§ 5870, 5871, 5872, 5879, former Penal Code 1910, §§ 1044, 1045, 1050, former Code 1933, §§ 38-1704, 38-1705, 38-1706, 38-1801, and former O.C.G.A. §§ 24-9-62, 24-9-63, 24-9-64, 24-9-81 are included in the annotations for this Code section.

Balancing witness interest with right to cross examine. — Right of a witness to be protected from improper questioning must be balanced against the right of parties to a thorough and sifting cross-examination. White v. Knapp, 31 Ga. App. 344, 120 S.E. 796, 1923 Ga. App. LEXIS 941 (1923) (decided under former Civil Code 1910, § 5870); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Civil Code 1910, § 5870); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1704); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131, 1952 Ga. App. LEXIS 845 (1952) (decided under former Code 1933, § 38-1704); Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511, 1971 Ga. App. LEXIS 1281 (1971) (decided under former Code 1933, § 38-1704); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466, 1974 Ga. LEXIS 994 (1974) (decided under former Code 1933, § 38-1704); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492, 1978 Ga. App. LEXIS 1710 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 835, 268 S.E.2d 330, 1980 Ga. LEXIS 955 (1980) (decided under former Code 1933, § 38-1704).

Witness's rights must be balanced with the party's right to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134, 1990 Ga. App. LEXIS 173 (1990) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486, 1994 Ga. App. LEXIS 1299 (1994), cert. denied, No. S95C0589, 1995 Ga. LEXIS 413 (Ga. Mar. 17, 1995) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64).

Failure to charge former statute was not error in absence of a timely written request. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Denial of grandparent's request to appear by telephone. — In a grandparent visitation matter, the trial court did not abuse the court's discretion in connection with the court's denial of the grandmother's request to appear by telephone, pursuant to O.C.G.A. § 19-9-50(b), because the trial court properly determined that the grandmother was not indigent based on the information provided that the grandmother's monthly income was $4,669. Devlin v. Devlin, 339 Ga. App. 520, 791 S.E.2d 840, 2016 Ga. App. LEXIS 506 (2016).

Use of doll for demonstration. — Trial court did not abuse the court's discretion in allowing the medical examiner to use a baby doll to demonstrate how some of the victim's injuries appeared to have been inflicted and the amount of force that would have been required to cause the victim's head and neck injuries. Smith v. State, 299 Ga. 424, 788 S.E.2d 433, 2016 Ga. LEXIS 453 (2016).

Cross Examination

Purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witness, and it is better for cross-examination to be too free than too restricted. Carroll v. Hill, 80 Ga. App. 576, 56 S.E.2d 821, 1949 Ga. App. LEXIS 883 (1949) (decided under former Code 1933, § 38-1705); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456, 1950 Ga. App. LEXIS 1185 (1950) (decided under former Code 1933, § 38-1705); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832, 1952 Ga. App. LEXIS 961 (1952) (decided under former Code 1933, § 38-1705); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828, 1954 Ga. App. LEXIS 548 (1954) (decided under former Code 1933, § 38-1705).

General rule favors freedom. — As a general rule, it is better that cross-exami-

nation should be too free than too restricted. Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511, 1971 Ga. App. LEXIS 1281 (1971) (decided under former Code 1933, § 38-1704).

Exposure of blundering witness. — There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations because a witness, however fair and honest and truthful, may not be careful enough; and it is to the interest of justice to expose the blundering of a witness, as well as the witness's willful departures from veracity. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1705).

Exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Hines v. State, 249 Ga. 257, 290 S.E.2d 911, 1982 Ga. LEXIS 1133 (1982) (decided under former O.C.G.A. § 24-9-64).

State's right to cross-examine. — State, like any other party, has the right to conduct a thorough and sifting cross-examination of a witness. Gentry v. State, 226 Ga. App. 216, 485 S.E.2d 824 (decided under former O.C.G.A. § 24-9-64).

More than one party examining witness. — Appellate court will not interfere with the action of the trial judge in allowing "double" or "multiple" cross-examination of witnesses, particularly in a situation involving more than two parties, absent a showing of manifest abuse of discretion. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213, 1972 Ga. App. LEXIS 1009 (1972) (decided under former Code 1933, § 38-1705).

Second sentence, applicable in cases when there is more than one party on one side, requires only that those parties have "distinct interests," not necessarily opposing interests. Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888, 1976 Ga. LEXIS 1291 (1976) (decided under former Code 1933, § 38-1705).

In a negligence case stemming from a motor vehicle collision, the defendant employee and the defendant employer were properly allowed to make separate cross-examinations, and any error was harmless because O.C.G.A. § 24-6-611 did not prohibit two or more parties with identical interests from cross-examining the same witness; the cross-examination by the defendant employer's counsel of the plaintiff and the plaintiff's expert witness were brief and did not provide the jury with any new information; and § 24-6-611 would not have applied to the key testimony of defense witnesses. Smith v. Laney, 358 Ga. App. 754, 856 S.E.2d 355, 2021 Ga. App. LEXIS 126 (2021).

Depositions. — When a witness is examined by commission, the party cross-examining may withdraw the party's cross questions if the party chooses — the other party having the liberty to read them at that party's option. Williams v. C. G.H. Kelsey Halsted, 6 Ga. 365, 1849 Ga. LEXIS 47 (1849) (decided under former law).

Prior thorough cross-examination of a witness unavailable at a trial. — When the preliminary hearing testimony of an unavailable witness is subject to extensive cross-examination, its admission at trial does not abridge the defendant's right of cross-examination. Moody v. State, 273 Ga. 24, 537 S.E.2d 666, 2000 Ga. LEXIS 772 (2000) (decided under former O.C.G.A. § 24-9-64).

Ex parte affidavits should not be allowed in evidence in any trial since the evidence is finally adjudicated because admission denies the privilege of cross-examination. Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125, 1957 Ga. LEXIS 303 (1957) (decided under former Code 1933, § 38-1705); Hunsucker v. Balkcom, 220 Ga. 73, 137 S.E.2d 43, 1964 Ga. LEXIS 453 (1964) (decided under former Code 1933, § 38-1705); Hartley v. Caldwell, 233 Ga. 333, 155 S.E.2d 389 (1967) (decided under former Code 1933, § 38-1705).

Records in regular course of business. — Trial courts of the state may not consider reports of the welfare departments of the counties in the trial of a case involving the custody of minors, and it is reversible error to consider such matter. Rather, the person or persons who made the investigation should be produced in court and submitted to cross-examination. Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125, 1957 Ga. LEXIS 303 (1957) (decided under former Code 1933, § 38-1705).

Cross Examination (Cont'd)

Ga. L. 1952, p. 177, §§ 1-3 (see now O.C.G.A. § 24-8-803) did not authorize the admission of a written record without cross-examination of the author under former Code 1933, § 38-1705. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370, 1957 Ga. App. LEXIS 938 (1957) (decided under former Code 1933, § 38-1705).

Former statute set forth the right of every party to cross-examination, thorough and sifting, of the witnesses called against that party, and a trial court's consideration of an ex parte report submitted by a psychiatrist of the psychiatrist's evaluation of defendant denied the defendant of this right. Rudd v. State, 150 Ga. App. 255, 257 S.E.2d 348, 1979 Ga. App. LEXIS 2136 (1979) (decided under former Code 1933, § 38-1705).

Interrogatory procedure wherein a plaintiff propounded interrogatories to be answered by the plaintiff, with both the defendant and defendant's counsel excluded, thus denying the defendant the right to cross-examination, is wholly void. Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115, 1961 Ga. LEXIS 423 (1961), overruled in part, Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662, 1982 Ga. LEXIS 870 (1982) (decided under former Code 1933, § 38-1705).

Assignment of error. — Rule that a party who complains of the rejection of oral testimony must show that the court was informed as to what the witness would answer does not apply to cross-examination. Macon Union Coop. Ass'n v. Chance, 31 Ga. App. 636, 122 S.E. 66, 1924 Ga. App. LEXIS 111 (1924) (decided under former Civil Code 1910, § 5871); City of La Grange v. Pound, 50 Ga. App. 219, 177 S.E. 762, 1934 Ga. App. LEXIS 713 (1934) (decided under former Code 1933, § 38-1705); McKoy v. Enterkin, 181 Ga. 447, 182 S.E. 518, 1935 Ga. LEXIS 118 (1935) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854, 1959 Ga. App. LEXIS 959 (1959) (decided under former Code 1933, § 38-1705); Cambron v. Canal Ins. Co., 246 Ga. 147, 269 S.E.2d 426, 1980 Ga. LEXIS 1293 (1980), overruled in part, Wright v. Young, 297 Ga. 683, 777 S.E.2d 475, 2015 Ga. LEXIS 666 (2015), overruled in part as stated in Williams v. State, 339 Ga. App. 158, 793 S.E.2d 485, 2016 Ga. App. LEXIS 595 (2016), overruled in part as stated in Syed v. Merchant's Square Office Bldgs., LLC, 354 Ga. App. 365, 841 S.E.2d 8, 2020 Ga. App. LEXIS 173 (2020), overruled in part as stated in Moore v. State, 308 Ga. 556, 842 S.E.2d 65, 2020 Ga. LEXIS 291 (2020) (decided under former Code 1933, § 38-1705).

State's cross-examination of defendant's spouse does not put the defendant's character in evidence. There is no prejudice to the defendant arising from such cross-examination; thus, no rebuke of the district attorney, instruction of the jury, or mistrial is required. Beasley v. State, 168 Ga. App. 255, 308 S.E.2d 560, 1983 Ga. App. LEXIS 2740 (1983) (decided under former O.C.G.A. § 24-9-64).

Allowing witness not within purview of former statute to be called for purposes of cross-examination was harmful error. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (decided under former Code 1933, § 38-1801); Jackson v. State, 124 Ga. App. 488, 184 S.E.2d 185, 1971 Ga. App. LEXIS 982 (1971) (decided under former Code 1933, § 38-1801).

Limitation on cross examination of witness regarding victim's criminal past. — The transcript showed that, given the questions posed by the defendant, the jury had sufficient information to make a discriminating appraisal of the witness's credibility and the basis for the witness's opinion of the victim's character trait for peacefulness; the trial court did not abuse the court's discretion when the court disallowed the defendant's cross-examination concerning the victim's 1992 conviction for robbery by intimidation. Griffin v. State, 309 Ga. 860, 849 S.E.2d 191, 2020 Ga. LEXIS 661 (2020).

Right of Cross-Examination

In general. — Right of cross-examination is a substantial right, the preservation of which is essential to a proper administration of justice, and extends to all matters within the knowledge of the

witness, the disclosure of which is material to the controversy; and being a substantial right, it should never be abridged or denied by the court. Lunday v. Thomas, 26 Ga. 537, 1858 Ga. LEXIS 357 (1858) (decided under former law); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282, 1894 Ga. LEXIS 592 (1894) (decided under former Code 1882, § 3864); Barnwell v. Hannegan, 105 Ga. 396, 31 S.E. 116, 1898 Ga. LEXIS 523 (1898) (decided under former Civil Code 1895, § 5282); Huff v. State, 106 Ga. 432, 32 S.E. 348, 1899 Ga. LEXIS 698 (1899) (decided under former Penal Code 1895, § 1018); Atlanta & B. Air-Line Ry. v. McManus, 1 Ga. App. 302, 58 S.E. 258, 1907 Ga. App. LEXIS 223 (1907) (decided under former Civil Code 1895, § 5282); Becker v. Donalson, 133 Ga. 864, 67 S.E. 92, 1910 Ga. LEXIS 84 (1910) (decided under former Civil Code 1910, § 5871); Brundage v. State, 14 Ga. App. 460, 81 S.E. 384, 1914 Ga. App. LEXIS 334 (1914) (decided under former Penal Code 1910, § 1044); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570, 1933 Ga. App. LEXIS 673 (1933) (decided under former Penal Code 1910, § 1044); Herndon v. State, 178 Ga. 832, 174 S.E. 597, 1934 Ga. LEXIS 197 (1934); McGinty v. State, 59 Ga. App. 675, 2 S.E.2d 134, 1939 Ga. App. LEXIS 390 (1939) (decided under former Code 1933, § 38-1705); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121, 1939 Ga. App. LEXIS 251 (1939) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-1705); Frady v. State, 212 Ga. 84, 90 S.E.2d 664, 1955 Ga. LEXIS 554 (1955) (decided under former Code 1933, § 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387, 1957 Ga. App. LEXIS 740 (1957) (decided under former Code 1933, § 38-1705); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115, 1961 Ga. LEXIS 423 (1961), overruled in part, Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662, 1982 Ga. LEXIS 870 (1982) (decided under former Code 1933, § 38-1705); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819, 1966 Ga. LEXIS 551 (1966) (decided under former Code 1933, § 38-1705); Gunnells v. Cotton States Mut. Ins. Co., 117 Ga. App. 123, 159 S.E.2d 730, 1968 Ga. App. LEXIS 996 (1968) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385, 1968 U.S. Dist. LEXIS 9634 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1705); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637, 1969 Ga. App. LEXIS 944 (1969) (decided under former Code 1933, § 38-1705); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639, 1970 Ga. App. LEXIS 860 (1970) (decided under former Code 1933, § 38-1705); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450, 1972 Ga. LEXIS 766 (1972) (decided under former Code 1933, § 38-1705); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213, 1972 Ga. App. LEXIS 1009 (1972) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861, 1973 Ga. App. LEXIS 1037 (1973) (decided under former Code 1933, § 38-1705); Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374, 1974 Ga. App. LEXIS 1129 (1974) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585, 1975 Ga. App. LEXIS 1864 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500, 1976 Ga. App. LEXIS 2426 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48, 1976 Ga. App. LEXIS 2476 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152, 1976 Ga. App. LEXIS 1761 (1976) (decided under former Code 1933, § 38-1705); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1, 1976 Ga. App. LEXIS 1436 (1976) (decided under former Code 1933, § 38-1705); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395, 1977 Ga. App. LEXIS 2441 (1977) (decided under former Code 1933, § 38-1705); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484, 1976 Ga. App. LEXIS 1973 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580, 1977 Ga. LEXIS 908 (1977), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492, 1978 Ga. App. LEXIS 1710 (1978) (decided under former Code 1933, § 38-1705); Goldgar v. Galbraith, 155 Ga. App.

Right of Cross-Examination (Cont'd)

429, 270 S.E.2d 833, 1980 Ga. App. LEXIS 2612 (1980) (decided under former Code 1933, § 38-1705); Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719, 1980 Ga. App. LEXIS 2689 (1980) (decided under former Code 1933, § 38-1705).

When a witness is sworn by one party, the other party has the right to cross-examine the witness at large. Lunday v. Thomas, 26 Ga. 537, 1858 Ga. LEXIS 357 (1858) (decided under former law); Brown v. State, 28 Ga. 199, 1859 Ga. LEXIS 180 (1859) (decided under former law); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936) (decided under former law).

Although the defendant's plea had been stricken, and although the defendant had no right to introduce any evidence, yet when the plaintiff, in order to make out plaintiff's case and secure a verdict, found it necessary to impanel a jury and to introduce witnesses to testify to facts not appearing on the face of the notes sued upon, the defendant, through defense counsel, had a right to cross-examine the witnesses. Daniel v. Georgia R.R. Bank, 44 Ga. App. 787, 163 S.E. 311, 1932 Ga. App. LEXIS 509 (1932) (decided under former Civil Code 1910, § 5871).

Although the scope of the cross-examination is not unlimited, every party has a right to a thorough and sifting cross-examination of opposing witnesses, the scope of which examination rests largely within the discretion of the trial judge. Jackson v. State, 157 Ga. App. 604, 278 S.E.2d 5, 1981 Ga. App. LEXIS 1929 (1981) (decided under former Code 1933, § 38-1705).

Party has the right to a thorough and sifting cross-examination of the witnesses called against the party and, usually, to conduct that examination by use of leading questions. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983) (decided under former O.C.G.A. § 24-9-64).

Witness's rights under former O.C.G.A. § 24-9-62 (see now O.C.G.A. §§ 24-6-611 and 24-6-623) must be balanced with the party's right under former O.C.G.A. § 24-9-64 to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134, 1990 Ga. App. LEXIS 173 (1990) (decided under former O.C.G.A. § 24-9-64); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486, 1994 Ga. App. LEXIS 1299 (1994), cert. denied, No. S95C0589, 1995 Ga. LEXIS 413 (Ga. Mar. 17, 1995) (decided under former O.C.G.A. § 24-9-64).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-9-64).

Trial court committed plain error by improperly bolstering the victims' credibility when the judge asked a witness specific questions regarding the victims, in violation of O.C.G.A. § 17-8-57, and the error was compounded when the trial court denied defendant the right to cross-examine the witness, pursuant to former O.C.G.A. § 24-9-64, in an attempt to rebut the bolstering of the victims' credibility that was performed by the trial court. Craft v. State, 274 Ga. App. 410, 618 S.E.2d 104, 2005 Ga. App. LEXIS 778 (2005), cert. denied, No. S05C1940, 2005 Ga. LEXIS 883 (Ga. Nov. 18, 2005) (decided under former O.C.G.A. § 24-9-64).

Employer entitled to cross-examine in workers' compensation case. — In a worker's compensation case, the administrative law judge erred in preventing the employer from pursuing the employer's right to a thorough and sifting cross-examination of the claimant because, as a defense, evidence tending to show a motive for malingering was relevant. David Jordan Logging Co. v. Sales, 203 Ga. App. 410, 416 S.E.2d 803, 1992 Ga. App. LEXIS 440 (1992), cert. denied, No. S92C0832,

1992 Ga. LEXIS 408 (Ga. May 8, 1992) (decided under former O.C.G.A. § 24-9-64).

Right does not apply to irrelevant information. — Judgment in favor of the plaintiffs in a medical malpractice action was affirmed; trial court did not prevent defendants from cross-examining plaintiffs' expert as to plaintiff's expert's mental illnesses in violation of former O.C.G.A. § 24-9-64, but only from cross-examining the expert as to a prior suit for disability benefits which was irrelevant. Fredericks v. Hall, 275 Ga. App. 412, 620 S.E.2d 638, 2005 Ga. App. LEXIS 984 (2005) (decided under former O.C.G.A. § 24-9-64).

Reliance of expert on report. — By giving a report written by the defendant and sent to plaintiff's counsel for "informational purposes" to plaintiff's expert, the defendant violated the agreement between the parties not to use it in the litigation, and reliance on the report by defendant's expert required allowing the plaintiff to cross-examine that expert using the report. Lewis v. Emory Univ., 235 Ga. App. 811, 509 S.E.2d 635 (decided under former O.C.G.A. § 24-9-64).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer about an incriminating statement made by the defendant after the state introduced evidence concerning the statement. former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822) ("When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence") and former O.C.G.A. § 24-9-64 were inapplicable because there had been no direct examination relating to any part of the statement by the state. Davis v. State, 261 Ga. 382, 405 S.E.2d 648, 1991 Ga. LEXIS 324 (1991) (decided under former O.C.G.A. § 24-9-64).

Designation of witness as hostile. — It was not error for trial judge to refuse to permit the defendant to have a police officer designated a hostile witness so that the officer could be called as a witness for cross-examination, when it was not shown that the witness was hostile; and when it appeared from the record that counsel was allowed to ask leading questions substantially identical to the question counsel complained was not permitted. Williams v. State, 164 Ga. App. 562, 298 S.E.2d 282, 1982 Ga. App. LEXIS 2870 (1982) (decided under former O.C.G.A. § 24-9-64).

Uncooperative witness. — Trial court did not abuse the court's discretion in allowing the state to treat a witness as hostile and ask leading questions after the witness was uncooperative in answering questions regarding the account of the shooting that the witness had previously provided. Brown v. State, 314 Ga. 193, 875 S.E.2d 784, 2022 Ga. LEXIS 183 (2022).

Limiting cross-examination of victim was abuse of discretion. — By cutting off inquiry of the victim with respect to the victim's gang membership (or lack thereof) or whether a facial tattoo reflected such membership, the trial court prevented the defendant from exposing to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the victim and, thus, the trial court abused the court's discretion in limiting the defendant's cross-examination of the victim. Williams v. State, 356 Ga. App. 19, 846 S.E.2d 190, 2020 Ga. App. LEXIS 403 (2020).

New trial for denial of right. — Substantial denial of the right of cross-examination is good cause for the grant of a new trial. Hall v. State, 117 Ga. 263, 43 S.E. 718, 1903 Ga. LEXIS 213 (1903) (decided under former Penal Code 1895, § 1018); Becker v. Donalson, 133 Ga. 864, 67 S.E. 92, 1910 Ga. LEXIS 84 (1910) (decided under former Civil Code 1910, § 5871); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936); Thompson v. State, 181 Ga. 620, 183 S.E. 566, 1936 Ga. LEXIS 400 (1936) (decided under former Code 1933, § 38-1705); Clifton v. State, 187 Ga. 502, 2 S.E.2d 102, 1939 Ga. LEXIS 745 (1939) (decided under former Code 1933, § 38-1705); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121, 1941 Ga. App. LEXIS 526 (1941) (decided under former Code 1933, § 38-1705); Cameron v.

Right of Cross-Examination (Cont'd)

State, 66 Ga. App. 414, 18 S.E.2d 16, 1941 Ga. App. LEXIS 219 (1941) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943) (decided under former Code 1933, § 38-1705); Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820, 1944 Ga. App. LEXIS 115 (1944) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-1705); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357, 1949 Ga. App. LEXIS 686 (1949) (decided under former Code 1933, § 38-1705); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456, 1950 Ga. App. LEXIS 1185 (1950) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665, 1952 Ga. App. LEXIS 793 (1952) (decided under former Code 1933, § 38-1705); Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84, 1953 Ga. App. LEXIS 1007 (1953) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854, 1959 Ga. App. LEXIS 959 (1959) (decided under former Code 1933, § 38-1705); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1705); Morris v. State, 150 Ga. App. 94, 256 S.E.2d 674, 1979 Ga. App. LEXIS 2110 (1979) (decided under former Code 1933, § 38-1705).

Motion for new trial was not granted when defendant learned after the trial that a witness who testified at trial but was not cross-examined had information of value to defendant's case. Hall v. State, 117 Ga. 263, 43 S.E. 718, 1903 Ga. LEXIS 213 (1903) (decided under former Penal Code 1895, § 1018).

Curing refusal to allow cross-examination. — Error in refusing to allow defendant to cross-examine a witness is not cured because the witness is subsequently introduced by defendant and examined as to the facts. White v. Dinkins, 19 Ga. 285, 1856 Ga. LEXIS 172 (1856) (decided under former law).

Personal examination by defendant. — Prisoner's rights are not violated if the prisoner is refused the privilege of personally cross-examining a hostile witness after the prisoner has stood by approvingly while the prisoner's counsel has conducted a thorough cross-examination. Roberts v. State, 14 Ga. 8, 1853 Ga. LEXIS 185 (1853) (decided under former law).

Codefendant's cross-examination of witness. — Trial court's sustaining of an objection by defendant's codefendant to the former's cross-examination of a police officer regarding a prior consistent statement made to the officer did not violate defendant's right to cross-examination since the court indicated that if the defendant testified the defendant could then cross-examine the officer on the statement. Wilson v. State, 227 Ga. App. 59, 488 S.E.2d 121 (decided under former O.C.G.A. § 24-9-64).

Court's interjection did not violate right. — Defendant's claim that the trial court's interjections interfered with the defendant's Sixth Amendment right to confrontation and the defendant's statutory right to a thorough and sifting cross-examination failed because the interjections did not hinder the defendant's attempts to test a witness's credibility and, thus, did not amount to an abuse of discretion. Barton-Smith v. State, 309 Ga. 799, 848 S.E.2d 384, 2020 Ga. LEXIS 597 (2020).

Right to subpoena crime lab work product. — Broad right of cross-examination afforded by former O.C.G.A. § 24-9-64 allowed a defendant the right to subpoena data relied upon by the state crime lab chemist, including graphs generated from gas chromatography. Price v. State, 269 Ga. 222, 498 S.E.2d 262 (decided under former O.C.G.A. § 24-9-64).

Calling witnesses. — It does not abridge the defendant's right of confrontation and cross-examination for the court to refuse to require the state to summon a witness not relied on by the state to make out its case before the jury as a witness. Bonds v. State, 232 Ga. 694, 208 S.E.2d 561, 1974 Ga. LEXIS 1059 (1974) (decided under former Code 1933, § 38-1705).

Witness not called to testify. — Trial court did not err in refusing to allow the defendant to cross-examine an officer who was present when the defendant made defendant's incriminating statement since this witness was not called to testify and did not present any direct testimony against the defendant. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262, 1994 Ga. App. LEXIS 152 (1994), cert. denied, No. S94C0851, 1994 Ga. LEXIS 626 (Ga. Apr. 7, 1994) (decided under former O.C.G.A. § 24-9-64).

Opposite party. — Defendant in a criminal case may be cross-examined with defendant's consent, but if defendant offers oneself for cross-examination there is no obligation upon the prosecution to conduct it. Roberson v. State, 12 Ga. App. 102, 76 S.E. 752, 1912 Ga. App. LEXIS 41 (1912) (decided under former Penal Code 1910, § 1044); Jones v. State, 18 Ga. App. 285, 89 S.E. 303, 1916 Ga. App. LEXIS 296 (1916) (decided under former Penal Code 1910, § 1044).

When counsel for the plaintiff calls defendant as a witness against oneself in order to prove only one point, the law permits the counsel for defendant to cross-examine the client. National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7, 1930 Ga. LEXIS 320 (1930) (decided under former Civil Code 1910, § 5871).

When a party to a suit calls the opposing party to the stand as a witness, it is within the discretion of the judge to refuse to prohibit the counsel for the opposing party from asking leading questions on cross-examination, and the fact that the court allowed the cross-questions complained of does not show such abuse of discretion as to authorize the grant of a new trial. Akridge v. Atlanta Journal Co., 56 Ga. App. 812, 194 S.E. 590, 1937 Ga. App. LEXIS 242 (1937) (decided under former Code 1933, § 38-1705).

Right of cross-examination of the opposite party does not include the right to require that party's presence in court, and such party may not be compelled to attend court except in the manner as other witnesses are required to attend court by subpoena. Johnston v. Dollar, 89 Ga. App. 876, 81 S.E.2d 502, 1954 Ga. App. LEXIS 601 (1954) (decided under former Code 1933, § 38-1705).

Right to cross examine guardian ad litem. — Trial court erred in depriving one parent and grandparent of the opportunity to question the guardian ad litem regarding the results of an investigation as the burden was theirs to establish that the child would be harmed if returned to the other parent and that it was in the best interest of the child to remain with the grandparent. Thus, the trial court's order deprived them of the opportunity to establish facts in support of their position that the child should remain in the grandparent's custody. Simmons v. Williams, 290 Ga. App. 644, 660 S.E.2d 435, 2008 Ga. App. LEXIS 382 (2008) (decided under former O.C.G.A. § 24-9-64).

Pro se defendant not prohibited from cross examining victim. — Trial court abused the court's discretion in a family violence protective order proceeding by prohibiting the defendant from cross-examining the victim because O.C.G.A. § 15-19-51 did not prohibit an individual proceeding pro se from representing themselves and employing their right to a thorough and sifting cross-examination of a witness called against them. Jha v. Menkee, 352 Ga. App. 81, 833 S.E.2d 759, 2019 Ga. App. LEXIS 527 (2019).

Admission of hearsay evidence violates right to cross-examination. — When officer testified that witness told the officer that the defendant had sold the witness drugs, this hearsay evidence was improperly admitted and deprived defendant of the right to cross-examination. Welch v. State, 231 Ga. App. 74, 498 S.E.2d 555 (decided under former O.C.G.A. § 24-9-64).

Hearsay evidence. — Excluding testimony that was purely hearsay did not deny the right of a thorough and sifting cross-examination. Bell v. State, 71 Ga. App. 430, 31 S.E.2d 109, 1944 Ga. App. LEXIS 386 (1944) (decided under former Code 1933, § 38-1705).

Scope of Cross-Examination

1. In General

Thorough and sifting cross-examination. — Right of thorough and sifting

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cross-examination extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy. Huff v. State, 106 Ga. 432, 32 S.E. 348, 1899 Ga. LEXIS 698 (1899) (decided under former Penal Code 1895, § 1018); White v. State, 121 Ga. 191, 48 S.E. 941, 1904 Ga. LEXIS 81 (1904) (decided under former Penal Code 1895, § 1018); Hagood v. State, 5 Ga. App. 80, 62 S.E. 641, 1908 Ga. App. LEXIS 19 (1908) (decided under former Penal Code 1895, § 1018); Hart v. State, 14 Ga. App. 364, 80 S.E. 909, 1913 Ga. App. LEXIS 448 (1913) (decided under former Penal Code 1910, § 1044); Richards v. Harpe, 42 Ga. App. 123, 155 S.E. 85, 1930 Ga. App. LEXIS 257 (1930) (decided under former Civil Code 1910, § 5871); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570, 1933 Ga. App. LEXIS 673 (1933) (decided under former Code 1933, § 38-1705); Williamson, Inman & Co. v. Thompson, 50 Ga. App. 564, 179 S.E. 289, 1935 Ga. App. LEXIS 222 (1935) (decided under former Code 1933, § 38-1705); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936); McGinty v. State, 59 Ga. App. 675, 2 S.E.2d 134, 1939 Ga. App. LEXIS 390 (1939) (decided under former Code 1933, § 38-1705); Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217, 1939 Ga. LEXIS 573 (1939) (decided under former Code 1933, § 38-1705); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121, 1939 Ga. App. LEXIS 251 (1939) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943) (decided under former Code 1933, § 38-1705); First Nat'l Bank v. Carmichael, 198 Ga. 309, 31 S.E.2d 811, 1944 Ga. LEXIS 423 (1944) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665, 1952 Ga. App. LEXIS 793 (1952) (decided under former Code 1933, § 38-1705); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131, 1952 Ga. App. LEXIS 845 (1952) (decided under former Code 1933, § 38-1705); Evans v. State, 210 Ga. 375, 80 S.E.2d 157, 1954 Ga. LEXIS 295 (1954) (decided under former Code 1933, § 38-1705); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828, 1954 Ga. App. LEXIS 548 (1954) (decided under former Code 1933, § 38-1705); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365, 1954 Ga. LEXIS 522 (1954) (decided under former Code 1933, § 38-1705); Rooker v. State, 211 Ga. 361, 86 S.E.2d 307, 1955 Ga. LEXIS 323 (1955) (decided under former Code 1933, § 38-1705); Frady v. State, 212 Ga. 84, 90 S.E.2d 664, 1955 Ga. LEXIS 554 (1955) (decided under former Code 1933, § 38-1705); Faircloth v. State, 95 Ga. App. 265, 97 S.E.2d 641, 1957 Ga. App. LEXIS 773 (1957) (decided under former Code 1933, § 38-1705); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818, 1966 Ga. LEXIS 491 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382, 1966 Ga. LEXIS 604 (1966) (decided under former Code 1933, § 38-1705); Millhollan v. Watkins Motor Lines, 116 Ga. App. 452, 157 S.E.2d 901, 1967 Ga. App. LEXIS 850 (1967) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385, 1968 U.S. Dist. LEXIS 9634 (N.D. Ga. 1968); (decided under former Code 1933, § 38-1705); State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770, 1969 Ga. App. LEXIS 890 (1969) (decided under former Code 1933, § 38-1705); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637, 1969 Ga. App. LEXIS 944 (1969) (decided under former Code 1933, § 38-1705); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639, 1970 Ga. App. LEXIS 860 (1970) (decided under former Code 1933, § 38-1705); Locke v. State, 229 Ga. 110, 189 S.E.2d 410, 1972 Ga. LEXIS 517 (1972) (decided under former Code 1933, § 38-1705); Saks Fifth Ave. v. Edwards, 128 Ga. App. 380, 196 S.E.2d 879, 1973 Ga. App. LEXIS 1485 (1973) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861, 1973 Ga. App. LEXIS 1037 (1973) (decided under former Code 1933, § 38-1705); Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375, 1974 Ga. App. LEXIS 1000 (1974) (decided under former Code 1933, § 38-1705); Gor-

don v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374, 1974 Ga. App. LEXIS 1129 (1974) (decided under former Code 1933, § 38-1705); Luke v. McGuire Ins. Agency of Ga., Inc., 133 Ga. App. 948, 212 S.E.2d 889, 1975 Ga. App. LEXIS 2344 (1975) (decided under former Code 1933, § 38-1705); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674, 1975 Ga. App. LEXIS 2192 (1975) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585, 1975 Ga. App. LEXIS 1864 (1975) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48, 1976 Ga. App. LEXIS 2476 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152, 1976 Ga. App. LEXIS 1761 (1976) (decided under former Code 1933, § 38-1705); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1, 1976 Ga. App. LEXIS 1436 (1976) (decided under former Code 1933, § 38-1705); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650, 1978 Ga. App. LEXIS 2865 (1978) (decided under former Code 1933, § 38-1705); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690, 1978 Ga. App. LEXIS 2879 (1978) (decided under former Code 1933, § 38-1705); Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457, 1979 Ga. App. LEXIS 3038 (1979) (decided under former Code 1933, § 38-1705); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522, 1980 Ga. App. LEXIS 1987 (1980) (decided under former Code 1933, § 38-1705); Crawford v. State, 154 Ga. App. 362, 268 S.E.2d 414, 1980 Ga. App. LEXIS 2168 (1980) (decided under former Code 1933, § 38-1705); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833, 1980 Ga. App. LEXIS 2612 (1980) (decided under former Code 1933, § 38-1705); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836, 1980 Ga. App. LEXIS 2620 (1980) (decided under former Code 1933, § 38-1705); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, § 38-1705); McDaniel v. DOT, 200 Ga. App. 674, 409 S.E.2d 552, 1991 Ga. App. LEXIS 1118 (1991) (decided under former O.C.G.A. § 24-9-64); Sawyers v. State, 211 Ga. App. 668, 440 S.E.2d 256, 1994 Ga. App. LEXIS 8 (1994) (decided under former O.C.G.A. § 24-9-64); Kier v. State, 247 Ga. App. 431, 543 S.E.2d 801, 2000 Ga. App. LEXIS 1466 (2000), cert. dismissed, No. S01C0718, 2001 Ga. LEXIS 488 (Ga. June 11, 2001) (decided under former O.C.G.A. § 24-9-64).

When one side calls and examines a witness, though only on a single point, the other has the right to cross-examine the witness on every point. Dawson v. Callaway, 18 Ga. 573, 1855 Ga. LEXIS 245 (1855) (decided under former law); Aiken v. Cato, 23 Ga. 154, 1857 Ga. LEXIS 231 (1857) (decided under former law); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282, 1894 Ga. LEXIS 592 (1894) (decided under former Code 1882, § 3864); National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7, 1930 Ga. LEXIS 320 (1930) (decided under former Civil Code 1910, § 5871); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

Right of cross examination is a substantial right, the preservation of which is essential to the proper administration of justice and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy; this right should not be abridged. James v. State, 260 Ga. App. 536, 580 S.E.2d 334, 2003 Ga. App. LEXIS 416 (2003) (decided under former O.C.G.A. § 24-9-64).

Right not unlimited. — Although it is true that the right to a thorough and sifting cross-examination may not be abridged, that right is not unlimited. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57, 1983 Ga. App. LEXIS 2049 (1983), rev'd in part, 252 Ga. 103, 312 S.E.2d 113, 1984 Ga. LEXIS 612 (1984) (decided under former O.C.G.A. § 24-9-64).

Court did not improperly restrict defendant's right of cross-examination of a state's witness since the testimony sought to be elicited would have been cumulative of other testimony. Gaither v. State, 259 Ga. 200, 378 S.E.2d 464, 1989 Ga. LEXIS 200 (1989) (decided under former O.C.G.A. § 24-9-64).

Victim's probation status improperly examined. — Trial court did not abuse the court's discretion in limiting the

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scope of defendant's cross-examination of the alleged crime victim to exclude questioning the victim as to the victim's probation status. Bogan v. State, 206 Ga. App. 696, 426 S.E.2d 392, 1992 Ga. App. LEXIS 1750 (1992), cert. denied, No. S93C0526, 1993 Ga. LEXIS 295 (Ga. Mar. 18, 1993) (decided under former O.C.G.A. § 24-9-64).

Inquiry into domestic dispute disallowed in kidnapping case. — Trial court properly restricted defendant's cross-examination of wife's alleged affair as the cause of the couple's separation was not relevant to the issues before the jury. Williams v. State, 207 Ga. App. 371, 427 S.E.2d 846, 1993 Ga. App. LEXIS 187 (1993) (decided under former O.C.G.A. § 24-9-64).

Limiting examination to relevant matters by proper questioning. — Right of cross-examination is not abridged when examination is limited by trial court to relevant matters by proper questioning. Johnson v. State, 158 Ga. App. 333, 280 S.E.2d 379, 1981 Ga. App. LEXIS 2192 (1981) (decided under former Code 1933, § 38-1705); Palmer v. State, 186 Ga. App. 892, 369 S.E.2d 38, 1988 Ga. App. LEXIS 530 (1988) (decided under former O.C.G.A. § 24-9-64); Mitchell v. State, 200 Ga. App. 146, 407 S.E.2d 115, 1991 Ga. App. LEXIS 775 (1991) (decided under former O.C.G.A. § 24-9-64).

Cross-examination covers relevant subjects and not just matters elicited on direct examination. — Right of cross-examination in Georgia includes questioning a witness about subjects relevant to any of the issues in the case, not simply those matters elicited on direct examination. James v. State, 260 Ga. App. 536, 580 S.E.2d 334, 2003 Ga. App. LEXIS 416 (2003) (decided under former O.C.G.A. § 24-9-64).

Privilege. — Right of cross-examination must be tempered and restricted so as not to infringe on privileged areas. Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152, 1976 Ga. App. LEXIS 1761 (1976) (decided under former Code 1933, § 38-1705).

Redirect examination. — Whether or not new matter is introduced on redirect and even though no reason shown why, through inadvertence or mistake, certain questions have been omitted, it is entirely within the discretion of the trial judge to permit further examination by either side. King v. Thompson, 59 Ga. 380, 1877 Ga. LEXIS 281 (1877) (decided under former Code 1873, § 3864); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570, 1933 Ga. App. LEXIS 673 (1933) (decided under former Penal Code 1910, § 1044).

Redirect examination and recross are, strictly speaking, not for the purpose of introducing new matter, but the judge in the judge's discretion may permit the questioner to inquire about something which the judge should have asked about during an earlier step but which was overlooked. Goodrum v. State, 158 Ga. App. 602, 281 S.E.2d 254, 1981 Ga. App. LEXIS 2331, 1981 Ga. App. LEXIS 3002 (1981) (decided under former Code 1933, § 38-1705).

On redirect, the trial court did not commit plain error by allowing the state to elicit testimony from an investigator, in which the investigator stated that the information that the investigator obtained from an eyewitness during the investigation was more consistent with other evidence collected than the information that the investigator obtained from the defendant because the investigator's testimony did not speak directly to the eyewitness's truthfulness, but, rather, the testimony was elicited in direct response to questions raised about the manner in which the investigator conducted the investigation, and involved whether aspects of that investigation lined up with information provided by the eyewitness. Jones v. State, 299 Ga. 40, 785 S.E.2d 886, 2016 Ga. LEXIS 353 (2016).

Documents. — When the relevancy of documents which may be used as evidence appears, it is error to unduly restrict the cross-examination relating to such documents. Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828, 1954 Ga. App. LEXIS 548 (1954) (decided under former Code 1933, § 38-1705); Snelling v. State, 215 Ga. App. 263, 450 S.E.2d 299, 1994 Ga. App. LEXIS 1230 (1994) (decided under former O.C.G.A. § 24-9-64).

Prior drug sales. — Trial court did not err in permitting cross-examination of the

defendant regarding prior drug sales held admissible to prove identity. Nuckles v. State, 207 Ga. App. 63, 427 S.E.2d 54, 1993 Ga. App. LEXIS 65 (1993) (decided under former O.C.G.A. § 24-9-64).

Conduct exceeding authorized scope. — Conduct of defense counsel exceeded the authorized scope of cross-examination after counsel injected independent non-testimonial evidence by lifting defendant's shirt to show defendant's body brace. State v. Battaglia, 221 Ga. App. 283, 470 S.E.2d 755 (decided under former O.C.G.A. § 24-9-64).

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In general. — Scope of cross-examination rests largely within the discretion of the trial judge to control this right within reasonable bounds, and this discretion will not be reviewed unless it is abused. Woolfolk v. State, 85 Ga. 69, 11 S.E. 814, 1890 Ga. LEXIS 4 (1890) (decided under former Code 1882, § 3864); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282, 1894 Ga. LEXIS 592 (1894) (decided under former Code 1882, § 3864); Fouraker v. State, 4 Ga. App. 692, 62 S.E. 116, 1908 Ga. App. LEXIS 510 (1908) (decided under former Penal Code 1895, § 1018); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Civil Code 1910, § 5871); Fields v. State, 46 Ga. App. 287, 167 S.E. 337, 1932 Ga. App. LEXIS 125 (1932) (decided under former Penal Code 1910, § 1044); Clifton v. State, 187 Ga. 502, 2 S.E.2d 102, 1939 Ga. LEXIS 745 (1939) (decided under former Code 1933, § 38-1705); Sweat v. State, 63 Ga. App. 299, 11 S.E.2d 40, 1940 Ga. App. LEXIS 76 (1940) (decided under former Code 1933, § 38-1705); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121, 1941 Ga. App. LEXIS 526 (1941) (decided under former Code 1933, § 38-1705); Cameron v. State, 66 Ga. App. 414, 18 S.E.2d 16, 1941 Ga. App. LEXIS 219 (1941) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943) (decided under former Code 1933, § 38-1705); Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820, 1944 Ga. App. LEXIS 115 (1944) (decided under former Code 1933, § 38-1705); Post v. State, 201 Ga. 81, 39 S.E.2d 1, 1946 Ga. LEXIS 428 (1946) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237, 1947 Ga. App. LEXIS 396 (1947) (decided under former Code 1933, § 38-1705); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357, 1949 Ga. App. LEXIS 686 (1949) (decided under former Code 1933, § 38-1705); Owens v. State, 81 Ga. App. 182, 58 S.E.2d 550, 1950 Ga. App. LEXIS 858 (1950) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665, 1952 Ga. App. LEXIS 793 (1952) (decided under former Code 1933, § 38-1705); Rozar v. State, 93 Ga. App. 207, 91 S.E.2d 131, 1956 Ga. App. LEXIS 680 (1956) (decided under former Code 1933, § 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387, 1957 Ga. App. LEXIS 740 (1957) (decided under former Code 1933, § 38-1705); Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313, 1957 Ga. App. LEXIS 927 (1957) (decided under former Code 1933, § 38-1705); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1705); Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531, 1962 Ga. App. LEXIS 655 (1962) (decided under former Code 1933, § 38-1705); Gravitt v. State, 220 Ga. 781, 141 S.E.2d 893, 1965 Ga. LEXIS 632 (1965) (decided under former Code 1933, § 38-1705); Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568, 1965 Ga. App. LEXIS 1123 (1965) (decided under former Code 1933, § 38-1705); Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382, 1966 Ga. LEXIS 604 (1966) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385, 1968 U.S. Dist. LEXIS 9634 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1705); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450, 1972 Ga. LEXIS 766 (1972) (decided under former Code 1933, § 38-1705); Goober v. Nix, 128 Ga. App. 578, 197 S.E.2d 486, 1973 Ga. App. LEXIS 1550 (1973) (decided

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under former Code 1933, § 38-1705); Howington v. Puckett, 130 Ga. App. 584, 203 S.E.2d 916, 1974 Ga. App. LEXIS 1188 (1974) (decided under former Code 1933, § 38-1705); Weaver v. Georgia Power Co., 134 Ga. App. 696, 215 S.E.2d 503, 1975 Ga. App. LEXIS 2134 (1975), overruled in part, Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689, 1978 Ga. App. LEXIS 2670 (1978) (decided under former Code 1933, § 38-1705); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674, 1975 Ga. App. LEXIS 2192 (1975) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585, 1975 Ga. App. LEXIS 1864 (1975) (decided under former Code 1933, § 38-1705); Franklin v. State, 136 Ga. App. 47, 220 S.E.2d 60, 1975 Ga. App. LEXIS 1240 (1975) (decided under former Code 1933, § 38-1705); Whitley v. State, 137 Ga. App. 68, 223 S.E.2d 17, 1975 Ga. App. LEXIS 1205 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500, 1976 Ga. App. LEXIS 2426 (1976) (decided under former Code 1933, § 38-1705); Mitchell v. State, 236 Ga. 251, 223 S.E.2d 650, 1976 Ga. LEXIS 831 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48, 1976 Ga. App. LEXIS 2476 (1976) (decided under former Code 1933, § 38-1705); McCarty v. State, 139 Ga. App. 101, 227 S.E.2d 898, 1976 Ga. App. LEXIS 1697 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152, 1976 Ga. App. LEXIS 1761 (1976) (decided under former Code 1933, § 38-1705); Lindsey v. Guhl, 237 Ga. 567, 229 S.E.2d 354, 1976 Ga. LEXIS 1306 (1976) (decided under former Code 1933, § 38-1705); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395, 1977 Ga. App. LEXIS 2441 (1977) (decided under former Code 1933, § 38-1705); Green v. State, 242 Ga. 261, 249 S.E.2d 1, 1978 Ga. LEXIS 1169 (1978), rev'd, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738, 1979 U.S. LEXIS 120 (1979); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650, 1978 Ga. App. LEXIS 2865 (1978) (decided under former Code 1933, § 38-1705); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690, 1978 Ga. App. LEXIS 2879 (1978) (decided under former Code 1933, § 38-1705); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, 1979 Ga. LEXIS 821 (1979), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 425, 1979 U.S. LEXIS 4099 (1979), overruled in part, Blankenship v. State, 247 Ga. 590, 280 S.E.2d 623, 1981 Ga. LEXIS 1077 (1981) (decided under former Code 1933, § 38-1705); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, 1980 Ga. LEXIS 812 (1980) (decided under former Code 1933, § 38-1705); Mullins v. State, 157 Ga. App. 204, 276 S.E.2d 877, 1981 Ga. App. LEXIS 1739 (1981), overruled in part, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599, 1991 Ga. App. LEXIS 43 (1991) (decided under former Code 1933, § 38-1705); Hines v. State, 160 Ga. App. 546, 287 S.E.2d 584, 1981 Ga. App. LEXIS 3227 (1981), rev'd in part, 249 Ga. 257, 290 S.E.2d 911, 1982 Ga. LEXIS 1133 (1982) (decided under former Code 1933, § 38-1705); Hines v. State, 249 Ga. 257, 290 S.E.2d 911, 1982 Ga. LEXIS 1133 (1982) (decided under former Code 1933, § 38-1705); Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57, 1983 Ga. App. LEXIS 2049 (1983), rev'd in part, 252 Ga. 103, 312 S.E.2d 113, 1984 Ga. LEXIS 612 (1984) (decided under former O.C.G.A. § 24-9-64); Price v. State, 179 Ga. App. 691, 347 S.E.2d 365, 1986 Ga. App. LEXIS 2656 (1986) (decided under former O.C.G.A. § 24-9-64).

Extent of cross-examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court which will not be disturbed on appeal unless manifestly abused. Fitzgerald v. State, 166 Ga. App. 307, 304 S.E.2d 114, 1983 Ga. App. LEXIS 3227 (1983) (decided under former O.C.G.A. § 24-9-64); Opatut v. Guest Pond Club, Inc., 188 Ga. App. 478, 373 S.E.2d 372, 1988 Ga. App. LEXIS 1098 (1988) (decided under former O.C.G.A. § 24-9-64); Stevens v. State, 213 Ga. App. 293, 444 S.E.2d 840, 1994 Ga. App. LEXIS 576 (1994) (decided under former O.C.G.A. § 24-9-64).

Although a defendant is entitled to a thorough and sifting cross-examination of

a witness, the scope of such cross-examination is within the sound discretion of the trial court. White v. State, 253 Ga. 106, 317 S.E.2d 196, 1984 Ga. LEXIS 813 (1984) (decided under former O.C.G.A. § 24-9-64); Scott v. State, 178 Ga. App. 222, 343 S.E.2d 117, 1986 Ga. App. LEXIS 1639 (1986) (decided under former O.C.G.A. § 24-9-64).

Scope of cross-examination is within the sound discretion of the trial judge. This discretion will not be disturbed by an appellate court unless manifestly abused. Thomas v. Clark, 188 Ga. App. 606, 373 S.E.2d 668, 1988 Ga. App. LEXIS 1130 (1988) (decided under former O.C.G.A. § 24-9-64).

Although a defendant is entitled to a thorough and sifting cross-examination of the state's witnesses, within carefully protected legal parameters, the scope of cross-examination lies within the sound discretion of the trial court and this discretion will not be disturbed by an appellate court absent manifest abuse. There was no error in a trial court's restrictions of cross examination of the victims of sexual abuse relating to whether defendant had molested other children. Pope v. State, 266 Ga. App. 602, 597 S.E.2d 632, 2004 Ga. App. LEXIS 437 (2004) (decided under former O.C.G.A. § 24-9-64).

Scope of cross-examination is not unlimited; the extent necessarily must rest largely within the discretion of the trial judge in order to keep the questioning within reasonable bonds. The extent of cross examination can be curtailed if the inquiry is not relevant nor material. Harris v. State, 168 Ga. App. 159, 308 S.E.2d 406, 1983 Ga. App. LEXIS 3381 (1983) (decided under former O.C.G.A. § 24-9-64); Williamson v. State, 186 Ga. App. 589, 367 S.E.2d 863, 1988 Ga. App. LEXIS 416 (1988) (decided under former O.C.G.A. § 24-9-64).

Trial court can exercise the court's discretion in keeping the defendant's cross-examination of the state's witnesses within reasonable bounds and in curtailing the cross-examination if the inquiry is not relevant or material. Samuels v. State, 174 Ga. App. 684, 331 S.E.2d 62, 1985 Ga. App. LEXIS 2740 (1985) (decided under former O.C.G.A. § 24-9-64).

Regulation of scope of cross-examination is within sound discretion of trial court and this discretion will not be controlled unless it is manifestly abused. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816, 1983 Ga. App. LEXIS 2826 (1983) (decided under former O.C.G.A. § 24-9-64).

Extent of cross-examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court, which will not be disturbed on appeal unless manifestly abused. Fletcher v. State, 197 Ga. App. 112, 397 S.E.2d 605, 1990 Ga. App. LEXIS 1219 (1990) (decided under former O.C.G.A. § 24-9-64); Stevens v. State, 213 Ga. App. 293, 444 S.E.2d 840, 1994 Ga. App. LEXIS 576 (1994) (decided under former O.C.G.A. § 24-9-64).

Trial court abused the court's discretion in refusing to allow the defendant to use a videotape of the defendant's daughter, concerning the defendant's alleged sexual abuse of the defendant's daughter, in the cross-examination of the defendant's daughter; however, the error was harmless because the subject matter was covered later during the trial when the entirety of the videotape was played and because the defendant had the opportunity to verbally cross-examine the daughter during the state's case regarding the daughter's former statements to authorities. Courrier v. State, 270 Ga. App. 622, 607 S.E.2d 221, 2004 Ga. App. LEXIS 1542 (2004) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion under former O.C.G.A. § 24-9-64 in limiting the defendant's ability to cross-examine a police officer as the limits were within the scope of the trial court's discretion and did not violate defendant's confrontation rights; the trial court allowed the defendant to cross-examine the officer as to the officer's experience and training, but limited the questioning as to other DUI arrests that the officer had made. Drogan v. State, 272 Ga. App. 645, 613 S.E.2d 195, 2005 Ga. App. LEXIS 359 (2005), cert. denied, No. S05C1284, 2005 Ga. LEXIS 609 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-9-64).

Trial court judge did not abuse the court's discretion in limiting the defen-

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dant's cross-examination of a detective who had taken a statement from the defendant shortly after being apprehended because, even assuming the restriction was erroneous during the defendant's trial for involuntary manslaughter and reckless conduct, the overwhelming evidence established the defendant's guilt, including the uncontroverted evidence that the defendant brandished and fired the weapon at the deceased victim, which made the error harmless. Anaya-Plasencia v. State, 283 Ga. App. 728, 642 S.E.2d 401, 2007 Ga. App. LEXIS 175 (2007) (decided under former O.C.G.A. § 24-9-64).

Trial court did not improperly limit the defendant's cross-examination to matters material to the issues as: (1) whether the victim had a boyfriend that a parent disapproved of was irrelevant; (2) there was no indication by the evidence that the victim was trying to explain away evidence of a relationship with one man by attributing that evidence to another; and (3) it was illogical for the victim to have fabricated a claim of child molestation. Gaines v. State, 285 Ga. App. 654, 647 S.E.2d 357, 2007 Ga. App. LEXIS 617 (2007) (decided under former O.C.G.A. § 24-9-64).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery, and the trial court did not err by failing to grant the defendant's motion for a directed verdict, based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. The trial court properly limited the defendant's cross-examination of the arresting officer to the length of the police report and the lack of details therein, and did not abuse the court's discretion by refusing to allow defense counsel to ask the officer about the length of time that suspects may spend in custody pre-trial, as that issue was irrelevant to any issue in the case. Burden v. State, 296 Ga. App. 441, 674 S.E.2d 668, 2009 Ga. App. LEXIS 258 (2009) (decided under former O.C.G.A. § 24-9-64).

There was no reversible error in a trial court's limitation of the cross-examination of a key state's witness and of a child victim when the defendant failed to show that the substance of the defendant's questions was limited, or how any of the trial court's actions affected the cross-examination or the defendant's ability to impeach the witnesses. Kerdpoka v. State, 314 Ga. App. 400, 724 S.E.2d 419, 2012 Ga. App. LEXIS 203 (2012), cert. denied, No. S12C1112, 2012 Ga. LEXIS 603 (Ga. June 18, 2012) (decided under former O.C.G.A. § 24-9-64).

Because the trial court did not abuse the court's discretion in regulating cross-examination by instructing defense counsel to be clear with counsel's question, the defendant's constitutional right of confrontation was not violated. Baker v. State, 293 Ga. 811, 750 S.E.2d 137, 2013 Ga. LEXIS 858 (2013) (decided under former O.C.G.A. § 24-9-62).

In a quiet title action, the trial court erred by limiting the cross examination of a defense witness since O.C.G.A. § 24-6-611(b) differed from the federal rule and allowed seeking information on cross-examination despite not being brought out during direct. R. C. Acres, Inc. v. Cambridge Faire Props., LLC, 331 Ga. App. 762, 771 S.E.2d 444, 2015 Ga. App. LEXIS 235 (2015).

Trial court did not abuse the court's discretion by allowing the state to challenge the veracity of a statement by the defendant's wife that a victim recanted because the state, having been unaware of the alleged call in which that was done, was authorized to ferret out the truth through the state's questioning. Patterson v. State, 350 Ga. App. 540, 829 S.E.2d 796, 2019 Ga. App. LEXIS 336 (2019), cert. denied, No. S19C1425, 2019 Ga. LEXIS 892 (Ga. Dec. 23, 2019).

Time limitations in child custody matters. — In a child custody dispute, the trial court did not err by imposing arbitrary time limits on the presentation of evidence during the final hearing and by prematurely terminating the mother's cross-examination of the father as a result of those limits because the mother did not

seek to proffer any evidence that was excluded based on the trial court's time limitations; and, in the mother's appellate brief, the mother neither identified the substance of any evidence the mother could not present nor explained how any such evidence likely would have changed any of the trial court's rulings. Skelton v. Skelton, 365 Ga. App. 53, 876 S.E.2d 715, 2022 Ga. App. LEXIS 361 (2022).

Trial court may restrict scope of cross-examination to matters relevant to issues being tried, and results of the exercise of that discretion will not be interfered with unless the discretion was manifestly abused. Ayers v. Carter, 159 Ga. App. 680, 285 S.E.2d 55, 1981 Ga. App. LEXIS 2767 (1981) (decided under former Code 1933, § 38-1705); Fowler v. State, 171 Ga. App. 491, 320 S.E.2d 219, 1984 Ga. App. LEXIS 2248 (1984) (decided under former O.C.G.A. § 24-9-64); Banks v. State, 178 Ga. App. 54, 341 S.E.2d 859, 1986 Ga. App. LEXIS 2497 (1986) (decided under former O.C.G.A. § 24-9-64); Walker v. State, 198 Ga. App. 422, 401 S.E.2d 613, 1991 Ga. App. LEXIS 71 (1991) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion by excluding reference to emails, admittedly containing mostly irrelevant material, between the victim and the victim's friend, the witness, but nevertheless allowed defense counsel to explore the subject areas desired, with the witness conceding the points raised. Courrier v. State, 270 Ga. App. 622, 607 S.E.2d 221, 2004 Ga. App. LEXIS 1542 (2004) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion in rejecting the defendant's proposed line of cross-examination questioning as the trial court ruled that testimony involving a totally unrelated arrest was irrelevant to the defendant's case after first giving the defendant the opportunity to establish its relevance. Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823, 2008 Ga. App. LEXIS 334 (2008), cert. denied, No. S08C1271, 2008 Ga. LEXIS 650 (Ga. July 7, 2008) (decided under former O.C.G.A. § 24-9-64).

3. Specific Applications

Impeachment. — If the purpose in cross-examination is to impeach or discredit a witness, great latitude should be allowed for a thorough and sifting cross-examination. Goodwyn v. Goodwyn, 20 Ga. 600, 1856 Ga. LEXIS 113 (1856) (decided under former law); Floyd v. Wallace, 31 Ga. 688, 1861 Ga. LEXIS 263 (1861) (decided under former law); Mitchell v. State, 71 Ga. 128, 1883 Ga. LEXIS 153 (1883) (decided under former Code 1882, § 3864); Atlanta & B. Air-Line Ry. v. McManus, 1 Ga. App. 302, 58 S.E. 258, 1907 Ga. App. LEXIS 223 (1907) (decided under former Civil Code 1895, § 5282); Kimbrough v. State, 9 Ga. App. 301, 70 S.E. 1127, 1911 Ga. App. LEXIS 523 (1911) (decided under former Penal Code 1910, § 1044); Smith v. State, 12 Ga. App. 13, 76 S.E. 647, 1912 Ga. App. LEXIS 5 (1912) (decided under former Penal Code 1910, § 1044); Glover v. State, 15 Ga. App. 44, 82 S.E. 602, 1914 Ga. App. LEXIS 12 (1914) (decided under former Penal Code 1910, § 1044); Boyett v. State, 16 Ga. App. 150, 84 S.E. 613, 1915 Ga. App. LEXIS 520 (1915) (decided under former Penal Code 1910, § 1044); Griffin v. State, 18 Ga. App. 462, 89 S.E. 537, 1916 Ga. App. LEXIS 1025 (1916) (decided under former Penal Code 1910, § 1044); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357, 1949 Ga. App. LEXIS 686 (1949) (decided under former Code 1933, § 38-1705); Wyatt v. State, 206 Ga. 613, 57 S.E.2d 914, 1950 Ga. LEXIS 524 (1950) (decided under former Code 1933, § 38-1705); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819, 1966 Ga. LEXIS 551 (1966) (decided under former Code 1933, § 38-1705); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484, 1976 Ga. App. LEXIS 1973 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580, 1977 Ga. LEXIS 908 (1977), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former Code 1933, § 38-1705); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298, 1980 Ga. App. LEXIS 2018 (1980) (decided under former Code 1933, § 38-1705); Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193, 1980 Ga. App. LEXIS 2814 (1980) (decided under former Code 1933, § 38-1705).

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On cross-examination the opposing party is entitled to a thorough and sifting examination of the witness, and, when the defendant's alibi witnesses were under cross-examination, the trial court correctly refused to grant a mistrial with reference to an effort to impeach those witnesses as to whether or not the testimony was fabricated before trial since the object of all legal investigation is the discovery of truth. Mitchell v. State, 157 Ga. App. 683, 278 S.E.2d 192, 1981 Ga. App. LEXIS 1967 (1981) (decided under former Code 1933, § 38-1705).

Prosecutor's cross-examination of witness did not constitute impeachment of the witness by proof of a criminal conviction since the prosecutor was cross-examining the witness concerning the criminal charges surrounding incarceration, in order to reveal possible biases, prejudices, or ulterior motives of the witness as they might relate to the witness's testimony on direct examination. Harrison v. State, 259 Ga. 486, 384 S.E.2d 643, 1989 Ga. LEXIS 416 (1989) (decided under former O.C.G.A. § 24-9-64).

Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination has voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits of defendant's character, is not prohibited. Butts v. State, 193 Ga. App. 824, 389 S.E.2d 395, 1989 Ga. App. LEXIS 1678 (1989) (decided under former O.C.G.A. § 24-9-64).

When a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries. The defendant wished to cross-examine the victim to establish this fact to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and was entitled to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. Boggs v. State, 195 Ga. App. 605, 394 S.E.2d 401, 1990 Ga. App. LEXIS 600 (1990) (decided under former O.C.G.A. § 24-9-64).

Trial court erred in allowing the state to impeach the defendant with evidence of a prior terroristic threats conviction after the defendant mentioned, in direct examination, that the defendant surrendered to the authorities after visiting the defendant's parole officer as the defendant was on parole for a theft by taking, not terroristic threats, and the trial court failed to make an on-the-record finding that the probative value of admitting the conviction outweighed the prejudicial effect. Williams v. State, 299 Ga. 834, 792 S.E.2d 336, 2016 Ga. LEXIS 660 (2016).

Expert witnesses. — Permitting cross-examination directed specifically to testing the accuracy of an expert's opinion stated on direct examination was not an abuse of discretion as to scope of cross-examination. Lane Drug Stores v. Brooks, 70 Ga. App. 878, 29 S.E.2d 716, 1944 Ga. App. LEXIS 128 (1944) (decided under former Code 1933, § 38-1705); Rozar v. State, 93 Ga. App. 207, 91 S.E.2d 131, 1956 Ga. App. LEXIS 680 (1956) (decided under former Code 1933, § 38-1705); Wooten v. Department of Human Resources, 152 Ga. App. 304, 262 S.E.2d 583, 1979 Ga. App. LEXIS 2906 (1979) (decided under former Code 1933, § 38-1705).

In a medical malpractice case, it was error to prevent plaintiffs from cross-examining defense experts about their personal practices, as such evidence, unless excludable on other evidentiary grounds, was admissible as substantive evidence and to impeach the experts' opinion as to the applicable standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152, 2009 Ga. LEXIS 391 (2009) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in overruling the defendant's objection to the state's cross-examination of defendant's expert witness, who opined about an alleged failure to properly document the preliminary interview of the victim, on the ground that the defendant previously impeached a deputy by showing the deputy the deputy's report and eliciting testimony that the deputy did ask and the victim did answer more substantive questions because the state's question did not inaccurately characterize the prior testimony, nor refer to

facts not in evidence, since there was testimony that the interview consisted of nothing more than asking the victim the victim's name and other preliminary information; that the defendant was able to later educe testimony to the contrary did not make the question improper as stated. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-9-64).

Juvenile court did not err in prohibiting defense counsel from asking an officer, who was qualified as an expert, how many shoe print comparisons the officer had actually performed because the officer testified on the first day of the hearing that the officer had handled other cases involving shoe-print matching, and the juvenile court already had qualified the officer as an expert witness. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827, 2010 Ga. App. LEXIS 743 (2010) (decided under former O.C.G.A. § 24-9-64).

Police officer's training in field sobriety testing. — In a case in which the defendant was tried for driving under the influence of alcohol to the extent of being a less safe driver, the trial court abridged the defendant's substantial right to cross-examination under former O.C.G.A. § 24-9-64 by precluding defendant from cross-examining the arresting officer about the officer's National Highway Traffic Safety Administration (NHTSA) training and NHTSA requirements for field sobriety evaluations like the horizontal gaze nystagmus (HGN) test, as the officer gave detailed testimony about the defendant's involuntary jerking of the defendant's eyes during a prescribed pattern of HGN testing and asserted that this showed that the defendant was under the influence of alcohol; the officer's NHTSA training and the NHTSA standards for conducting HGN testing were clearly material to the officer's opinion and to the controversy before the court, and the error was not harmless since the state's case relied entirely on the officer's testimony regarding the field sobriety tests. James v. State, 260 Ga. App. 536, 580 S.E.2d 334, 2003 Ga. App. LEXIS 416 (2003) (decided under former O.C.G.A. § 24-9-64).

Character witnesses. — While the general character of the parties, and especially their conduct in other transactions, are irrelevant matters, it is proper on cross-examination to question a character witness regarding particular matters so as to test the extent and basis for the opinion given. Haire v. State, 209 Ga. 378, 72 S.E.2d 707, 1952 Ga. LEXIS 493 (1952) (decided under former Code 1933, § 38-1705); Compher v. Georgia Waste Sys., 155 Ga. App. 819, 273 S.E.2d 200, 1980 Ga. App. LEXIS 2805 (1980) (decided under former Code 1933, § 38-1705); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411, 1980 Ga. App. LEXIS 2808 (1980) (decided under former Code 1933, § 38-1705).

Use of videotape. — In a prosecution for criminal attempt to process cocaine, stemming from a reverse sting operation, it would have been proper to allow defense counsel to play a videotape of the attempted purchase during the cross-examination of a police officer. Givens v. State, 264 Ga. 522, 448 S.E.2d 687, 1994 Ga. LEXIS 823 (1994) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus tests because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245, 2017 Ga. App. LEXIS 68 (2017), cert. denied, No. S17C1278, 2017 Ga. LEXIS 678 (Ga. Aug. 14, 2017).

Repetitious questions. — Exclusion of unnecessarily repetitious questions in the cross-examination which have been previously propounded and answered does not constitute an abuse of discretion. Clifton v. State, 187 Ga. 502, 2 S.E.2d 102, 1939 Ga. LEXIS 745 (1939) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665, 1952 Ga. App. LEXIS 793 (1952) (decided under former Code 1933, § 38-1705); Hamilton v. State, 91 Ga. App. 295, 85 S.E.2d 496, 1954 Ga. App. LEXIS 914 (1954) (decided under former Code 1933,

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§ 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387, 1957 Ga. App. LEXIS 740 (1957) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854, 1959 Ga. App. LEXIS 959 (1959) (decided under former Code 1933, § 38-1705); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818, 1966 Ga. LEXIS 491 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382, 1966 Ga. LEXIS 604 (1966) (decided under former Code 1933, § 38-1705); Goober v. Nix, 128 Ga. App. 578, 197 S.E.2d 486, 1973 Ga. App. LEXIS 1550 (1973) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861, 1973 Ga. App. LEXIS 1037 (1973) (decided under former Code 1933, § 38-1705); Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456, 1973 Ga. App. LEXIS 1103 (1973) (decided under former Code 1933, § 38-1705); Luther v. DeKalb County, 131 Ga. App. 25, 205 S.E.2d 70, 1974 Ga. App. LEXIS 1312 (1974) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585, 1975 Ga. App. LEXIS 1864 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500, 1976 Ga. App. LEXIS 2426 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48, 1976 Ga. App. LEXIS 2476 (1976) (decided under former Code 1933, § 38-1705).

When a question has been asked of and answered by a witness, the trial court does not unduly limit the right to a thorough cross-examination by disallowing its repetition. Fitzgerald v. State, 166 Ga. App. 307, 304 S.E.2d 114, 1983 Ga. App. LEXIS 3227 (1983) (decided under former O.C.G.A. § 24-9-64).

Argumentative questions. — Questions which are argumentative are properly excluded. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304, 1975 Ga. LEXIS 1148 (1975), overruled in part, White v. State, 273 Ga. 787, 546 S.E.2d 514, 2001 Ga. LEXIS 346 (2001) (decided under former Code 1933, § 38-1705).

Hypothetical questions to determine the witnesses' knowledge must embody the facts offered in evidence. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397, 1936 Ga. App. LEXIS 424 (1936) (decided under former Code 1933, § 38-1705); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411, 1980 Ga. App. LEXIS 2808 (1980) (decided under former Code 1933, § 38-1705).

Conclusion of witness. — Right to a thorough and sifting cross-examination is not abridged if the question propounded calls for a conclusion by the witness. Proctor v. State, 235 Ga. 720, 221 S.E.2d 556, 1975 Ga. LEXIS 975 (1975) (decided under former Code 1933, § 38-1705).

Victim's state of mind. — In a prosecution for child molestation, the trial court properly limited the cross-examination of witnesses as to the victim's state of mind, use of drugs, and psychiatric treatment because such inquiry had no relevance to the charges against defendant. Davidson v. State, 232 Ga. App. 250, 501 S.E.2d 510 (decided under former O.C.G.A. § 24-9-64).

Prior sexual activity. — Victim of an alleged rape may not be cross-examined as to specific acts of prior sexual intercourse with men other than the accused. Thomas v. State, 234 Ga. 635, 217 S.E.2d 152, 1975 Ga. LEXIS 1209 (1975) (decided under former Code 1933, § 38-1705).

Since defendant had known the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. Lamar v. State, 243 Ga. 401, 254 S.E.2d 353, 1979 Ga. LEXIS 913 (1979) (decided under former Code 1933, § 38-1705).

In a child molestation case, defendant was properly precluded from inquiring into the victim's family lifestyle and sexual history. Schwindler v. State, 254 Ga. App. 579, 563 S.E.2d 154, 2002 Ga. App. LEXIS 335 (2002), cert. denied, No. S02C1230, 2002 Ga. LEXIS 677 (Ga. Sept. 6, 2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854, 2003 U.S. LEXIS 3533 (2003), overruled in part,

State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020), overruled in part, George v. State, 312 Ga. 801, 865 S.E.2d 127, 2021 Ga. LEXIS 679 (2021) (decided under former O.C.G.A. § 24-9-64).

Seduction. — On trial of the defendant under an indictment charging him with seduction of the prosecutor by persuasion and promise of marriage, where such prosecutor was the only witness for the state and her testimony was self-contradictory as to whether or not she knew, at the time of the alleged seduction, that the defendant was a married man, it was error to deny to defendant's counsel the right to a thorough and sifting cross-examination as provided by statute. Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84, 1953 Ga. App. LEXIS 1007 (1953) (decided under former Code 1933, § 38-1705).

Admission of crime. — In a trial for murder, since the state has introduced an admission by the accused of a willful and intentional killing unaccompanied with any justification or mitigation, it is the accused's right, by cross-examination, to elicit a previous conversation with the same witness in which the admission of the homicide was accompanied by a statement giving the reason therefor. West v. State, 200 Ga. 566, 37 S.E.2d 799, 1946 Ga. LEXIS 305 (1946) (decided under former Code 1933, § 38-1705).

Prior convictions. — After the defendant's sister testified on direct examination that her brothers were often accused of doing things they did not do, such testimony opened the door to cross-examination about convictions of the defendant's brothers. Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (decided under former O.C.G.A. § 24-9-64).

Trial court did not err when the court prevented the defendant from interrogating a witness about the specific facts of a prior offense as the witness explained that the witness was on parole for aggravated assault and made effort toward rehabilitation. Upshaw v. State, 300 Ga. 442, 796 S.E.2d 287, 2017 Ga. LEXIS 28 (2017) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64).

Codefendant's plea agreement. — Cross-examination of an accomplice regarding a deal the accomplice made with the prosecution, including the potential sentence the accomplice could receive and the fact that the accomplice would not be eligible for parole, is constitutionally protected because it shows the witness's motive, bias or interest in cooperating with the state and testifying against defendant. The fact that a witness faces a sentence without eligibility for parole, or a mandatory minimum sentence, gives the witness much more incentive to give favorable testimony. Vogleson v. State, 250 Ga. App. 555, 552 S.E.2d 513, 2001 Ga. App. LEXIS 822 (2001), aff'd, 275 Ga. 637, 571 S.E.2d 752, 2002 Ga. LEXIS 967 (2002) (decided under former O.C.G.A. § 24-9-64).

Defendant has a constitutionally protected right to explore on cross-examination a codefendant's or an accomplice's agreement with the state, including the amount of prison time the codefendant or accomplice would avoid by agreeing to cooperate with the state and testify against the defendant. Perez v. State, 254 Ga. App. 872, 564 S.E.2d 208, 2002 Ga. App. LEXIS 408 (2002), cert. denied, No. S02C1272, 2002 Ga. LEXIS 1103 (Ga. Nov. 25, 2002) (decided under former O.C.G.A. § 24-9-64).

Fact that counsel abandons line of inquiry presents nothing for review. — Since the trial court did not curtail proper examination but simply exercised the court's discretion to require counsel to obtain the information through proper questions, the fact that counsel abandoned the line of inquiry presents nothing for review. Johnson v. State, 158 Ga. App. 333, 280 S.E.2d 379, 1981 Ga. App. LEXIS 2192 (1981) (decided under former Code 1933, § 38-1705).

When the plaintiff is called as a defense witness upon an objection to the witness being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing the questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475, 1983 Ga. App. LEXIS 2078 (1983) (decided under former O.C.G.A. § 24-9-64).

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State is not required to reveal the identity of an informant. Montford v. State, 168 Ga. App. 394, 309 S.E.2d 650, 1983 Ga. App. LEXIS 2787 (1983), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-64).

Defendant's testimony on direct examination that defendant had previously been in "some trouble" did not place defendant's character in issue, but it was not error to allow defendant to be cross-examined as to the specific circumstances surrounding the "trouble" to which defendant testified. Richardson v. State, 173 Ga. App. 695, 327 S.E.2d 813, 1985 Ga. App. LEXIS 2669 (1985) (decided under former O.C.G.A. § 24-9-64).

Defendant's intent. — State's objection to defendant's cross-examination under former O.C.G.A. § 24-9-64 of the victim was properly sustained as defendant's intent to commit the crime was a jury question; even if there were error, it was harmless, as defendant obtained the requested information through another line of questioning. Burdette v. State, 259 Ga. App. 59, 576 S.E.2d 47, 2002 Ga. App. LEXIS 1616 (2002) (decided under former O.C.G.A. § 24-9-64).

Generally, the wealth or worldly circumstances of a party litigant is never admissible, except in those cases when position or wealth is necessarily involved. First Fed. Sav. & Loan Ass'n v. Jones, 173 Ga. App. 356, 326 S.E.2d 554, 1985 Ga. App. LEXIS 1541 (1985) (decided under former O.C.G.A. § 24-9-64).

Minors as witnesses. — Trial court did not abuse court's discretion in refusing to allow defense counsel, while cross-examining a 16-year-old witness, to repeat questions that had been asked and fully answered or from asking questions in a "rapid-fire" method, especially in light of the witness's youth. Phyfer v. State, 259 Ga. App. 356, 577 S.E.2d 56, 2003 Ga. App. LEXIS 96 (2003), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-64).

Testimony from witness with immunity. — Any error in limiting a defendant's cross-examination of a witness who had been granted immunity from prosecution was harmless given that the state informed the jury that: the witness had received testimonial immunity; at the time the witness gave the witness's statement to police, the witness was charged only with criminal attempt to commit armed robbery; the detective told the witness then that other charges might be added, or the witness may be offered a plea agreement; the witness was jailed after giving a statement; and the witness was later charged with felony murder and possession of a firearm during the commission of a felony. Younger v. State, 288 Ga. 195, 702 S.E.2d 183, 2010 Ga. LEXIS 847 (2010) (decided under former O.C.G.A. § 24-9-64).

Victim's mother. — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that the defendant's cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented the defendant from showing any bias or prejudice against the defendant on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward the defendant pursuant to former O.C.G.A. § 24-9-68 (see now O.C.G.A. § 24-6-622) and about the defendant's relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141, 2011 Ga. App. LEXIS 154 (2011) (decided under former O.C.G.A. § 24-9-64).

Relationship with victim. — In defendant's trial on a charge of aggravated assault under O.C.G.A. § 16-5-21(a), the trial court did not abuse the court's discre-

tion under former O.C.G.A. § 24-9-64 in precluding the defendant from cross-examining the victim about what the victim meant when the victim said that there was tension in the victim's relationship with the defendant and that the victim was going through a transitional period in the victim's life; while the defendant contended that the defendant wanted to examine the victim about the victim's failure to comply with a drug rehabilitation program in which the victim was enrolled and that the defendant was upset about the possibility that the victim would leave Georgia if the victim failed to complete the program, thereby ending the relationship, such evidence was irrelevant to the defendant's justification defense because it was not evidence either of the victim's general reputation for violence or of specific acts of violence perpetrated by the victim. Evidence about the status of the couple's relationship and the nature of their arguments in the week leading up to their fight would not have shed any light on whether the defendant was in reasonable fear of suffering immediate serious harm to the defendant when the defendant choked the victim and threatened to kill the victim. As such, the trial court did not err in ruling that the evidence was irrelevant. Chambers v. State, 308 Ga. App. 748, 708 S.E.2d 651, 2011 Ga. App. LEXIS 272 (2011) (decided under former O.C.G.A. § 24-9-64).

Specific questions. — In a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Civil Code 1910, § 5871).

If upon cross-examination of a hostile witness it is shown that the witness has testified to a contradictory statement on a former trial of a codefendant, and the attention of the witness is called to the alleged contradictions and the contradictory statements are admitted by the witness, it is within the legitimate scope of the right of cross-examination to ask the witness upon which occasion the witness was testifying to the truth. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1705).

Questions involving prior crimes are not admissible when the sole purpose is to show that defendant is guilty of such other crimes; however, questions as to other offenses may be asked in rebuttal to testimony of another witness. Wyatt v. State, 206 Ga. 613, 57 S.E.2d 914, 1950 Ga. LEXIS 524 (1950) (decided under former Code 1933, § 38-1705); Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375, 1974 Ga. App. LEXIS 1000 (1974) (decided under former Code 1933, § 38-1705).

It was not error for the court, in cross-examination of a police officer, to refuse to require the officer to disclose the name of the person who had given the officer information which led to the arrest of defendant. Morgan v. State, 211 Ga. 172, 84 S.E.2d 365, 1954 Ga. LEXIS 522 (1954) (decided under former Code 1933, § 38-1705).

Judgment of the trial court refusing to permit the condemnee to cross-examine witness as to whether the witness had testified as a witness in all other condemnation cases tried in the same court was error and the judgment overruling the motion for new trial on such ground would be reversed. Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1705).

It is not error to permit the defendant's trial attorney as witness to answer the question why the attorney did not raise the issue of insanity as a defense. Chaffin v. State, 227 Ga. 327, 180 S.E.2d 741, 1971 Ga. LEXIS 690 (1971) (decided under former Code 1933, § 38-1705).

Questions which are a misstatement of the witnesses' testimony or matters not within the witnesses' knowledge are properly excluded. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304, 1975 Ga. LEXIS 1148 (1975), overruled in part, White v. State,

Specific Applications (Cont'd)

273 Ga. 787, 546 S.E.2d 514, 2001 Ga. LEXIS 346 (2001) (decided under former Code 1933, § 38-1705).

Right to a thorough and sifting cross-examination is not abridged since the question propounded calls for a conclusion by the witness as to matters which can be determined only by the jury, such as whether there was provocation or justification of a homicide. Proctor v. State, 235 Ga. 720, 221 S.E.2d 556, 1975 Ga. LEXIS 975 (1975) (decided under former Code 1933, § 38-1705).

It is error to permit cross-examination of a defendant for impeachment purposes regarding defendant's silence, or failure to offer an exculpatory statement, at the time of defendant's arrest, including a defendant who was not apprised of defendant's Miranda rights. Harrison v. State, 154 Ga. App. 343, 268 S.E.2d 396, 1980 Ga. App. LEXIS 2156 (1980) (decided under former Code 1933, § 38-1705).

On cross-examination, the state may inquire with particularity to test the witness's basis for the opinion given, and may inquire if the witness has not heard particular persons speak ill of the witness, or if the witness has not been known to be accused of particular crimes. Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193, 1980 Ga. App. LEXIS 2814 (1980) (decided under former Code 1933, § 38-1705).

In action for deceit in connection with purchase of used car, where purchase and resale of trade-in vehicle were already in evidence, there was no error in allowing jury to know monetary details of that transaction. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533, 1982 Ga. App. LEXIS 2692 (1982) (decided under former O.C.G.A. § 24-9-64).

In prosecution for criminal trespass at welcome center, trial court acted incorrectly when the court curtailed attempts of appellant's counsel to impeach a witness by means of the witness's apparent prior inconsistent statements on issue, on issue of whether the witness had authorized a police officer to act as the witness's representative in giving notice to appellant that appellant was not to return to the center. Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219, 1982 Ga. App. LEXIS 3218 (1982) (decided under former O.C.G.A. § 24-9-64).

As one need not be the owner of premises in order to be deemed in possession of the goods contained therein, the right to a thorough and sifting cross-examination is not abridged by the sustaining of an objection when counsel is trying to elicit from a witness the extent of the witness's knowledge as to the proof of ownership of a home where stolen property was found. Brady v. State, 169 Ga. App. 316, 312 S.E.2d 632, 1983 Ga. App. LEXIS 3469 (1983) (decided under former O.C.G.A. § 24-9-64).

In an action seeking damages for injuries sustained when a motorcycle collided with an automobile, the trial court did not abuse the court's discretion in excluding a merely speculative, suggested line of questioning of the defendant, whose defense was that the plaintiff's own negligence caused the injury, about why defendant had failed or chosen not to instigate legal process against the plaintiff. Corley v. Harris, 171 Ga. App. 688, 320 S.E.2d 833, 1984 Ga. App. LEXIS 2317 (1984) (decided under former O.C.G.A. § 24-9-64).

When on cross-examination an agent was asked if the agent occupied the lowest position, as far as salary was concerned, in the GBI, there was no abuse of discretion in sustaining the state's objection on the ground of relevancy. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57, 1983 Ga. App. LEXIS 2049 (1983), rev'd in part, 252 Ga. 103, 312 S.E.2d 113, 1984 Ga. LEXIS 612 (1984) (decided under former O.C.G.A. § 24-9-64).

In view of the evidence connecting a witness with the crime and the witness's prior inconsistent statements, the defendant properly inquired into the witness's veracity and the extent of the witness's actual participation. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983) (decided under former O.C.G.A. § 24-9-64).

When the defendant's attorney "opened the door" regarding the defendant's status as a licensed insurance agent in this state, the state's attorney was entitled to a thor-

ough and sifting cross-examination regarding this issue. The fact that the defendant's insurance license was temporarily revoked by an administrative order issued by the Insurance Commissioner may have incidentally placed the defendant's character in issue; however, since the defendant's attorney "opened the door" to this issue, the testimony was not inadmissible. Mason v. State, 180 Ga. App. 235, 348 S.E.2d 754, 1986 Ga. App. LEXIS 2710 (1986) (decided under former O.C.G.A. § 24-9-64).

Trial court's refusal to allow defendant to ask a witness, who had entered a guilty plea and was cooperating with the prosecution prior to defendant's sentencing, if the defendant had been told what period of time Georgia law prescribed as the mandatory minimum sentence for defendant's crime, was not error since the court did allow defendant to establish the basis for possible bias or interest of the witness. Matthews v. State, 194 Ga. App. 386, 390 S.E.2d 873, 1990 Ga. App. LEXIS 150 (1990) (decided under former O.C.G.A. § 24-9-64).

In a prosecution for violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 et seq., and obstruction of an officer, the court did not abuse the court's discretion by restricting defendant's cross-examination of the state's crime lab witness when the court refused to allow defendant to examine the witness regarding another crime lab scientist who testified at a hearing in another county in an unrelated case that a substance was cocaine when in fact it was soap, since the crime lab witness testified, during proffer, that the witness had "no personal knowledge" of the incident and all the information be possessed about it was "secondary information" which was told to the witness at a crime lab meeting conducted by the witness's supervisor. Stephens v. State, 207 Ga. App. 645, 428 S.E.2d 661, 1993 Ga. App. LEXIS 314 (1993) (decided under former O.C.G.A. § 24-9-64).

When the trial court did not restrict defendant's counsel from questioning police officers regarding any bias the officer had toward black males, but merely restricted defendant's counsel from questioning police officers regarding an alleged prior brutality incident, in which no formal complaint had apparently been filed, there was no abuse of the trial court's decision. Harris v. State, 216 Ga. App. 297, 454 S.E.2d 146, 1995 Ga. App. LEXIS 97 (1995) (decided under former O.C.G.A. § 24-9-64).

State was entitled to cross-examine the defendant about why defendant had been in jail prior to defendant's prosecution for burglary and kidnapping, since the defendant introduced the topic of defendant's incarceration by testifying that the defendant had told the gunmen, who allegedly forced the defendant to accompany them to the victims' apartment, that the defendant could not have sold drugs for the victim because the defendant had been in jail. Cosby v. State, 234 Ga. App. 723, 507 S.E.2d 551 (decided under former O.C.G.A. § 24-9-64).

In a malpractice action, the court properly excluded the following question put to defendants' expert, i.e., "whether hospitals all over the country admit people to find out what is causing abdominal pain" because the expert had earlier answered a similar question that asked "whether people were admitted to a hospital to find out what was causing a problem." Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420, 2000 Ga. App. LEXIS 460 (2000), cert. denied, No. S00C1375, 2000 Ga. LEXIS 911 (Ga. Nov. 30, 2000) (decided under former O.C.G.A. § 24-9-64).

When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the rape shield law, former O.C.G.A. § 24-2-3(a) (see now O.C.G.A. § 24-4-412), did not prohibit the defendant from inquiring of the victim about a theory that the victim fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish a romantic relationship with the boyfriend, because the defendant was not seeking to inquire about the victim's character for sexual behavior. Richardson v. State, 276 Ga. 639, 581 S.E.2d 528, 2003 Ga. LEXIS 544 (2003) (decided under former O.C.G.A. § 24-9-64).

Specific Applications (Cont'd)

Trial court did not abuse the court's discretion in limiting the defendant's cross-examination of one detective about how another detective, who was unavailable at trial, formed that detective's opinions and impressions regarding how the defendant's spouse was killed as such questioning was beyond the detective's personal knowledge. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119, 2003 Ga. LEXIS 549 (2003) (decided under former O.C.G.A. § 24-9-64).

In a suit brought for specific performance of a contract provision and damages, the trial court did not err in preventing the defendant from cross-examining the plaintiff regarding the fairness of the provision; the suit involved a single provision in a written contract reflecting an arm's length transaction terminating a business relationship, and it was not incumbent upon the plaintiff to prove the fairness of the provision. Hibbard v. McMillan, 284 Ga. App. 753, 645 S.E.2d 356, 2007 Ga. App. LEXIS 400 (2007) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in sustaining the state's objection to defense counsel's questioning of a police officer regarding the officer's observation of other men on a defendant's property at the time the police began watching the property because the officer had not testified that the officer saw other men at the time the officer began the surveillance. Price v. State, 303 Ga. App. 859, 694 S.E.2d 712, 2010 Ga. App. LEXIS 377 (2010), cert. dismissed, No. S10C1470, 2010 Ga. LEXIS 743 (Ga. Oct. 4, 2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not manifestly abuse the court's discretion in limiting the defendant's crossexamination of a police officer by restricting the defendant from asking the officer about criminal charges brought against other persons involved in the underlying incident because the defendant did not show that allowing cross-examination about whether another party was charged with the offense of selling cocaine would have raised a reasonable inference that the defendant was not guilty of the separate offense of possession of cocaine with intent to distribute. Bush v. State, 305 Ga. App. 617, 699 S.E.2d 899, 2010 Ga. App. LEXIS 763 (2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion in curtailing the defendant's cross-examination of a Department of Family and Children Services (DFCS) employee about whether the Department at some point thought the evidence was not sufficient to warrant referring a victim's case to the district attorney and whether the victim's mother laughed when the mother was told of the victim's allegations because even if DFCS had initially concluded that a referral was not warranted or that the mother had laughed, such evidence could have no relevance to any issue in the defendant's child molestation case. Kay v. State, 306 Ga. App. 666, 703 S.E.2d 108, 2010 Ga. App. LEXIS 1019 (2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in requiring defense counsel to voir dire defendant's wife, who had accused defendant of child molestation, prior to questioning her as to possible motives to fabricate her testimony in order to obtain a special visa for victims of domestic violence under the immigration laws. Defense counsel was permitted to cross-examine the wife in these areas, but not to ask questions regarding how the wife came into the United States. Gonzalez v. State, 310 Ga. App. 348, 714 S.E.2d 13, 2011 Ga. App. LEXIS 568 (2011) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in sustaining the state's objection to a defendant's request that a police officer come down from the stand and describe the defendant's tattoos because what the defendant sought was not related to a legitimate purpose of cross-examination, but to introduce evidence from the defendant without the burden of subjecting the defendant to cross-examination. Jefferson v. State, 312 Ga. App. 842, 720 S.E.2d 184, 2011 Ga. App. LEXIS 962 (2011), cert. dismissed, No. S12C0604, 2012 Ga. LEXIS 408 (Ga. Apr. 24, 2012) (decided under former O.C.G.A. § 24-9-64).

Questioning witness on immigration status. — Trial court did not err in disallowing cross-examination of a wit-

ness about the witness's immigration status as the notion that the witness was influenced in any way as to testimony by immigration status was speculative, such evidence had little probative value, and the defendant was not prohibited from cross-examining the witness about the witness's bias or partiality toward the prosecution. Lucas v. State, 303 Ga. 134, 810 S.E.2d 491, 2018 Ga. LEXIS 100 (2018).

Leading Questions

1. In General

In general. — For a question to be objectionable it must be necessarily leading. Allgood v. State, 87 Ga. 668, 13 S.E. 569, 1891 Ga. LEXIS 258 (1891) (decided under former Code 1882, § 3865).

Question was leading when it was so framed as to suggest to the witness the answer which was desired; on the other hand, a question not suggesting the desired answer was not leading if the question inquired only into a single fact. Denson v. Miller, 33 Ga. 275, 1862 Ga. LEXIS 25 (1862) (decided under former law); James v. State, 215 Ga. 213, 109 S.E.2d 735, 1959 Ga. LEXIS 438 (1959) (decided under former Code 1933, § 38-1706); Ealey v. State, 139 Ga. App. 110, 227 S.E.2d 902, 1976 Ga. App. LEXIS 1702 (1976) (decided under former Code 1933, § 38-1706).

Judge was given latitude and discretion in permitting leading questions, and unless there was an abuse thereof resulting in prejudice and injury there was no reversible error. Hill v. State, 41 Ga. 484, 1871 Ga. LEXIS 130 (1871) (decided under former Code 1868, § 309); Burrus & Williams v. Kyle & Co., 56 Ga. 24, 1876 Ga. LEXIS 193 (1876) (decided under former Code 1873, § 3865); Parker v. Georgia Pac. Ry., 83 Ga. 539, 10 S.E. 233, 1889 Ga. LEXIS 107 (1889) (decided under former Code 1873, § 3865); Doster v. State, 93 Ga. 43, 18 S.E. 997, 1893 Ga. LEXIS 352 (1893) (decided under former Civil Code 1895, § 5283); Georgia R.R. & Banking Co. v. Churchill, 113 Ga. 12, 38 S.E. 336, 1901 Ga. LEXIS 142 (1901) (decided under former Civil Code 1895, § 5283); City of Rome v. Stewart, 116 Ga. 738, 42 S.E. 1011, 1902 Ga. LEXIS 240 (1902) (decided under former Civil Code 1895, § 5283); McBride v. Georgia Ry. & Elec. Co., 125 Ga. 515, 54 S.E. 674, 1906 Ga. LEXIS 214 (1906) (decided under former Civil Code 1895, § 5283); Lauchheimer & Sons v. Jacobs, 126 Ga. 261, 55 S.E. 55, 1906 Ga. LEXIS 370 (1906) (decided under former Civil Code 1895, § 5283); Lyles v. State, 130 Ga. 294, 60 S.E. 578, 1908 Ga. LEXIS 263 (1908) (decided under former Civil Code 1895, § 5283); Peterson v. State, 6 Ga. App. 491, 65 S.E. 311, 1909 Ga. App. LEXIS 350 (1909) (decided under former Civil Code 1895, § 5283); Ethridge v. State, 163 Ga. 186, 136 S.E. 72, 1926 Ga. LEXIS 47 (1926) (decided under former Civil Code 1910, § 5872); Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471, 1938 Ga. LEXIS 521 (1938) (decided under former Code 1933, § 38-1706); Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720, 1952 Ga. App. LEXIS 945 (1952) (decided under former Code 1933, § 38-1706); English v. State, 234 Ga. 602, 216 S.E.2d 851, 1975 Ga. LEXIS 1197 (1975) (decided under former Code 1933, § 38-1706); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48, 1976 Ga. App. LEXIS 2476 (1976) (decided under former Code 1933, § 38-1706); Clary Appliance & Furn. Ctr., Inc. v. Butler, 139 Ga. App. 233, 228 S.E.2d 211, 1976 Ga. App. LEXIS 1752 (1976) (decided under former Code 1933, § 38-1706); Tucker v. Mappin, 149 Ga. App. 847, 256 S.E.2d 135, 1979 Ga. App. LEXIS 2053 (1979) (decided under former Code 1933, § 38-1706); Booker v. State, 156 Ga. App. 40, 274 S.E.2d 84, 1980 Ga. App. LEXIS 2867 (1980), rev'd in part, 247 Ga. 74, 274 S.E.2d 334, 1981 Ga. LEXIS 622 (1981); Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715, 1981 Ga. App. LEXIS 2152 (1981) (decided under former Code 1933, § 38-1706); Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757, 1981 Ga. App. LEXIS 2180 (1981) (decided under former Code 1933, § 38-1706).

Court may, in the exercise of the court's discretion, permit a party calling a witness to propound leading questions. Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715, 1981 Ga. App. LEXIS 2152 (1981) (decided under former Code 1933, § 38-1706).

In General (Cont'd)

Trial court was permitted to exercise the court's discretion in granting the right to the party calling the witness to ask leading questions, and reversible error occurred only if that discretion was abused to the extent that the appealing party was prejudiced and injured. Blue Cross of Georgia/Columbus, Inc. v. Whatley, 180 Ga. App. 93, 348 S.E.2d 459, 1986 Ga. App. LEXIS 2062 (1986) (decided under former O.C.G.A. § 24-9-63).

2. Permitted

Bill for discovery. — Leading questions may be propounded in a bill for discovery. Cade v. Hatcher, 72 Ga. 359, 1884 Ga. LEXIS 268 (1884) (decided under former Code 1882, § 3865).

Leading questions were permitted on cross-examination, and a trial court did not err in allowing questions to a defendant on cross-examination about whether defendant had heard the testimony of an earlier witness. Brown v. State, 265 Ga. App. 613, 594 S.E.2d 770, 2004 Ga. App. LEXIS 199 (2004) (decided under former O.C.G.A. § 24-9-63).

Judge may personally ask leading questions. Smith v. State, 11 Ga. App. 89, 74 S.E. 711, 1912 Ga. App. LEXIS 269 (1912) (decided under former Penal Code 1910, § 1045).

Uncooperative witness. — Trial court did not abuse the court's discretion in allowing the state to treat a witness as hostile and ask leading questions after the witness was uncooperative in answering questions regarding the account of the shooting that the witness had previously provided. Brown v. State, 314 Ga. 193, 875 S.E.2d 784, 2022 Ga. LEXIS 183 (2022).

Interest adverse to questioning party. — When the vouchee was subpoenaed by plaintiff and sworn as the plaintiff's witness, the vouchee's interest was adverse to that of the defendant, and the vouchee's testimony was material and relevant to the defendant's defense, there was no abuse of discretion of the trial court in permitting the voucher to cross-examine the vouchee. Clary Appliance & Furn. Ctr., Inc. v. Butler, 139 Ga. App. 233, 228 S.E.2d 211, 1976 Ga. App. LEXIS 1752 (1976) (decided under former Code 1933, § 38-1706).

Unfriendly witnesses may be asked leading questions. Moore v. State, 130 Ga. 322, 60 S.E. 544, 1908 Ga. LEXIS 265 (1908) (decided under former Penal Code 1895, § 1019); Morgan v. State, 17 Ga. App. 124, 86 S.E. 281, 1915 Ga. App. LEXIS 292 (1915) (decided under former Penal Code 1910, § 1045); see also Nalley v. State, 11 Ga. App. 15, 74 S.E. 567, 1912 Ga. App. LEXIS 237 (1912).

Unwilling witnesses may be led, as a rule, especially when contumacious or equivocal. Durham v. State, 70 Ga. 264, 1883 Ga. LEXIS 318 (1883) (decided under former Code 1882, § 3865).

Nervous, ignorant, or hostile witness. — Trial court hads the discretion to allow leading questions on direct examination when, for example, the witness was nervous, ignorant, or hostile. Fugate v. State, 263 Ga. 260, 431 S.E.2d 104, 1993 Ga. LEXIS 504 (1993) (decided under former O.C.G.A. § 24-9-63); Crowder v. State, 222 Ga. App. 351, 474 S.E.2d 246 (decided under former O.C.G.A. § 24-9-63); Smith v. State, 243 Ga. App. 331, 533 S.E.2d 431, 2000 Ga. App. LEXIS 461 (2000) (decided under former O.C.G.A. § 24-9-63).

Favorable and willing witnesses. — Trial judge was given great latitude and discretion in permitting counsel to examine and lead a witness in an effort to get to the true facts, even though the witness may be a favorable and willing one; and, therefore, ordinarily, and unless there was a palpable and illegal abuse of the above discretion resulting in prejudice and injury to the complaining party in a material manner, reversible error will not be predicated by this court upon rulings of the trial court as to allowance of leading questions in examination of a witness. Hawthorne v. Pope, 51 Ga. App. 498, 180 S.E. 920, 1935 Ga. App. LEXIS 384 (1935) (decided under former Code 1933, § 38-1706).

Favorable witness who has repudiated testimony. — When an alleged coconspirator was sworn and testified as a witness for the state, but on cross-examination repudiated the witness's testimony given on direct examination, and testified

that the witness's evidence on direct examination had been given on account of threats and intimidation made by a police officer who had told the witness what to say, it was proper to permit the prosecutor to cross-examine the witness for the purpose of showing entrapment, and in this way to prove that the accomplice witness had made statements after the pendency of the alleged conspiracy, but prior to the date of the witness's alleged intimidation, which corroborated the witness's testimony given on direct examination by the state. Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767, 1947 Ga. LEXIS 420 (1947) (decided under former Code 1933, § 38-1706).

Witness sworn but not examined. — Witness who was sworn but not examined by a party may be asked leading questions by the opposing party. Brown v. State, 28 Ga. 199, 1859 Ga. LEXIS 180 (1859). See also Lunday v. Thomas, 26 Ga. 537, 1858 Ga. LEXIS 357 (1858) (decided under former law).

Children and like minded persons. — Judge, when need appeared, will ordinarily permit leading questions to children, or to witnesses so ignorant, timid, weakminded, or deficient in the English language that the witnesses cannot otherwise be brought to understand what information was sought. McCrary v. State, 137 Ga. 784, 74 S.E. 536, 1912 Ga. LEXIS 147 (1912) (decided under former Penal Code 1910, § 1045); Hayslip v. State, 154 Ga. App. 835, 270 S.E.2d 61, 1980 Ga. App. LEXIS 2408 (1980) (decided under former Code 1933, § 38-1706).

In a defendant's prosecution for aggravated child molestation under O.C.G.A. § 16-6-4(b), the prosecutor was properly permitted to use leading questions under former O.C.G.A. § 24-9-63 during the victim's direct examination as the victim was only 14 at the time of trial, was often non-responsive, spoke very softly, and exhibited signs of timidity and fear. Bell v. State, 294 Ga. App. 779, 670 S.E.2d 476, 2008 Ga. App. LEXIS 1313 (2008) (decided under former O.C.G.A. § 24-9-63).

Questioning a young female relating to matters of a sexual character. Keller v. State, 102 Ga. 506, 31 S.E. 92, 1897 Ga. LEXIS 525 (1897) (decided under former Penal Code 1895, § 1019); Wade v. State, 11 Ga. App. 411, 75 S.E. 494, 1912 Ga. App. LEXIS 423 (1912), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720, 1952 Ga. App. LEXIS 945 (1952) (decided under former Code 1933, § 38-1706).

Parties as witnesses. — Leading questions may be allowed although the witness called may be one of the opposite parties to the case. Cade v. Hatcher, 72 Ga. 359, 1884 Ga. LEXIS 268 (1884) (decided under former Code 1882, § 3865); Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220, 1884 Ga. LEXIS 369 (1885) (decided under former Code 1882, § 3865).

Even though a witness was not hostile but was favorable, as if the witness was a party, or was the injured female in a criminal prosecution for seduction, the reviewing court would not control the trial judge's discretion in allowing leading questions, and a new trial would not be granted in such case unless it was plainly apparent that the judge in the exercise of that discretion manifestly abused the discretion, and that thereby the defendant suffered harm. Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720, 1952 Ga. App. LEXIS 945 (1952) (decided under former Code 1933, § 38-1706).

It was not objectionable as a leading question to ask a witness, "Do you know that boy over there?" pointing at the prisoner. Paschal v. State, 89 Ga. 303, 15 S.E. 322, 1892 Ga. LEXIS 331 (1892) (decided under former Code 1882, § 3865).

It was held not a leading question to ask a witness whether or not designated language was used in a given occasion. Fountain v. State, 7 Ga. App. 559, 67 S.E. 218, 1910 Ga. App. LEXIS 385 (1910) (decided under former Penal Code 1895, § 1019).

Question, "You know anything about making up any money to buy whiskey?" was held not objectionable. Hinsman v. State, 14 Ga. App. 481, 81 S.E. 367, 1914 Ga. App. LEXIS 346 (1914) (decided under former Penal Code 1910, § 1045).

When the plaintiff was called as a defense witness upon an objection to the witness being recalled for further cross-

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examination, this tactic entitled counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there was no abuse of discretion in allowing the questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475, 1983 Ga. App. LEXIS 2078 (1983) (decided under former O.C.G.A. § 24-9-63).

Witness with speech impediment. — It was not an abuse of the trial court's discretion to permit one instance of leading a witness who testified that the witness suffered from a speech impediment. Parker v. State, 172 Ga. App. 540, 323 S.E.2d 826, 1984 Ga. App. LEXIS 3070 (1984) (decided under former O.C.G.A. § 24-9-63).

Language barrier. — When a witness exhibited a language barrier, to the extent that the court reporter had a hard time understanding the witness's answers to be able to adequately transcribe the answers, despite the fact that the witness spoke English, the trial court properly allowed the state to ask the witness leading questions. Dumas v. State, 283 Ga. App. 279, 641 S.E.2d 271, 2007 Ga. App. LEXIS 32 (2007) (decided under former O.C.G.A. § 24-9-63).

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness when the witness was determined to have played a key part in a case by, inter alia, finding items of importance matchable to plaintiff's car. Although the witness did not concededly fall within the expressly authorized categories in former O.C.G.A. § 24-9-81, former O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. Hicks v. Doe, 206 Ga. App. 596, 426 S.E.2d 174, 1992 Ga. App. LEXIS 1714 (1992) (decided under former O.C.G.A. § 24-9-63).

Treatment of hostile witness. — When a state's witness was nervous, attempted to evade the prosecutor's questions, and, when asked if the witness would tell the jury what happened at the time of the shooting, the witness said the witness would "rather not," the trial court properly allowed the state to treat the witness as a hostile witness and ask the witness leading questions. Culler v. State, 277 Ga. 717, 594 S.E.2d 631, 2004 Ga. LEXIS 271 (2004) (decided under former O.C.G.A. § 24-9-63).

Trial court did not err in allowing the state to treat one of the state's witnesses, the co-defendant, as a hostile witness, thereby allowing the state to ask leading questions because, although the co-defendant agreed in the plea agreement to testify truthfully about the methamphetamine operation and testify against the defendant, the co-defendant's testimony was not consistent with the proffer the state was given; the co-defendant professed ignorance about any of the items discovered during the search; and the co-defendant's testimony was evasive and unresponsive. Lopez-Vasquez v. State, 331 Ga. App. 570, 771 S.E.2d 218, 2015 Ga. App. LEXIS 198 (2015).

Cross-examination of one's own witness. — Trial court properly allowed a wife to cross-examine two of her own witnesses to show that the husband fraudulently conveyed marital assets to a close friend and to a sister in anticipation of the divorce as such a determination was within the trial court's discretion pursuant to former O.C.G.A. § 24-9-63. Lanier v. Lanier, 278 Ga. 881, 608 S.E.2d 213, 2005 Ga. LEXIS 37 (2005) (decided under former O.C.G.A. § 24-9-63).

3. Not Permitted

Party's own witness. — When the question to which an objection was sustained was leading in nature, it was not properly propounded on redirect examination of defendant's own witness. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413, 1979 Ga. App. LEXIS 2739 (1979) (decided under former Code 1933, § 38-1706).

After unfavorable answer. — Mere fact that an unfavorable answer was given by the witness would not demand that counsel be allowed to ask leading questions of such witness so that a refusal to permit such questions would be an abuse of discretion. Perkins v. Edwards, 228 Ga. 470, 186 S.E.2d 109, 1971 Ga. LEXIS 599 (1971) (decided under former Code 1933,

§ 38-1706); Tucker v. Mappin, 149 Ga. App. 847, 256 S.E.2d 135, 1979 Ga. App. LEXIS 2053 (1979) (decided under former Code 1933, § 38-1706).

On trial for assault with intent to rape, a question asked by the prosecutor, "Did defendant attempt to strip up your clothes," was held too leading. Wade v. State, 12 Ga. 25, 1852 Ga. LEXIS 86 (1852) (decided under former law).

Relevant Matter

Discretion of judge. — Trial judge had discretion to control the scope and manner of cross-examination and this discretion will not be curtailed absent some clear abuse. Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511, 1971 Ga. App. LEXIS 1281 (1971) (decided under former Code 1933, § 38-1704); Whitley v. State, 137 Ga. App. 68, 223 S.E.2d 17, 1975 Ga. App. LEXIS 1205 (1975) (decided under former Code 1933, § 38-1704); Redd v. State, 141 Ga. App. 888, 234 S.E.2d 812, 1977 Ga. App. LEXIS 2108 (1977) (decided under former Code 1933, § 38-1704).

Relevancy and materiality of a line of question rests, even on cross-examination, largely within the discretion of the trial judge. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405, 1979 Ga. App. LEXIS 2778 (1979) (decided under former Code 1933, § 38-1704).

Trial court judge did not abuse the judge's discretion by refusing to allow the defendant to cross-examine robbery victims as to their immigration status because such testimony was not relevant to the case and there was no pending immigration proceedings against the victims. Lemons v. State, 270 Ga. App. 743, 608 S.E.2d 15, 2004 Ga. App. LEXIS 1450 (2004), cert. denied, No. S05C0532, 2005 Ga. LEXIS 256 (Ga. Mar. 28, 2005) (decided under former O.C.G.A. § 24-9-62).

Question for jury. — Evidence of doubtful relevancy or competency should be admitted and the weight left to the jury. Crass v. State, 150 Ga. App. 374, 257 S.E.2d 909, 1979 Ga. App. LEXIS 2322 (1979) (decided under former Code 1933, § 38-1704).

Highway land condemnation. — When the question to be determined by the jury in condemnation proceedings was the value of the property at the time of the property's taking for public purposes on the date that the property was taken, which was the date that the property was condemned, the court did not err in restricting counsel in counsel's direct, rebuttal, and cross-examination of the witnesses with reference to knowledge of the condemnees that the highway was to be located at or near their property at the time they purchased the property, and in refusing to allow final argument thereon by counsel. State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770, 1969 Ga. App. LEXIS 890 (1969) (decided under former Code 1933, § 38-1704).

Improper Questions

Testing intelligence, memory, accuracy, or veracity. — Question propounded by counsel on cross-examination is allowable for the purpose of testing the intelligence of the witness, or memory, accuracy, and veracity, but must not be argumentative. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1704).

Illegal or immoral conduct. — Until a foundation showing the relevancy of a line of questioning is established so as to come within the "other crime" exception, one may not, under the guise of attacking the witness's credibility, ask questions suggesting illegal or immoral conduct in areas other than that before the court. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405, 1979 Ga. App. LEXIS 2778 (1979) (decided under former Code 1933, § 38-1704).

Accuracy. — When in a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Civil Code 1910, § 5870).

Improper Questions (Cont'd)

Chastity. — Witnesses cannot be impeached by showing their lack of chastity since this bears no relevance to the case. Smith v. State, 235 Ga. 327, 219 S.E.2d 440, 1975 Ga. LEXIS 868 (1975) (decided under former Code 1933, § 38-1704).

Pregnancy of rape victim. — In a prosecution for rape, the trial court properly barred defendant's crossexamination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. Lee v. State, 241 Ga. App. 182, 525 S.E.2d 426 (decided under former O.C.G.A. § 24-9-62).

Harsh or Insulting Demeanor

In general. — Courts will not violate the right of a witness to have excluded an irrelevant document, of an impeaching nature, for which no foundation has been laid for submission of this evidence to the jury. Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770, 1963 Ga. App. LEXIS 912 (1963) (decided under former Code 1933, § 38-1704).

Speaking too loudly. — Trial court did not err by admonishing defendant's counsel for speaking too loudly when counsel questioned a 12-year old witness since the trial court did limit the type of questions that defendant could ask or in any way comment on the evidence, but rather, the trial court merely exercised the court's broad discretion to protect a witness from harsh or insulting demeanor. Schneider v. State, 267 Ga. App. 508, 603 S.E.2d 663, 2004 Ga. App. LEXIS 704 (2004) (decided under former .O.C.G.A. § 24-9-62).

Life style. — It is improper argument to infer that witnesses are not worthy of belief because the witnesses are living in the same apartment while unmarried. Smith v. State, 235 Ga. 327, 219 S.E.2d 440, 1975 Ga. LEXIS 868 (1975) (decided under former Code 1933, § 38-1704).

Questioning reluctant witnesses. — It is the privilege of counsel and the duty of courts to propound such questions to reluctant witnesses as will strip the witnesses of the subterfuges to which the witnesses resort to evade telling the truth. Kelly v. State, 19 Ga. 425, 1856 Ga. LEXIS 194 (1856) (decided under former law).

Repeated questions. — Trial court properly prevented a defendant from questioning a witness for the fourth time as to whether the witness would tell a lie after the witness had answered the first three times with some variant of the word "no." Butler v. State, 285 Ga. 518, 678 S.E.2d 92, 2009 Ga. LEXIS 296 (2009) (decided under former O.C.G.A. § 24-9-62).

Principles of Impeachment

Neither the arrest nor the indictment of a witness is impeaching, since, until proof of conviction, the witness is protected by the legal presumption of innocence. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867, 1986 Ga. App. LEXIS 2626 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment of Own Witness

1. In General

Former statute prohibited a party from impeaching the party's own witness. — See Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650, 1977 Ga. LEXIS 894 (1977) (decided under former Code 1933, § 38-1801).

Even if a trial court erred by allowing the state to impeach the state's own witness with a prior statement when the witness could not vouch for the statement's accuracy pursuant to former O.C.G.A. § 24-9-81, no harm resulted due to the overwhelming evidence of the defendant's guilt. Coleman v. State, 278 Ga. 486, 604 S.E.2d 151, 2004 Ga. LEXIS 845 (2004), superseded by statute as stated in Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018) (decided under former O.C.G.A. § 24-9-81).

Broad construction. — Right to impeach one's own witness is broadly construed. Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690, 1978 Ga. App. LEXIS 2879 (1978) (decided under former Code 1933, § 38-1801); Robinson v. State, 150 Ga. App. 642, 258 S.E.2d 294, 1979 Ga. App. LEXIS 2235 (1979) (decided under former Code 1933, § 38-1801).

Strict construction. — Party may be "misled" but not "entrapped," since the former statute, which was in derogation of the common law and must be construed strictly, used the word "entrapped" and not "misled." Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055, 1915 Ga. LEXIS 44 (1915) (decided under former Civil Code 1910, § 5579); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230, 1946 Ga. App. LEXIS 350 (1946) (decided under former Code 1933, § 38-1801).

Applicability to state. — Former statute applied to the state as well as to the defendant. Dixon v. State, 86 Ga. 754, 13 S.E. 87, 1891 Ga. LEXIS 55 (1891) (decided under former Code 1882, § 3869).

Treatment as hostile witness. — Trial court did not err in declaring that defendant's cousin, who had earlier pled guilty to the theft for which defendant was on trial, was a hostile witness and in allowing the state to ask the cousin leading questions because the trial court had great latitude to allow the state to treat a person as a hostile witness and propound leading questions, and allowing it in the present case was proper because the state was not aware that the cousin would change the cousin's testimony at trial from earlier statements the cousin had made about the theft. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432, 2002 Ga. App. LEXIS 1378 (2002) (decided under former O.C.G.A. § 24-9-81).

Effect of exercising constitutional privilege. — After defendant's counsel pled entrapment but when called upon to testify, the defendant availed under oath the constitutional privilege of refusing to answer on the ground that to answer might tend to incriminate the defendant, and thereafter counsel attempted to cross-examine the witness as to what this witness told counsel about the circumstances surrounding this matter, the court erred in refusing to allow a thorough and sifting cross-examination of the witness as to the entrapment. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, § 38-1801).

Entrapment refers to the right of a party to impeach the party's own witness after the party testifies to matters which are contradictory to statements previously made, authorizing a thorough and sifting cross-examination of the party's own witness. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913, 1971 Ga. App. LEXIS 1216 (1971) (decided under former Code 1933, § 38-1801).

Function of cross-examination. — When the introduction of earlier out-of-court statements might occasion confusion, it is the function of a thorough and sifting cross-examination to explore the circumstances of each of the witness's pronouncements in the ultimate quest for truth. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Testimony cannot be withdrawn. — Witness who has delivered testimony hurtful to the party introducing the witness cannot be withdrawn; but if the party has been entrapped by the witness, the law permits the witness's impeachment by the party introducing the witness. Zipperer v. Mayor of Savannah, 128 Ga. 135, 57 S.E. 311, 1907 Ga. LEXIS 48 (1907) (decided under former Civil Code 1895, § 5290).

Showing contradictions of facts. — Although a party may not impeach the party's own witness, unless entrapped by the party, the party may show that the facts are different from the statement of the witness. Cronan v. Roberts & Co., 65 Ga. 678, 1880 Ga. LEXIS 295 (1880) (decided under former Code 1873, § 3869); Hollingsworth v. State, 79 Ga. 605, 4 S.E. 560, 1887 Ga. LEXIS 274 (1887) (decided under former Code 1882, § 3869); McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359, 1890 Ga. LEXIS 216 (1890) (decided under former Code 1882, § 3869); Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923, 1904 Ga. LEXIS 538 (1904) (decided under former Civil Code 1895, § 5290); Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S.E. 143, 1904 Ga. LEXIS 691 (1904) (decided under former Civil Code 1895, § 5290); Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055, 1907 Ga. LEXIS 323 (1907) (decided under former Civil Code 1895,

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§ 5290); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5290); Sessions v. State, 6 Ga. App. 336, 64 S.E. 1101 (1909) (decided under former Penal Code 1895, § 1024); Carter & Martin v. Carter, 7 Ga. App. 216, 66 S.E. 630, 1909 Ga. App. LEXIS 599 (1909) (decided under former Civil Code 1895, § 5290); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, 1924 Ga. App. LEXIS 548 (1924); Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729, 1969 Ga. App. LEXIS 1148 (1969) (decided under former Code 1933, § 38-1801).

Refusal to respond to questions in discovery proceedings is not tantamount to making a statement or giving testimony contradictory to testimony on trial. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729, 1969 Ga. App. LEXIS 1148 (1969) (decided under former Code 1933, § 38-1801).

Putting witness up merely for purpose of discrediting the witness, or merely to lay a foundation for the witness to be contradicted on a material point and thereby rendered unworthy of belief, is reversible error. Eberhart v. State, 121 Ga. App. 663, 175 S.E.2d 73, 1970 Ga. App. LEXIS 1301 (1970) (decided under former Code 1933, § 38-1801).

Proof of bad character. — One who knows the general bad character of a witness by reason of previous felony convictions should not be allowed first to impliedly accredit the witness by offering the witness before a jury as worthy of belief, and then, when entrapped by the witness's testimony, prove, in addition to the contradictory statements by which the witness was surprised and deceived, the general bad character which neither surprised nor misled the witness. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920, 1967 Ga. App. LEXIS 684 (1967) (decided under former Code 1933, § 38-1801).

Trial court did not err by refusing to allow defendant to impeach the defendant's own witness, who had not been declared hostile, by proof of convictions of misdemeanors involving moral turpitude. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497, 1994 Ga. App. LEXIS 198 (1994) (decided under former O.C.G.A. § 24-9-81).

Either party may waive the former statutory requirements and allow a party to impeach the party's own witness without first having shown the court that the witness had entrapped the party. O'Dell v. State, 120 Ga. 152, 47 S.E. 577, 1904 Ga. LEXIS 474 (1904) (decided under former Penal Code 1895, § 1024).

Directing witness to time and place of previous testimony. — Witness cannot be impeached by proof of contradictory statement until the witness's attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5290).

Admission for impeachment only. — When impeachment is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only. Kemp v. State, 214 Ga. 558, 105 S.E.2d 582, 1958 Ga. LEXIS 490 (1958) (decided under former Code 1933, § 38-1801); Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of prior testimony. — Trial court did not err in allowing one of the state's witnesses to testify that another state witness told the witness immediately before the shooting that the witness had seen the defendant get a gun from the car in which the defendant was a passenger that night because the statement was offered and admitted to impeach the other witness's prior testimony that the witness had never witnessed the defendant retrieve anything from the car after the concert. Anderson v. State, 286 Ga. 57, 685 S.E.2d 716, 2009 Ga. LEXIS 676 (2009) (decided under former O.C.G.A. § 24-9-81).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse,

would have been proper as prior inconsistent statements under former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-611), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284, 2006 Ga. LEXIS 987 (2006), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-81).

Deposition admitted for impeachment. — When it appears that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. Parker & Co. v. Glenn, 90 Ga. App. 500, 83 S.E.2d 263, 1954 Ga. App. LEXIS 744 (1954) (decided under former Code 1933, § 38-1801).

Admission of repudiated statement. — It was not erroneous to admit a written statement later repudiated by a witness, over the objection made to the state's admission, since the repudiation would tend to impeach the witness. Fincher v. State, 211 Ga. 89, 84 S.E.2d 76, 1954 Ga. LEXIS 509 (1954) (decided under former Code 1933, § 38-1801).

When, on direct examination, a witness testified that the witness had lied in a statement the witness gave the police, the trial court did not err in allowing the state to impeach the state's own witness by admitting the witness's prior inconsistent statement as substantive evidence. Willis v. State, 214 Ga. App. 659, 448 S.E.2d 755, 1994 Ga. App. LEXIS 1018 (1994) (decided under former O.C.G.A. § 24-9-81).

No application to witness who must explain or deny contradictory statement. — First sentence of former O.C.G.A. § 24-9-81 was applicable to impeachment of witnesses by prior contradictory statements, but since a prior contradictory statement of a witness was admissible as substantive evidence, the first sentence was inapplicable to a witness who must be given an opportunity to explain or deny the prior contradictory statement. Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497, 1983 Ga. App. LEXIS 3232 (1983) (decided under former O.C.G.A. § 24-9-81).

Inconsistent statement admissible for impeachment purposes only. — When impeachment of one's own witness is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only and not to prove the truth of the prior statement. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118, 1983 Ga. App. LEXIS 3228 (1983) (decided under former O.C.G.A. § 24-9-81).

Use of prior inconsistent statements. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes. Ranger v. State, 249 Ga. 315, 290 S.E.2d 63, 1982 Ga. LEXIS 1126 (1982) (decided under former O.C.G.A. § 24-9-81); Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497, 1983 Ga. App. LEXIS 3232 (1983) (decided under former O.C.G.A. § 24-9-81); Jackson v. Ensley, 168 Ga. App. 822, 310 S.E.2d 707, 1983 Ga. App. LEXIS 2932 (1983) (decided under former O.C.G.A. § 24-9-81).

In defendant's trial on a charge that the defendant molested his 13-year-old stepdaughter by touching her "private area" and placing his hands under her shirt, the record did not support defendant's claim that the state called the stepdaughter's mother solely for the purpose of impeaching her, and the trial court properly allowed the state to call two investigators to testify that the mother gave them a statement that was not the same as her testimony at trial. Black v. State, 261 Ga. App. 263, 582 S.E.2d 213, 2003 Ga. App. LEXIS 605 (2003) (decided under former O.C.G.A. § 24-9-81).

Witness's testimony that the witness did not recall details included in a prior statement given to police was inconsistent with the prior statement about those details, and thus, the requirements of former O.C.G.A. § 24-9-81 were met; a trial court thus properly allowed the state to

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impeach the state's own witness who, inter alia, denied having previously identified the defendant as the shooter in a murder incident. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152, 2006 Ga. LEXIS 464 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant as witness for state. — Introduction by state in a criminal prosecution of defendant's statement to police did not make defendant a witness for the state. Wiley v. State, 250 Ga. 343, 296 S.E.2d 714, 1982 Ga. LEXIS 1244 (1982) (decided under former O.C.G.A. § 24-9-81).

When counsel elicits testimony unfavorable to a client, counsel will not be heard to object to the testimony, no matter how prejudicial the testimony may be, if the testimony is a direct and pertinent response to the question propounded. Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757, 1981 Ga. App. LEXIS 2180 (1981) (decided under former Code 1933, § 38-1801).

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Statement made to party or attorney. — Party may not impeach party's own witness by proof of a previous contradictory statement, even if the party claims to have been surprised and entrapped, unless the statement was made directly to the party or the party's attorney, or was made to some third person with instruction to communicate it or for the purpose of being communicated to the party or the party's counsel. Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055, 1915 Ga. LEXIS 44 (1915) (decided under former Civil Code 1910, § 5879); Carter v. State, 17 Ga. App. 244, 86 S.E. 413, 1915 Ga. App. LEXIS 316 (1915) (decided under former Penal Code 1910, § 1050); Burns v. State, 20 Ga. App. 77, 92 S.E. 548, 1917 Ga. App. LEXIS 718 (1917) (decided under former Penal Code 1910, § 1050); Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107, 1944 Ga. App. LEXIS 143 (1944) (decided under former Code 1933, § 38-1801); Sparks v. State, 209 Ga. 250, 71 S.E.2d 608, 1952 Ga. LEXIS 462 (1952) (decided under former Code 1933, § 38-1801).

Statements made to others. — Prior inconsistent statements made by a witness called by the state were not limited to those given to police investigators or prosecuting attorneys. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (decided under former O.C.G.A. § 24-9-81).

Showing of entrapment required. — Prosecutor must show to the court that the prosecutor has been entrapped by the witness by a previous contradictory statement. Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230, 1946 Ga. App. LEXIS 350 (1946) (decided under former Code 1933, § 38-1801).

One's own witness may be impeached when one can show the court that one has been entrapped by that witness by a previous contradictory statement. James v. State, 157 Ga. App. 763, 278 S.E.2d 696, 1981 Ga. App. LEXIS 2008 (1981) (decided under former Code 1933, § 38-1801).

Party may not impeach party's own witness without a showing of entrapment. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867, 1986 Ga. App. LEXIS 2626 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment error absent entrapment. — Admittance of a certified copy of a witness's prior felony conviction was harmful error if it was for the purpose of impeachment, no announcement having been made by the state that this witness was being called for the purpose of cross-examination and no entrapment on the part of the witness having been shown. Hicks v. State, 204 Ga. App. 232, 418 S.E.2d 794, 1992 Ga. App. LEXIS 772 (1992) (decided under former O.C.G.A. § 24-9-81).

Surprise and prejudice. — Term "entrapment" required that one desiring to impeach one's own witness show both surprise and prejudice by the actual testimony as opposed to the earlier statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

While a defendant was entitled to cross-examine a state's witness about pending criminal charges to show the witness's bias, that right did not extend to the defendant's own witness when the defendant failed to show surprise or entrap-

ment by the witness's previous contradictory statement. Arnold v. State, 284 Ga. App. 598, 645 S.E.2d 68, 2007 Ga. App. LEXIS 371 (2007) (decided under former O.C.G.A. § 24-9-81).

Total surprise unnecessary. — To establish entrapment, it is not required that the witness's testimony be a total surprise or that it be affirmatively damaging. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801); Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650, 1977 Ga. LEXIS 894 (1977) (decided under former Code 1933, § 38-1801); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22, 1979 Ga. App. LEXIS 2333 (1979) (decided under former Code 1933, § 38-1801); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707, 1979 Ga. App. LEXIS 3025 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904, 1980 Ga. App. LEXIS 2720 (1980) (decided under former Code 1933, § 38-1801); Andrews v. State, 156 Ga. App. 734, 275 S.E.2d 782, 1980 Ga. App. LEXIS 3185 (1980) (decided under former Code 1933, § 38-1801); Young v. State, 156 Ga. App. 865, 275 S.E.2d 804, 1981 Ga. App. LEXIS 1630 (1981) (decided under former Code 1933, § 38-1801); Ingram v. State, 161 Ga. App. 5, 288 S.E.2d 842, 1982 Ga. App. LEXIS 1738 (1982) (decided under former O.C.G.A. § 24-9-81); Davis v. State, 249 Ga. 309, 290 S.E.2d 273, 1982 Ga. LEXIS 1127 (1982) (decided under former O.C.G.A. § 24-9-81).

Prior showing of surprise unnecessary. — Since it is not error for the trial judge to allow an attorney to cross-examine and lead the witness without first subjecting the attorney personally to an examination, any rule under which a showing of surprise and prejudice must first be made is wrong. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

What constitutes surprise. — Even though the state in a criminal case knows of a repudiation of an earlier statement by one of the state's witnesses before one testifies at trial, if it only goes to the details of the defendant's alleged confession, there is still sufficient "surprise" to admit into evidence the witness's prior statement for impeachment purposes only. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Showing of surprise is no longer required before a party is allowed to impeach the party's own witness. Davis v. State, 249 Ga. 309, 290 S.E.2d 273, 1982 Ga. LEXIS 1127 (1982) (decided under former O.C.G.A. § 24-9-81); Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402, 1982 Ga. App. LEXIS 2160 (1982) (decided under former O.C.G.A. § 24-9-81).

Surprise or prejudice unnecessary. — To meet the requirement of establishing entrapment before one might impeach one's own witness, a showing of prejudice or surprise is no longer necessary. Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447, 1983 Ga. App. LEXIS 2308 (1983) (decided under former O.C.G.A. § 24-9-81).

Refusing party opportunity to introduce further testimony. — There is no abuse of discretion if the trial court refuses party opportunity to introduce further evidence which would impeach the party's previous testimony absent surprise or entrapment. Gorrell v. Fowler, 248 Ga. 801, 286 S.E.2d 13, 1982 Ga. LEXIS 1085 (1982) (decided under former O.C.G.A. § 24-9-81).

Belief of prosecutor. — To establish entrapment, it is sufficient that the prosecutor believed the witness would testify consistently with the earlier testimony. Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22, 1979 Ga. App. LEXIS 2333 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904, 1980 Ga. App. LEXIS 2720 (1980) (decided under former Code 1933, § 38-1801).

Statement by district attorney that the district attorney has been surprised by the testimony is sufficient, in the absence of a showing to the contrary, to show entrapment. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888, 1977 Ga. LEXIS 1314 (1977) (decided under former Code 1933, § 38-1801); James v. State, 157 Ga. App. 763, 278 S.E.2d 696, 1981 Ga. App. LEXIS

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2008 (1981) (decided under former Code 1933, § 38-1801); Foskey v. State, 229 Ga. App. 209, 493 S.E.2d 595 (decided under former O.C.G.A. § 24-9-81).

Testimony failing to bolster case. — Trial court does not err in allowing the district attorney to impeach the state's own witness by introducing prior inconsistent statements, even though the witness's testimony did not damage the state's case save by failing to bolster it as hoped. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Inconsistent testimony. — Impeachment is allowed when the testimony is merely "inconsistent" with a prior written statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-1801).

Although the requirements of surprise and prejudice have been removed from the element of entrapment in the former statute, the plain language of former O.C.G.A. § 24-9-81 still required as a threshold matter a showing that the witness made a statement inconsistent with the witness's testimony at trial. Jones v. State, 270 Ga. 25, 505 S.E.2d 749 (decided under former O.C.G.A. § 24-9-81).

Cross-examination not error. — When the prosecutor stated that the prosecutor had been entrapped by a witness called by the prosecutor and further proved the entrapment by introducing a written statement made by the witness which was contrary to the witness's testimony given upon the trial, it was not error for the trial court to permit the prosecutor to cross-examine the witness. Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107, 1944 Ga. App. LEXIS 143 (1944) (decided under former Code 1933, § 38-1801); Anderson v. State, 103 Ga. App. 83, 118 S.E.2d 381, 1961 Ga. App. LEXIS 866 (1961) (decided under former Code 1933, § 38-1801); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200, 1974 Ga. App. LEXIS 1713 (1974), superseded by statute as stated in Norman v. State, 269 Ga. App. 219, 603 S.E.2d 737, 2004 Ga. App. LEXIS 1120 (2004) (decided under former Code 1933, § 38-1801).

No entrapment shown. — Evidence did not show that the prosecutor was entrapped by a witness. King v. State, 166 Ga. 10, 142 S.E. 160, 1928 Ga. LEXIS 204 (1928) (decided under former Penal Code 1910, § 1050).

Examination of Opposite Party

1. In General

Real purpose of former statute was that of allowing a party to call for cross-examination those persons who by reason of a relationship existing at the time of the examination were subject to "all of the pressures and possible prejudices . . . which that relationship would tend to engender," and when such relationship was no longer in existence it was not error, in the absence of any basis other than a former relationship, to refuse to allow the party calling the witness to treat such person as an adverse witness. Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp., 117 Ga. App. 707, 161 S.E.2d 342, 1968 Ga. App. LEXIS 1201 (1968) (decided under former Code 1933, § 38-1801).

Use of former statute not presumed. — There was no presumption to the effect that when one party puts an opposing party on the stand, or puts an agent or officer of the opposing party on the stand, the witness was put on the stand for the purpose of cross-examination and not as a witness for the party putting such a witness on the stand. Wight Hdwe. Co. v. American Lubricants Co., 91 Ga. App. 339, 85 S.E.2d 507, 1954 Ga. App. LEXIS 922 (1954) (decided under former Code 1933, § 38-1801).

Balancing of rights. — Former statute, providing for the right of thorough and sifting cross-examination, must be balanced with the former statute, protecting the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492, 1978 Ga. App. LEXIS 1710 (1978) (decided under former Code 1933, §§ 38-1704 and 38-1801).

"Present" and "available" are not criteria for determining the qualification of witness for cross-examination. A person not a party may be called for such purpose only if such person is one for whose immediate benefit such suit is prosecuted or defended or is an agent of that party or agent of any person for whose immediate benefit such suit is prosecuted or defended or is an official or agent of a corporation when a corporation is such party, or for whose benefit such suit is prosecuted or defended. Logan v. Turner, 97 Ga. App. 866, 104 S.E.2d 627, 1958 Ga. App. LEXIS 904 (1958) (decided under former Code 1933, § 38-1801); Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (decided under former Code 1933, § 38-1801).

Calling opposite party for direct examination. — When the witness is called to the stand for cross-examination, it is to be understood that the opposite party is to be examined, but a plaintiff who merely calls a defendant as "a witness against himself" in order to prove a prima facie case is not proceeding under the provisions thereof. Jones v. Chambers, 94 Ga. App. 433, 95 S.E.2d 335, 1956 Ga. App. LEXIS 564 (1956) (decided under former Code 1933, § 38-1801).

Calling opposite party for purposes of impeachment. — When defendant was not permitted to recall the victim as the defendant's own witness for purposes of impeachment, since there was no showing of entrapment, this is not permitted. Mingo v. State, 195 Ga. App. 438, 394 S.E.2d 104, 1990 Ga. App. LEXIS 586 (1990) (decided under former O.C.G.A. § 24-9-81).

Impeachment on drug use. — Trial court did not err by prohibiting the defendant from questioning the witness about prior drug use in general as the defendant was permitted to ask whether the witness was under the influence at the time the witness saw the two men outside the victim's house. Boothe v. State, 293 Ga. 285, 745 S.E.2d 594, 2013 Ga. LEXIS 598 (2013) (decided under former O.C.G.A. § 24-9-62).

Belated announcement of calling adverse party as witness. — If the adverse party or agent as specified in former O.C.G.A. § 24-9-81 is called, and an announcement is made by the calling party that the witness was being called for cross-examination, but that announcement was not timely made, the calling party may cross-examine the adverse witness and the other party may or may not be allowed to cross-examine the witness, in the discretion of the trial court, depending upon when in the course of the witness's testimony the announcement was made, the relationship and attitude of the witness to the parties, and the nature of the testimony given or sought to be elicited. Colwell v. Voyager Cas. Ins. Co., 251 Ga. 744, 309 S.E.2d 617, 1983 Ga. LEXIS 976 (1983) (decided under former O.C.G.A. § 24-9-81).

Cross-examination within court's discretion. — When a witness had been called for cross-examination under former O.C.G.A. § 24-9-81, it was within the discretion of the trial court to allow the witness to be cross-examined by the attorney for the opposite party, as well as to ask leading questions. Thomas v. Baxter, 234 Ga. App. 663, 507 S.E.2d 766 (decided under former O.C.G.A. § 24-9-81).

Trial court erred in improperly limiting defense counsel's cross-examination of the alleged victim's financial interest in the trial based upon the victim's claim for financial assistance from the Georgia Crime Victims Emergency Fund. Bowen v. State, 252 Ga. App. 382, 556 S.E.2d 252, 2001 Ga. App. LEXIS 1290 (2001) (decided under former O.C.G.A. § 24-9-81).

Subsequent examination by own attorney. — When the opposite party has been called as a witness for cross-examination, it is within the discretion of the court as to whether to allow the witness to be questioned by the witness's own attorney at the conclusion of the examination by the opposite party. Scarborough v. Wilson, 36 Ga. App. 428, 136 S.E. 830, 1927 Ga. App. LEXIS 93 (1927) (decided under former Civil Code 1910, § 5879); Akridge v. Atlanta Journal Co., 56 Ga. App. 812, 194 S.E. 590, 1937 Ga. App. LEXIS 242 (1937) (decided under former Code 1933, § 38-1801); Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88, 1942 Ga. LEXIS 547 (1942) (decided under former Code 1933, § 38-1801); Barton v. Strickland, 208 Ga. 163,

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65 S.E.2d 602, 1951 Ga. LEXIS 306 (1951) (decided under former Code 1933, § 38-1801); Southeastern Metal Prods., Inc. v. De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305, 1959 Ga. App. LEXIS 905 (1959) (decided under former Code 1933, § 38-1801).

Cross-examination on irrelevant matters. — It is not error to refuse to allow a party to call for cross-examination of a former employee, even though while employed the employee may have been an agent of the opposite party within the sense of the term, although it may be error, as an abuse of discretion, to allow a party to call an employee of the other party for cross-examination on irrelevant matters, irrespective of whether the employee's actions were within or outside the employee's authority as an agent. Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp., 117 Ga. App. 707, 161 S.E.2d 342, 1968 Ga. App. LEXIS 1201 (1968) (decided under former Code 1933, § 38-1801).

There was no prohibition about the prior inconsistent statement being lengthier than the in-court testimony; also, the fact that a witness admitted to making the inconsistent pre-trial statement did not render the statement inadmissible. Warner v. State, 281 Ga. 763, 642 S.E.2d 821, 2007 Ga. LEXIS 253 (2007) (decided under former O.C.G.A. § 24-9-81).

2. Who May Be Examined

Agent at time of trial. — Former statute was intended to apply only to those situations where the witness sought to be examined was, at the time of trial, an agent of an opposite party; for only at that time would such witness be subject to pressure and possible prejudice in favor of one's present employer. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (decided under former Code 1933, § 38-1801).

Definition of agent. — Word "agent" meant any agent available to the party (principal) as a witness in a pending case, and did not refer merely to an agent who had some relation or connection with the transaction in litigation. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (decided under former Code 1933, § 38-1801).

Agency can be proved by agent's sworn testimony. — See Terminal Transp. Co. v. Decatur Truck & Equip. Co., 90 Ga. App. 859, 84 S.E.2d 494, 1954 Ga. App. LEXIS 834 (1954) (decided under former Code 1933, § 38-1801).

Prosecution witness not agent or party. — Former statute did not permit a defendant to call a prosecution witness for cross-examination as an agent of the state or as a party for whom the suit was being prosecuted. Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904, 1974 Ga. App. LEXIS 1436 (1974) (decided under former Code 1933, § 38-1801).

When plaintiff is called as defense witness. — When the plaintiff is called as a defense witness upon an objection to the plaintiff's being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine plaintiff just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing those questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475, 1983 Ga. App. LEXIS 2078 (1983) (decided under former O.C.G.A. § 24-9-81).

Deponent as opposite party. — Mere fact that, prior to the trial, the plaintiff had taken a deposition of the president of the defendant corporation, who was subpoenaed "to testify and the truth say in behalf of the plaintiff," would not prevent the president being called by the plaintiff at the trial of the case for the purpose of cross-examination since the deposition was not introduced in evidence at the trial. Southeastern Metal Prods., Inc. v. De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305, 1959 Ga. App. LEXIS 905 (1959) (decided under former Code 1933, § 38-1801).

Third-party defendant. — Trial court properly allowed party to call third-party defendant as witness for purposes of cross-examination. Ranger Constr. Co. v. Robertshaw Controls Co., 166 Ga. App. 679, 305 S.E.2d 361, 1983 Ga. App. LEXIS

2293 (1983) (decided under former O.C.G.A. § 24-9-81); Wilson v. Childers, 174 Ga. App. 179, 329 S.E.2d 503, 1985 Ga. App. LEXIS 1775 (1985) (decided under former O.C.G.A. § 24-9-81).

Agent of opposing party at time of trial. — When a witness called by the plaintiff was a former employee of the plaintiff and was employed by the defendant at the time of trial, under the provisions of former O.C.G.A. § 24-9-81 plaintiff had a right to cross-examine the witness as an agent of the opposite party, although there was no showing that the witness was a hostile witness. Henderson v. Glen Oak, Inc., 179 Ga. App. 380, 346 S.E.2d 842, 1986 Ga. App. LEXIS 1916 (1986), aff'd, 256 Ga. 619, 351 S.E.2d 640, 1987 Ga. LEXIS 553 (1987) (decided under former O.C.G.A. § 24-9-81).

Effect of testimony. — When witness sworn by plaintiff testified as the defendant corporation's employee, the legal effect of the employee's testimony conflicting with that of another witness called by plaintiff would be the same as if they had both been sworn as the plaintiff's witnesses generally. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234, 1958 Ga. App. LEXIS 859 (1958) (decided under former Code 1933, § 38-1801).

Witness previously sworn. — When the firefighter was agent of the opposite party within the meaning of the former statute, the fact that this witness was previously sworn in behalf of the plaintiff would not prevent the witness being called by the plaintiff for the purpose of cross-examination. Thompson v. Central of Ga. Ry., 102 Ga. App. 5, 115 S.E.2d 471, 1960 Ga. App. LEXIS 1068, 1960 Ga. App. LEXIS 537 (1960) (decided under former Code 1933, § 38-1801).

Witness not agent. — When witness called by plaintiff to testify under cross-examination was not an agent of the defendant individually and since the action was not prosecuted or defended for the witness's immediate benefit and since the witness was not an agent of any person for whose immediate benefit the suit was prosecuted or defended, the witness was not qualified as a witness for cross-examination. Logan v. Turner, 97 Ga. App. 866, 104 S.E.2d 627, 1958 Ga. App. LEXIS 904 (1958) (decided under former Code 1933, § 38-1801).

Employee as agent. — One in the employ of another is subject to all the pressure and possible prejudice in favor of one's employer which such relationship would tend to engender and therefore should be subject to cross-examination by the opposite party. Terminal Transp. Co. v. Decatur Truck & Equip. Co., 90 Ga. App. 859, 84 S.E.2d 494, 1954 Ga. App. LEXIS 834 (1954) (decided under former Code 1933, § 38-1801); Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (decided under former Code 1933, § 38-1801).

Former employees. — Former statute did not allow the cross-examination of ex-employees of a party. Massey Junior College v. Taggart, 140 Ga. App. 591, 231 S.E.2d 540, 1976 Ga. App. LEXIS 1576 (1976) (decided under former Code 1933, § 38-1801).

Corporation or individual as principal. — When an employee of the opposite party is called on the theory that such employee is the agent of that party, the procedure is equally proper whether the principal is in fact a corporation or an individual. Wall v. Rhodes, 112 Ga. App. 572, 145 S.E.2d 756, 1965 Ga. App. LEXIS 777 (1965) (decided under former O.C.G.A. § 24-9-81).

Operator of bus being used as a common carrier of passengers is the agent and alter ego of the common carrier bus company, and as such is subject to cross-examination by the opposite party, and to refuse the opposite party such right is error. Huell v. Southeastern Stages, Inc., 78 Ga. App. 311, 50 S.E.2d 745, 1948 Ga. App. LEXIS 736 (1948) (decided under former Code 1933, § 38-1801).

Agents of school board. — Provisions of former statute were broad enough to include agents of a school board and the principal of a school which was destroyed by fire. Rodgers v. Styles, 100 Ga. App. 124, 110 S.E.2d 582, 1959 Ga. App. LEXIS 549 (1959) (decided under former Code 1933, § 38-1801).

Legatee. — Former statute was applicable on appeal from probate of a will in solemn form; person designated as a legatee in the will, whose interest would be

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adversely affected if the caveat should be sustained, may be called as a witness by the caveatrix for the purpose of cross-examination and impeachment. Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471, 1938 Ga. LEXIS 521 (1938) (decided under former Code 1933, § 38-1801).

Endorser of check. — When one defendant was sued as an endorser and two other defendants as makers, and the case was in default as to the endorser, the court did not err in not permitting the plaintiff (holder of the check) to put the endorser on the stand for cross-examination for the purpose of making out a case against the makers. A.J. Cannon & Co. v. Collier, 91 Ga. App. 40, 84 S.E.2d 482, 1954 Ga. App. LEXIS 854 (1954) (decided under former Code 1933, § 38-1801).

Parent in termination proceeding. — Former O.C.G.A. § 24-9-81 applied to termination proceedings which were civil, not criminal, in nature; therefore, a mother had no right to refuse to be called as a witness for cross-examination by the Department of Family and Children Services. In the Interest of A.R.A.S., 278 Ga. App. 608, 629 S.E.2d 822, 2006 Ga. App. LEXIS 213 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant's mother questioned about prior inconsistent statement. — State properly questioned defendant's mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother's prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that the defendant was involved in gang activity, pursuant to former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-611). Garrett v. State, 280 Ga. 30, 622 S.E.2d 323, 2005 Ga. LEXIS 824 (2005) (decided under former O.C.G.A. § 24-9-81).

Examination of Own Witness

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness after witness was determined to have played a key part in the case by, inter alia, finding items of importance matchable to plaintiff's car. Although a witness did not concededly fall within the expressly authorized categories of former O.C.G.A. § 24-9-81, former O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. Hicks v. Doe, 206 Ga. App. 596, 426 S.E.2d 174, 1992 Ga. App. LEXIS 1714 (1992) (decided under former O.C.G.A. § 24-9-81).

Use of inconsistent prior statements. — Because a state witness, who was also one of defendant's cohorts, was evasive concerning the facts stated in the witness's prior interview and also testified to facts that were inconsistent with those previously stated in the interview, the trial court did not err in permitting the state to ask leading questions or in allowing the taped interview to be introduced into evidence. Johnson v. State, 279 Ga. App. 489, 631 S.E.2d 720, 2006 Ga. App. LEXIS 617 (2006) (decided under former O.C.G.A. § 24-9-81).

Requirements for Appeal

Objection required. — If no objection was made to the asking of leading questions, the allowance of such questions will furnish no ground for a new trial. Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220, 1884 Ga. LEXIS 369 (1885) (decided under former Code 1882, § 3865).

Defendant must demonstrate specific instances of abuse of discretion on appeal. — When defendant failed to demonstrate that the trial court abused the court's discretion in permitting the state on specific occasions to lead the state's witnesses, this precluded the Court of Appeals from finding error in the trial court's exercise of discretion. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188, 1981 Ga. App. LEXIS 1951 (1981) (decided under former Code 1933, § 38-1706).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, §§ 49 et seq., 631 et seq.

Am. Jur. Proof of Facts.

Criminal Law — Need for Disclosure of Identity of Informant, 33 POF2d 549.

C.J.S.

32 C.J.S., Evidence, §§ 711, 726 et seq., 741, 748 et seq., 761.

ALR.

Abuse of witness by counsel as ground for new trial or reversal, 4 A.L.R. 414.

Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party, 5 A.L.R. 1505.

Cross-examination of witness called to testify on particular point or under order of court, 7 A.L.R. 1116.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf, 33 A.L.R. 826.

Impeaching witness examined by both parties, 54 A.L.R. 1374.

Cross-examination as to sexual morality for purpose of affecting credibility of witness, 65 A.L.R. 410.

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Proper practice and relief on development of hostility by party's own witness, 117 A.L.R. 326.

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Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 A.L.R.2d 756.

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Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner, 38 A.L.R.2d 952.

Right of a defendant in personal injury or death action to cross-examine codefendant, 43 A.L.R.2d 1000.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 A.L.R.2d 1239.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses, 53 A.L.R.2d 1229.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 A.L.R.2d 1108.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 A.L.R.2d 610.

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Propriety of hypothetical question to expert witness on cross-examination, 71 A.L.R.2d 6.

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Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 A.L.R.3d 1337.

Right to cross-examine witness as to his place of residence, 85 A.L.R.3d 541.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 A.L.R.3d 304.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 A.L.R.3d 1060.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 A.L.R.4th 796.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

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What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 A.L.R.5th 277.

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness, 3 A.L.R.6th 269.

Construction and application of provision of Rule 611(b) of federal rules of evidence that cross-examination should be limited to subject matter of direct examination, 93 A.L.R. Fed. 2d 243.

24-6-612. Writing used to refresh memory.

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

(b) If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under Code Section 9-11-26, use of the writing to refresh recollection prior to testifying shall not constitute a waiver of that privilege or protection. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice

requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

History.

Code 1981, § 24-6-612, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 524, § 1-4/HB 78.

Cross references.

Writing used to refresh a witness's memory, Fed. R. Evid. 612.

Law reviews.

For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951).

For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953).

For comment on Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), see 22 Ga. B.J. 380 (1960).

For note, "Hypnosis in Court: A Memory Aid for Witnesses," see 1 Ga. L. Rev. 268 (1967).

For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For article, "Confronting Memory Loss," see 55 Ga. L. Rev. 95 (2020).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3810, former Code 1873, § 3866, former Code 1882, § 3866, former Civil Code 1895, § 5284, former Penal Code 1895, § 1020, former Civil Code 1910, § 5873, former Penal Code 1910, § 1046, former Code 1933, § 38-1707, and former O.C.G.A. § 24-9-69 are included in the annotations for this Code section.

Obvious purpose of the former statute was to allow proper and legitimate aid to a witness which will enable the witness to testify fully as to the witness's knowledge. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499, 1945 Ga. LEXIS 316 (1945) (decided under former Code 1933, § 38-1707).

Rule stated in Weldon v. State, 21 Ga. App. 330, 94 S.E. 326, 1917 Ga. App. LEXIS 589 (1917) (decided under former Civil Code 1910, § 5873).

Illegal evidence must not be allowed to reach the jury on the pretense that the evidence was offered in compliance with the former statute. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499, 1945 Ga. LEXIS 316 (1945) (decided under former Code 1933, § 38-1707); Hull v. State, 265 Ga. 757, 462 S.E.2d 596, 1995 Ga. LEXIS 855 (1995) (decided under former O.C.G.A. § 24-9-69).

Past and present recollections distinguished. — For discussion of the distinction between cases where the witness finally testifies to a "past" recollection, and where the witness finally testifies to a "present" recollection, see Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, 1924 Ga. App. LEXIS 290 (1924) (decided under former Civil Code 1910, § 5873).

Testimony must be based on memory and not on memorandum. — Witness may, for the purpose of refreshing the witness's recollection, use any memoranda useful for that purpose; and the witness's testimony will not be objectionable if it is not dependent upon the memoranda, but is based upon the memory of the witness, even though the memoranda may be necessary in order to refresh the witness's recollection. Southern Ry. v.

General Consideration (Cont'd)

Cowan, 52 Ga. App. 360, 183 S.E. 331, 1936 Ga. App. LEXIS 632 (1936) (decided under former Code 1933, § 38-1707).

Independent memory of contents not required. — Witness may testify from the witness's memory refreshed by a writing that the witness made, though the witness has no independent memory of the writing's contents. Bridges v. Mutual Benefit Health & Accident Ass'n, 49 Ga. App. 552, 176 S.E. 543, 1934 Ga. App. LEXIS 482 (1934) (decided under former Code 1933, § 38-1707); Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318, 1954 Ga. App. LEXIS 747 (1954) (decided under former Code 1933, § 38-1707); Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304, 1968 Ga. App. LEXIS 1266 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340, 1968 Ga. App. LEXIS 1458 (1968) (decided under former Code 1933, § 38-1707); Marby v. Henley, 123 Ga. App. 561, 181 S.E.2d 884, 1971 Ga. App. LEXIS 1296 (1971) (decided under former Code 1933, § 38-1707).

Does not affect probative value. — Rule relates as to the admissibility of testimony, and not a rule for the determination of the testimony's probative value. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873); Kines v. State, 67 Ga. App. 314, 20 S.E.2d 89, 1942 Ga. App. LEXIS 400 (1942) (decided under former Code 1933, § 38-1707).

Reading record in hearing of jury. — Witness may not only read the witness's own deposition but it may be read to the witness in the presence and hearing of the jury to refresh the witness's memory. Burney v. Ball, 24 Ga. 505, 1858 Ga. LEXIS 243 (1858) (decided under former law).

Waiver. — When only part of the memorandum was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the opposite party of the remainder of the memorandum amounted to a waiver of the party's objection. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873).

Error in allowing counsel to view witness's notes harmless. — Though the trial court erred in permitting the plaintiff's counsel to examine the notes used by defendant's witness to refresh the witness's memory, defendant failed to show how this error prejudiced the defense, therefore, the error was harmless. Seaboard Coastline R.R. v. Delahunt, 179 Ga. App. 647, 347 S.E.2d 627, 1986 Ga. App. LEXIS 2661 (1986), overruled in part, CSX Transp. v. Williams, 230 Ga. App. 573, 497 S.E.2d 66, 1998 Ga. App. LEXIS 225 (1998) (decided under former O.C.G.A. § 24-9-69).

Preserving error. — While it was true that under former O.C.G.A. § 24-9-69, a witness whose memory was refreshed with a document had to continue their testimony on the basis of recollection alone, when such was not the basis of the defendant's objection at trial, the claim was not preserved for review. Hunter v. State, 282 Ga. App. 355, 638 S.E.2d 804, 2006 Ga. App. LEXIS 1391 (2006) (decided under former O.C.G.A. § 24-9-69).

Written Instrument or Memorandum

Either personal preparation or knowledge that facts true. — In order to testify positively from paper itself, the witness must either have made the paper personally, or, at some time when facts were fresh in the witness's memory, the witness must have known the facts stated in the paper to be correct. Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360, 1982 Ga. App. LEXIS 3165 (1982) (decided under former O.C.G.A. § 24-9-69).

After a defendant was charged with DUI, the trial court did not err in allowing one of the police witnesses to refresh the witness's recollection from a written document without any showing that the witness had prepared the document personally; so long as a witness is testifying from personal recollection, the witness is entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Ussery v.

State, 195 Ga. App. 394, 393 S.E.2d 522, 1990 Ga. App. LEXIS 485 (1990) (decided under former O.C.G.A. § 24-9-69).

Paper itself as evidence. — When a witness testifies from the witness's recollection refreshed as provided by statute, the paper itself, where not otherwise binding upon the party against whom the witness testifies, is without probative value and is not admissible as documentary evidence for any purpose. Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, 1924 Ga. App. LEXIS 290 (1924) (decided under former Civil Code 1910, § 5873).

Excluding such memoranda as are admissible as business records or as part of the res gestae, it is generally held that the memorandum has no present evidentiary value, since it is not the memorandum that is the evidence, but the recollection of the witness. An exception is when the opposite side wished to introduce the memorandum in order to weaken the effect of the testimony. Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304, 1968 Ga. App. LEXIS 1266 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340, 1968 Ga. App. LEXIS 1458 (1968) (decided under former Code 1933, § 38-1707); Mason v. State, 147 Ga. App. 179, 248 S.E.2d 302, 1978 Ga. App. LEXIS 2840 (1978) (decided under former Code 1933, § 38-1707).

Memorandum prepared by another. — If the writing, instrument, document, or other thing from which the witness refreshes the witness's recollection was made in the witness's presence or at the witness's direction and if the witness knows that it contains true and correct information and is willing to swear positively to that effect, it is immaterial that the witness did not personally make the thing from which the witness testified. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (for comment, see 22 Ga. B.J. 380 (1960)) (decided under former Code 1933, § 38-1707).

Although a witness may refresh the witness's memory from a writing prepared by another, the witness must nevertheless testify from the witness's memory thus refreshed. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830, 1975 Ga. LEXIS 1181 (1975), overruled in part, Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former Code 1933, § 38-1707).

In view of a prosecution witness's averment that the witness was testifying from the witness's refreshed memory, the trial court did not err in permitting the witness to testify to the tag number on defendant's truck, even though the witness refreshed the witness's memory by viewing a computer printout bearing the tag number; since the witness was entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Byrd v. State, 182 Ga. App. 284, 355 S.E.2d 666, 1987 Ga. App. LEXIS 2608 (1987) (decided under former O.C.G.A. § 24-9-69).

Trial court correctly allowed a testifying police officer to refresh the officer's memory of the incident using a report written by someone else; O.C.G.A. § 24-9-69, permitted a witness to refresh and assist the witness's memory by the use of any written instrument or memorandum. Penland v. State, 258 Ga. App. 659, 574 S.E.2d 880, 2002 Ga. App. LEXIS 1538 (2002) (decided under former O.C.G.A. § 24-9-69).

Defendants' motions for mistrial were properly denied because the trial judge — who had the benefit of observing the work-detail guard's demeanor and judging the guard's credibility before ruling upon the motions for mistrial — determined that the guard did not actually use the notes prepared by the prosecutor to refresh the guard's recollection; on direct examination, the guard testified that the guard was not actually using the notes; and the guard's recollection was only refreshed after the guard was permitted to review the incident report that the guard created in the immediate wake of the day in question, after review of which the guard provided more detailed and substantial answers to the state's questions. Jones v.

Written Instrument or Memorandum (Cont'd)

State, 340 Ga. App. 142, 796 S.E.2d 765, 2017 Ga. App. LEXIS 27 (2017).

Witness at some time must have had personal knowledge of the memorandum's correctness. Davis v. State, 91 Ga. 167, 17 S.E. 292, 1892 Ga. LEXIS 548 (1892) (decided under former Code 1882, § 3866); Hematite Mining Co. v. East Tenn., Va. & Ga. Ry., 92 Ga. 268, 18 S.E. 24, 1893 Ga. LEXIS 55 (1893) (decided under former Code 1882, § 3866); Jones v. State, 99 Ga. 46, 25 S.E. 617, 1896 Ga. LEXIS 166 (1896) (decided under former Civil Code 1895, § 5284); Lenney v. Finley, 118 Ga. 427, 45 S.E. 317, 1903 Ga. LEXIS 578 (1903) (decided under former Civil Code 1895, § 5284); Shrouder v. State, 121 Ga. 615, 49 S.E. 702, 1905 Ga. LEXIS 25 (1905) (decided under former Civil Code 1895, § 5284); Smith v. City of Atlanta, 22 Ga. App. 511, 96 S.E. 334, 1918 Ga. App. LEXIS 581 (1918) (decided under former Civil Code 1910, § 5873); Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, 1924 Ga. App. LEXIS 290 (1924); Herring v. State, 122 Ga. App. 730, 178 S.E.2d 551, 1970 Ga. App. LEXIS 1018 (1970) (decided under former Code 1933, § 38-1707); Morris v. State, 228 Ga. 39, 184 S.E.2d 82, 1971 Ga. LEXIS 458 (1971); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, 1978 Ga. LEXIS 839, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249, 1978 U.S. LEXIS 3404 (1978).

Investigation reports prepared by witness. — In a proceeding to terminate the parental rights of a parent who had been convicted of molesting the parent's children, the trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh the official's recollection about interviews the official had with the parent. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (decided under former O.C.G.A. § 24-9-69).

It was not improper for an officer to use a police report to refresh the officer's recollection about a prior driving under the influence incident involving the defendant. Becker v. State, 280 Ga. App. 97, 633 S.E.2d 436, 2006 Ga. App. LEXIS 766 (2006) (decided under former O.C.G.A. § 24-9-69).

Investigation reports prepared by another witness. — An investigating officer's report can be used to refresh another witness's recollection. Brown v. State, 247 Ga. App. 741, 545 S.E.2d 114, 2001 Ga. App. LEXIS 107 (2001) (decided under former O.C.G.A. § 24-9-69).

Statement as past recollection recorded. — Although it is preferable to ask a witness specifically at trial whether the witness had told the truth as the witness then perceived it when the witness gave the witness's oral statement and whether a transcript thereof constituted an accurate recording in toto of what the witness had personally stated, since an adequate foundation was established, the transcribed statement may qualify as past recollection recorded under former O.C.G.A. § 24-9-69. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, 1992 Ga. App. LEXIS 1304 (1992), cert. denied, No. S93C0062, 1992 Ga. LEXIS 968 (Ga. Nov. 13, 1992) (decided under former O.C.G.A. § 24-9-69).

Statement was inadmissible as a past recollection recorded or under the medical diagnosis exception to the hearsay rule because after reviewing the typed statement, the social worker testified that the worker's memory was not refreshed and the worker was unwilling to swear that the statement accurately reflected the interview as required under former O.C.G.A. § 24-9-69. Sandlin v. State, 273 Ga. 440, 542 S.E.2d 496, 2001 Ga. LEXIS 146 (2001) (decided under former O.C.G.A. § 24-9-69).

Transcript allowed to go out with jury. — Transcript of statement by witness which was admissible as past recollection recorded should not have been allowed to go out with the jury during deliberation. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, 1992 Ga. App. LEXIS 1304 (1992), cert. denied, No. S93C0062, 1992 Ga. LEXIS 968 (Ga. Nov. 13, 1992) (decided under former O.C.G.A. § 24-9-69).

Cross-examination concerning contents. — Cross-examiner should and does possess the right to quiz the witness con-

cerning the contents of the written instrument without introduction of the document. In doing so the witness is entitled to shed light on the relevant issues whether this be favorable or unfavorable to the client's cause. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-1707).

Examination of memorandum by opposing counsel. — Trial court does not err in refusing to allow defense counsel to examine all a police officer's notes in the officer's file, although defense counsel is allowed to cross-examine the officer with reference to the notes used to refresh the officer's recollection. Sprague v. State, 147 Ga. App. 347, 248 S.E.2d 711, 1978 Ga. App. LEXIS 2686 (1978). See also Ellison v. Robinson, 96 Ga. App. 882, 101 S.E.2d 902, 1958 Ga. App. LEXIS 937 (1958) (decided under former Code 1933, § 38-1707).

Testimony is not subject to "best evidence" objections if the witness merely used records made, kept, and maintained in the regular course of business under the witness's supervision, direction, and control to refresh the witness's memory and the records were admitted into evidence. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969) (decided under former Code 1933, § 1106).

Use of codefendant's testimony prohibited. — Witness may not refresh witness's memory from testimony given at the trial of another defendant under the same indictment. Brown v. State, 28 Ga. 199, 1859 Ga. LEXIS 180 (1859) (decided under former law).

Illustrations

Recollection refreshed. — Testimony was admissible in the following cases, where witness's recollection was refreshed by a memorandum: Veal v. Wood, 29 Ga. App. 94, 113 S.E. 818, 1922 Ga. App. LEXIS 75 (1922) (decided under former Civil Code 1910, § 5873); Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250, 1935 Ga. App. LEXIS 224 (1935) (decided under former Code 1933, § 38-1707).

Since the doctor was present when the plaintiff was brought into the hospital immediately after plaintiff's injury, was present when X-ray pictures were taken and developed, examined the x-rays immediately thereafter and ascertained therefrom that the nature of the plaintiff's injury was such that it was necessary to refer the plaintiff to an orthopedic surgeon, the refusal of the court to allow the witness to refresh the witness's memory under the circumstances shown was probably harmful error and required a reversal of the case. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (for comment, see 22 Ga. B. J. 380 (1960)) (decided under former Code 1933, § 38-1707).

Trial court did not improperly allow a prosecutor to refresh a victim's recollection with a letter the victim wrote to the district attorney's office expressing fear of the defendant as: (1) the defense counsel asked to see the letter before the prosecutor handed the letter to the victim; (2) the prosecutor granted that request; (3) after previewing the letter, the defense counsel did not object to the victim using the letter to refresh the victim's memory; and (4) the letter was neither admitted into evidence nor read to the jury. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448, 2006 Ga. App. LEXIS 194 (2006) (decided under former O.C.G.A. § 24-9-69).

Detective's use of a photograph to refresh that detective's recollection as to which of the codefendants was the defendant on trial went to the weight of the detective's testimony, but did not require that the identification of the defendant on trial be excluded due to a substantial likelihood of irreparable misidentification. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590, 2007 Ga. App. LEXIS 428 (2007) (decided under former O.C.G.A. § 24-9-69).

Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because a proper foundation was laid for the attorney to read the letter to the jury as a past recollection recorded when the attorney testified that the attorney personally prepared the letter and that the conversation concerning the

Illustrations (Cont'd)

scope of a receipt that was recounted in the letter occurred no more than three days before the letter was prepared; although the attorney could not presently recall being told by the decedent that the release from indebtedness contained in the receipt was intended to be limited in scope, the attorney testified that based on the wording of the letter the attorney believed that such a conversation with the decedent and the executor's two siblings had taken place, and that testimony established that the attorney memorialized the conversation in the letter when it was fresh in the attorney's mind and that the attorney believed that the letter was true and accurate when written. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324, 2009 Ga. App. LEXIS 1251 (2009) (decided under former O.C.G.A. § 24-9-69).

Swearing positively from paper. — Testimony was admissible in the following cases when a witness swore positively from the paper that the facts contained therein were correct: Williams v. C. G.H. Kelsey Halsted, 6 Ga. 365, 1849 Ga. LEXIS 47 (1849) (decided under former law); Black v. Thornton, 30 Ga. 361, 1860 Ga. LEXIS 103 (1860) (decided under former law); Schmidt v. Wambacker & Weil, 62 Ga. 321, 1879 Ga. LEXIS 516 (1879) (decided under former Code 1868, § 3810); Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397, 1936 Ga. App. LEXIS 424 (1936) (decided under former Code 1933, § 38-1707); Elliott v. Georgia Power Co., 58 Ga. App. 151, 197 S.E. 914, 1938 Ga. App. LEXIS 213 (1938), superseded by statute as stated in Payne v. Sherrer, 217 Ga. App. 761, 458 S.E.2d 916, 1995 Ga. App. LEXIS 580 (1995) (decided under former Code 1933, § 38-1707); Brown-Rogers-Dixson Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702, 1949 Ga. App. LEXIS 669 (1949) (decided under former Code 1933, § 38-1707); Haskins v. Carson, 115 Ga. App. 336, 154 S.E.2d 626, 1967 Ga. App. LEXIS 1100 (1967) (decided under former Code 1933, § 38-1707).

Before a witness may swear positively from a paper it is not necessary that the witness show a present recollection of the contents of the document. Mincey v. State, 257 Ga. 500, 360 S.E.2d 578, 1987 Ga. LEXIS 918 (1987) (decided under former O.C.G.A. § 24-9-69).

Reading from paper for rebuttal purposes. — Trial court properly permitted an arresting officer to read that portion of the form containing the Miranda warnings which the witness had administered to the defendant for the sole purpose of rebutting the defendant's contention that the defendant had not been advised of the defendant's Miranda rights. Adams v. State, 260 Ga. 298, 392 S.E.2d 866, 1990 Ga. LEXIS 257 (1990) (decided under former O.C.G.A. § 24-9-69).

Inadequate basis for use of memorandum. — Witness could not, over objection, testify to the contents of a typewritten signed memorandum which purported to be a statement of the witness's account with the plaintiff when on cross-examination the witness admitted that the witness did not prepare the memorandum, that the witness did not know who did, that the witness received the memorandum through the mail, but the witness did not recall even the return address on the envelope, that the memorandum was not signed, and that the witness had no independent knowledge of the memorandum's contents or that the items had in fact been charged back to the witness's account. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627, 1937 Ga. App. LEXIS 207 (1937) (decided under former Code 1933, § 38-1707).

No refreshment absent personal knowledge. — Trial court did not err by refusing to allow one of the prosecution witnesses (a police officer) to refresh the officer's recollection from a police report prepared by another officer since the officer testified that the officer had no such personal knowledge. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845, 1992 Ga. App. LEXIS 503 (1992) (decided under former O.C.G.A. § 24-9-69).

Refusal to refresh recollection appropriate. — Refusal to allow defendant to use an officer's report to refresh a witness's recollection was harmless error

since defendant's goal was to use the witness's refreshed recollection to impeach the witness in an impermissible manner — with a document created by one other than the witness and which the witness had not signed. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (decided under former O.C.G.A. § 24-9-69).

Pursuant to former O.C.G.A. § 24-9-69, a witness is allowed to refresh and assist the witness's memory by the use of any written instrument or memorandum; trial counsel's failure to object to the refreshing of a witness's recollection was not ineffective assistance of counsel. Usher v. State, 258 Ga. App. 459, 574 S.E.2d 580, 2002 Ga. App. LEXIS 1481 (2002) (decided under former O.C.G.A. § 24-9-69).

Refreshing police officer's recollection on be on the lookout bulletin. — Trial court's refusal in a suppression hearing to allow a police officer to refresh the officer's recollection about the contents of a be on the lookout police dispatch was harmless error because, given the other evidence that was presented, it did not contribute either to the court's decision on the suppression motion or to the court's adjudication of a juvenile as delinquent. In re H.A., 308 Ga. App. 111, 706 S.E.2d 615, 2011 Ga. App. LEXIS 133 (2011) (decided under former O.C.G.A. § 24-9-69).

Officer's memory refreshed by police report. — In the defendant's trial for murdering a victim by bludgeoning the victim with a rock, the trial court properly admitted an incident that occurred seven years earlier in which the defendant hit an officer with a brick. The officer initially said that it was "possibly" defendant who hit the officer with a brick; however, after the state refreshed the officer's memory with the police report, the officer recalled that the defendant was the person the officer identified as the attacker. Carson v. State, 308 Ga. 761, 843 S.E.2d 421, 2020 Ga. LEXIS 348 (2020) (decided under former O.C.G.A. § 24-9-69).

Failure to object to reading of transcript from preliminary hearing did not constitute ineffective assistance of counsel. — As counsel allowed a detective to read from a transcript of the defendant's preliminary hearing so that counsel could cross-examine the detective about a "blank" in the transcript and thus imply that it did not reflect the defendant's entire statement, counsel's strategic decision not to object to the reading of the transcript under former O.C.G.A. § 24-9-69 did not constitute ineffective assistance. Nesbitt v. State, 296 Ga. App. 139, 673 S.E.2d 652, 2009 Ga. App. LEXIS 152 (2009) (decided under former O.C.G.A. § 24-9-69).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 686 et seq.

ALR.

Use of memorandum by witness to refresh recollection as affected by the time when it was made, 65 A.L.R. 1478; 125 A.L.R. 19.

Refreshment of recollection by use of memoranda or other writings, 125 A.L.R. 19; 82 A.L.R.2d 473.

Admissibility of testimony of witness at former trial or in another case to cover gaps or omissions, due to faulty memory or other causes, in his present testimony given in person or by deposition, 129 A.L.R. 843.

Refreshment of recollection by use of memoranda or other writings, 82 A.L.R.2d 473.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 A.L.R.4th 104.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 A.L.R.4th 1239.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

24-6-613. Prior statements of witnesses.

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.

(c) A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose.

History.

Code 1981, § 24-6-613, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Witness's prior statement, Fed. R. Evid. 613.

Law reviews.

For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3815, 3816, 3819, former Code 1873, §§ 3871, 3872, 3875, former Code 1882, §§ 3871, 3872, 3875, former Civil Code 1895, § 5292, former Penal Code 1895, § 1026, former Civil Code 1910, § 5881, former Penal Code 1910, § 1052, former Code 1933, § 38-1803, and former O.C.G.A. § 24-9-83 are included in the annotations for this Code section.

Witness impeached by disproving facts. — Witness can be impeached as to matters relevant to the witness's testimony and to the case, and by disproving facts testified to by the witness. Morris v. State Farm Mut. Auto. Ins. Co., 203 Ga. App. 839, 418 S.E.2d 119, 1992 Ga. App. LEXIS 628 (1992) (decided under former O.C.G.A. § 24-9-83).

Former Civil Code 1910, §§ 5881 and 5882 (see now O.C.G.A. §§ 24-4-608 and 24-6-613) were not exhaustive as to the manner in which a witness may be impeached. Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913, 1923 Ga. App. LEXIS 184 (1923) (decided under former Civil Code 1910, §§ 5881 and 5882); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

Pretrial statement does not prohibit trial testimony inconsistent therewith. Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510, 1981 Ga. App. LEXIS 2134 (1981) (decided under former O.C.G.A. § 24-9-83).

Absence of prior statement at preliminary hearing fails to amount to a contradiction. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881, 1983 Ga. App. LEXIS 2859 (1983) (decided under former O.C.G.A. § 24-9-83).

Effect of inconsistent statement. — Inconsistency of statement does not render a witness's testimony inadmissible; it merely lays the witness open to impeachment. Carter v. State, 2 Ga. App. 254, 58 S.E. 532, 1907 Ga. App. LEXIS 340 (1907) (decided under former Penal Code 1895, § 1026).

Prior inconsistent statement of witness who takes stand and is subject to cross-examination is admissible as substantive evidence and is not limited to impeachment purposes. Brown v. State, 175 Ga. App. 246, 333 S.E.2d 124, 1985 Ga. App. LEXIS 2794 (1985) (decided under former O.C.G.A. § 24-9-83).

With regard to a defendant's conviction for aggravated assault in a case that the defendant and the complainant reconciled and the complainant had recanted the allegations against the defendant by the time of trial, the defendant failed to prove that defense counsel was ineffective as a result of failing to object to attempted impeachment evidence of the complainant wherein the complainant was asked whether the officers the crime was reported to had lied at trial because the state's question was permissible as part of an attempt to impeach the complainant with the complainant's prior inconsistent statement. Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64, 2009 Ga. App. LEXIS 885 (2009) (decided under former O.C.G.A. § 24-9-83).

Failure to impeach with prior inconsistent statement not prejudicial. — Trial counsel was not ineffective as the defendant failed to demonstrate prejudice because, even if the witness's testimony had been impeached by the witness's prior inconsistent statement, whether the victim was angry prior to the altercation bore little relevance to the defendant's argument that the defendant acted in self-defense. Willerson v. State, 312 Ga. 369, 863 S.E.2d 50, 2021 Ga. LEXIS 606 (2021).

Previous statements not proof of truth. — Evidence of previous contradictory statements made by a witness sought to be impeached is not affirmative proof of the truth of such previous statements. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5292); Early v. Ramey, 119 Ga. App. 621, 168 S.E.2d 629, 1969 Ga. App. LEXIS 1188 (1969) (decided under former Code 1933, § 38-1803); Morgan v. State, 135 Ga. App. 139, 217 S.E.2d 175, 1975 Ga. App. LEXIS 1596, rev'd in part, 235 Ga. 632, 221 S.E.2d 47, 1975 Ga. LEXIS 949 (1975).

General Consideration (Cont'd)

Knowing and willful swearing. — To constitute impeachment, the witness must have knowingly and willfully sworn differently on the present trial from the witness's testimony on the former trial. Stanford v. State, 153 Ga. 219, 112 S.E. 130, 1922 Ga. LEXIS 60 (1922) (decided under former Penal Code 1910, § 1052).

Court determines materiality. — Party may be required to announce the statement the party seeks to contradict, that the court may judge of the statement's materiality. Williams v. Chapman, 7 Ga. 467, 1849 Ga. LEXIS 166 (1849) (decided under former law).

When prior inconsistent statement becomes admissible. — Prior inconsistent statement of a witness becomes admissible when the witness denies having made the statement. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100, 1981 Ga. App. LEXIS 1963 (1981) (decided under former Code 1933, § 38-1803).

Prior contradictory statement of a witness does not become contradictory or exculpatory until the witness testifies. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650, 1981 Ga. LEXIS 873 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (decided under former O.C.G.A. § 24-9-83).

Upon review of a witness's testimony and prior statement, trial counsel was not ineffective in failing to object to the detective's testimony about the witness's statement as hearsay because the trial court likely would have exercised the court's discretion to admit the evidence as a prior inconsistent statement as the defendant admitted that the witness's statement to the detective was a little bit contradictory to what the witness testified to. Faust v. State, 302 Ga. 211, 805 S.E.2d 826, 2017 Ga. LEXIS 827 (2017).

Prior contradictory statement best used during cross examination. — Statement of a witness which does no more than show that the witness made a prior contradictory statement has its most effective use at trial in cross-examination. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650, 1981 Ga. LEXIS 873 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (decided under former O.C.G.A. § 24-9-83).

Recalling of witness for further examination at the instance of either party is always within the discretion of the trial judge. Money v. State, 137 Ga. App. 779, 224 S.E.2d 783, 1976 Ga. App. LEXIS 2600, cert. denied, 429 U.S. 858, 97 S. Ct. 158, 50 L. Ed. 2d 136, 1976 U.S. LEXIS 2884 (1976) (decided under former Code 1933, § 38-1803).

Defendant's request to recall state's witnesses for further cross-examination for impeachment purposes is properly denied if the court is not informed of what statements are intended to be contradicted. Wehunt v. State, 168 Ga. App. 353, 309 S.E.2d 143, 1983 Ga. App. LEXIS 3399 (1983) (decided under former O.C.G.A. § 24-9-83).

Cross-examination. — When it is sought to impeach a witness by a party in order to disparage the witness's testimony, this is properly done by cross-examination of the witness. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd in part, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936) (decided under former Code 1933, § 38-1803).

Alibi witnesses. — State was obligated to respond to the defendants' notification of the defendants' intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under former O.C.G.A. §§ 24-9-82 and 24-9-83 (see now O.C.G.A. §§ 24-6-613 and 24-6-621) was a substitute for compliance with O.C.G.A. § 17-16-5(b). Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813, 2001 Ga. App. LEXIS 648 (2001), cert. denied, No. S01C1518, 2001 Ga. LEXIS 878 (Ga. Nov. 5, 2001), cert. denied, No. S01C1517, 2001 Ga. LEXIS 879 (Ga. Nov. 5, 2001) (decided under former O.C.G.A. § 24-9-83).

Impeaching memory. — It is not competent to impeach, by witnesses, the memory of the witness in order to disparage the witness's testimony. It must be done by cross-examination. Goodwyn v. Goodwyn, 20 Ga. 600, 1856 Ga. LEXIS 113 (1856) (decided under former law).

Because the defendant could have impeached the witnesses who allegedly contradicted themselves as a result of faded memories without losing any right to open and conclude closing argument before the jury, the defendant could not show that an alleged loss of memory caused by any delay in the proceedings amounted to prejudice. Parker v. State, 283 Ga. App. 714, 642 S.E.2d 111, 2007 Ga. App. LEXIS 36 (2007), cert. denied, No. S07C0854, 2007 Ga. LEXIS 361 (Ga. May 14, 2007), cert. denied, 552 U.S. 995, 128 S. Ct. 496, 169 L. Ed. 2d 347, 2007 U.S. LEXIS 11912 (2007) (decided under former O.C.G.A. § 24-9-83).

Impeachment of neighbor. — Defendant asserted that defense counsel could have impeached the neighbor with the neighbor's prior inconsistent statements to the investigator by calling the investigator as a witness at trial; however, this was not ineffective assistance of counsel as there was no prejudice to the defendant. Espinosa v. State, 352 Ga. App. 698, 834 S.E.2d 558, 2019 Ga. App. LEXIS 652 (2019).

Criminal defendant, when a witness, stands before the court as any other witness. Klug v. State, 77 Ga. 734, 1886 Ga. LEXIS 393 (1886) (decided under former Code 1882, §§ 3871, 3872, and 3875); Coleman v. State, 141 Ga. 731, 82 S.E. 228, 1914 Ga. LEXIS 129 (1914) (decided under former Penal Code 1910, § 1052).

Prosecutor, when a witness, stands before the court as any other witness. Womack v. State, 72 Ga. 215, 1883 Ga. LEXIS 111 (1883) (decided under former Code 1882, §§ 3871, 3872, and 3875).

When allegations that defendant impeached were not supported by evidence, summary judgment was not precluded. — See Bonney Motor Express, Inc. v. Yates, 171 Ga. App. 754, 320 S.E.2d 844, 1984 Ga. App. LEXIS 2331 (1984) (decided under former O.C.G.A. § 24-9-83).

Because admission of a booking photograph did not suggest guilt of a prior crime or enflame the jury, the admission did not place defendant's character into evidence or deprive the defendant of a fair trial. Hunter v. State, 273 Ga. App. 52, 614 S.E.2d 179, 2005 Ga. App. LEXIS 406 (2005) (decided under former O.C.G.A. § 24-9-83).

Inconsistent statements. — While the trial court erred in holding that a witness's prior inconsistent statement had to be admitted into evidence prior to the statement's use for impeachment, considering that the allegedly inconsistent statement concerned only a fine distinction whether, prior to the defendant's wife's arrival, the defendant and the murder victim argued with each other or the defendant alone yelled at the victim, the trial court's error did not contribute to the verdict and was, therefore, harmless. Holsey v. State, 281 Ga. 177, 637 S.E.2d 32, 2006 Ga. LEXIS 891 (2006) (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in allowing a codefendant to play a 9-1-1 tape to impeach a witness's testimony with a prior inconsistent statement because the witness and the 9-1-1 operator could all be heard on the 9-1-1 tape, they testified at trial, and they were subject to cross-examination; on the 9-1-1 tape, the witness could be heard saying that the defendant told the witness that the defendant shot the victim, but at trial, the witness testified, "I don't believe that I said that she said she shot him," and the codefendant reminded the witness of the statement on the 9-1-1 call, but the witness did not change the witness' testimony. Krause v. State, 286 Ga. 745, 691 S.E.2d 211, 2010 Ga. LEXIS 269 (2010) (decided under former O.C.G.A. § 24-9-83).

Given a witness's inconsistent testimony at trial and the witness's convenient memory lapses about the portions of the witness's conversation with the police that implicated the defendant, the witness's earlier statements were not hearsay but rather were properly admitted as prior inconsistent statements as the witness was given an opportunity to explain or deny the witness's prior inconsistent statements to the police, and the defendant had the opportunity to cross-examine the witness about those statements. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Evidence sufficient to impeach in the following cases. — See Central of Ga. Ry. v. Pitts, 38 Ga. App. 780, 145 S.E.

General Consideration (Cont'd)

518, 1928 Ga. App. LEXIS 451 (1928) (decided under former Civil Code 1910, § 5881); Sands v. State, 46 Ga. App. 730, 169 S.E. 58, 1933 Ga. App. LEXIS 220 (1933) (decided under former Code 1933, § 38-1803); Felts v. State, 244 Ga. 503, 260 S.E.2d 887, 1979 Ga. LEXIS 1309 (1979) (decided under former Code 1933, § 38-1803); Walker v. Bruno's, Inc., 228 Ga. App. 589, 492 S.E.2d 336 (decided under former O.C.G.A. § 24-9-83).

Use of term "bad guys." — Defendant's motion for a mistrial was properly denied as a witness's use of the term "bad guys" in explaining undercover operations did not improperly inject defendant's character into evidence; even assuming the comment was improper, the error was harmless in light of the overwhelming evidence of defendant's guilt. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417, 2004 Ga. App. LEXIS 827 (2004) (decided under former O.C.G.A. § 24-9-83).

Attempt to bribe victim to change testimony. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because, even assuming that the victim was cross-examined with charges of recent fabrication or improper influence, the victim was not rehabilitated with a prior consistent statement; and the testimony regarding the attempted bribery was not used in any way to explain the prior inconsistent statements to law enforcement about which the victim was cross examined. Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018).

Contradictions were shown in the following cases. — See Cox v. State, 64 Ga. 374, 64 Ga. 375, 1879 Ga. LEXIS 78 (1879) (stenographic notes of testimony at coroner's inquest) (decided under former Code 1873, §§ 3871, 3872, and 3875); Owens v. State, 139 Ga. 92, 76 S.E. 860, 1912 Ga. LEXIS 540 (1912) (affidavit made previous to trial) (decided under former Penal Code 1910, § 1052); Frank v. State, 141 Ga. 243, 80 S.E. 1016, 1914 Ga. LEXIS 183 (1914) (affidavit of witness plus testimony of another witness) (decided under former Penal Code 1910, § 1052).

Exclusion of testimony harmless. — Trial court did not abuse the court's discretion in excluding testimony by the defendant's investigator that the defendant asserted was relevant to the issue of provocation because, even assuming that the testimony at issue was relevant in showing provocation, the testimony was properly excluded and the testimony's exclusion was harmless given that the jury heard testimony that the victim had been spreading rumors that the defendant was gay. Slaughter v. State, 292 Ga. 573, 740 S.E.2d 119, 2013 Ga. LEXIS 251 (2013) (decided under former O.C.G.A. § 24-9-83).

Admissibility of Statement

1. In General

General rule. — Prior inconsistent statements are in general admissible to impeach a witness. Andrews v. State, 118 Ga. 1, 43 S.E. 852, 1903 Ga. LEXIS 412 (1903) (decided under former Penal Code 1895, § 1026); Bates v. State, 4 Ga. App. 486, 61 S.E. 888, 1908 Ga. App. LEXIS 453 (1908) (decided under former Penal Code 1895, § 1026); Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510, 1981 Ga. App. LEXIS 2134 (1981) (decided under former Code 1933, § 38-1803).

Rule that declarations to third persons against the declarant's penal interest to the effect that the declarant and not the accused was the actual perpetrator of the offense are not admissible in favor of the accused at the trial and does not apply when the declarant is present, testifies, and is subject to cross-examination; the accused should have been permitted to produce testimony of the declarant's prior inconsistent statements as substantive evidence of the facts contained therein. Guess v. State, 262 Ga. 487, 422 S.E.2d 178, 1992 Ga. LEXIS 916 (1992) (decided under former O.C.G.A. § 24-9-83).

One method of impeaching a witness is by showing that the witness made statements out of court at variance with the witness's testimony on the witness stand.

Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303, 1943 Ga. App. LEXIS 321 (1943) (decided under former Code 1933, § 38-1803).

Prior statement of fact or opinion. — Prior inconsistent statement is admissible to impeach a witness whether the statement was one of fact or one of opinion when the statement is different from the facts testified to or from the conclusion which the testimony tends to establish. Bates v. State, 4 Ga. App. 486, 61 S.E. 888, 1908 Ga. App. LEXIS 453 (1908) (decided under former Penal Code 1895, § 1026).

Rape victim's statement to an investigator was not impeaching since the statement was neither contradictory nor inconsistent with her trial testimony, but merely stated facts that corroborated the trial testimony. Hightower v. State, 227 Ga. App. 74, 487 S.E.2d 646 (decided under former O.C.G.A. § 24-9-83).

Trial court did not abuse the court's discretion in admitting the testimony of the physician, the detective and the victim's friend regarding the victim's prior consistent statements because part of the defendant's trial strategy was to discredit the victim by attacking the victim's memory of the assault due to smoking marijuana; thus, the prior consistent statements to the physician, the detective, and friend were admissible to logically rebut that the victim's memory was clouded. Wilson v. State, 351 Ga. App. 794, 833 S.E.2d 175, 2019 Ga. App. LEXIS 489 (2019).

Witness's day-after statement inadmissible. — One witness's day-after statement was inadmissible as the only mode of attack on that witness's credibility was via the allegation of collusion to fabricate. The two other witnesses' day-after statements were inadmissible as the federal case law would not support the admission of the prior consistent statements to logically rebut prior inconsistent statements made in different interviews on the previous day, particularly when an alleged motive to fabricate arose during the time between the initial and the day-after statements. McGarity v. State, 311 Ga. 158, 856 S.E.2d 241, 2021 Ga. LEXIS 86 (2021).

Contradictory statements were immaterial. — In a trial for statutory rape and child molestation, the trial court did not err in not allowing the defendant to use contradictory statements about the victim's age to impeach the victim under former O.C.G.A. § 24-9-83 as the victim's age was not contested at trial and the defendant's knowledge of the victim's age was irrelevant; thus, the contradictory statements were immaterial. Haywood v. State, 283 Ga. App. 568, 642 S.E.2d 203, 2007 Ga. App. LEXIS 117 (2007) (decided under former O.C.G.A. § 24-9-83).

Rent dispute was immaterial matter. — Trial court did not err when the court excluded extrinsic evidence to impeach a witness's testimony about a rent dispute that the witness and the victim had with a prior landlord because the prior dispute was not germane or material to whether the defendant was justified in shooting the victim. Corley v. State, 308 Ga. 321, 840 S.E.2d 391, 2020 Ga. LEXIS 172 (2020).

Relevant matters. — Contradictory statements must relate to matters relevant to the testimony of the witness and to the case. Green v. State, 43 Ga. 368, 1871 Ga. LEXIS 249 (1871) (decided under former Code 1868, §§ 3815, 3816, and 3819); Whitaker v. State, 79 Ga. 87, 3 S.E. 403, 1887 Ga. LEXIS 167 (1887) (decided under former Code 1882, §§ 3871, 3872, and 3875); Futch v. State, 90 Ga. 472, 16 S.E. 102, 1892 Ga. LEXIS 205 (1892), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); (decided under former Code 1882, §§ 3871, 3872, and 3875); Watts v. State, 120 Ga. 496, 48 S.E. 142, 1904 Ga. LEXIS 614 (1904) (decided under former Code 1882, §§ 3871, 3872, and 3875); Mann v. State, 124 Ga. 760, 53 S.E. 324, 1906 Ga. LEXIS 607 (1906) (decided under former Penal Code 1895, § 1026); Tanner v. State, 163 Ga. 121, 135 S.E. 917, 1926 Ga. LEXIS 36 (1926) (decided under former Penal Code 1910, § 1052); Cooper v. State, 66 Ga. App. 594, 18 S.E.2d 644, 1942 Ga. App. LEXIS 243 (1942) (decided under former Code 1933, § 38-1803); Green v. State, 138 Ga. App. 48, 225 S.E.2d 495, 1976 Ga. App. LEXIS 2049 (1976) (decided under former Code 1933, § 38-1803); Wakily v. State, 225 Ga. App. 56, 483 S.E.2d 313 (decided under former O.C.G.A. § 24-9-83).

In General (Cont'd)

Since the declarant's testimony was relevant to the case and contradictory statements attributed to the declarant were relevant to the declarant's testimony, testimony proffered by the accused should have been admitted under "the prior inconsistent statement exception to the hearsay rule." Guess v. State, 262 Ga. 487, 422 S.E.2d 178, 1992 Ga. LEXIS 916 (1992) (decided under former O.C.G.A. § 24-9-83).

"Material matters" were matters competent to prove on one side or other of the issue, and admissible for that purpose. Kennedy v. State, 9 Ga. App. 219, 70 S.E. 986, 1911 Ga. App. LEXIS 479 (1911) (decided under former Penal Code 1910, § 1052); Stockton v. State, 20 Ga. App. 186, 92 S.E. 1019, 1917 Ga. App. LEXIS 792 (1917) (decided under former Penal Code 1910, § 1052).

Pre-trial statements. — For a party's credibility to be impeached by prior inconsistent statements, such statement must be relevant and material to the issues on trial; a factual stipulation presented by the parties to the trial court did not conflict with the pre-trial statement, and did not cause a prior inconsistent statement for purposes of impeachment. Redfearn v. Huntcliff Homes Assoc., 260 Ga. App. 150, 579 S.E.2d 37, 2003 Ga. App. LEXIS 245 (2003), cert. denied, No. S03C1031, 2003 Ga. LEXIS 645 (Ga. July 14, 2003) (decided under former O.C.G.A. § 24-9-83).

Because the prosecuting attorney laid a proper foundation for a witness's prior inconsistent statement by questioning the witness about the circumstances of the witness's earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the court's discretion when the court admitted the witness's earlier statement. Edwards v. State, 293 Ga. 612, 748 S.E.2d 870, 2013 Ga. LEXIS 710 (2013).

Purpose of testimony limited. — Testimony offered avowedly to impeach the credit of a witness by showing contradictory statements cannot, in the argument before the jury, be used for a wholly different purpose. Williams v. Chapman, 7 Ga. 467, 1849 Ga. LEXIS 166 (1849) (decided under former law).

Witness could not be impeached by a memorandum that was not written by the witness and that did not record any statement made by the witness. Mobley v. State, 265 Ga. 292, 455 S.E.2d 61, 1995 Ga. LEXIS 155, cert. denied, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301, 1995 U.S. LEXIS 7209 (1995) (decided under former O.C.G.A. § 24-9-83).

Witness could not be cross-examined regarding a document the witness did not prepare and did not know about since the purpose of the cross-examination was to impeach the witness, not refresh the witness's recollection. Fleming v. State, 269 Ga. 245, 497 S.E.2d 211 (decided under former O.C.G.A. § 24-9-83).

Email could not be used for impeachment. — In a child molestation prosecution, an email that the defendant claimed the victim sent, in which the writer apologized for lying about the defendant, was not admissible to impeach the victim, as no testimony elicited from the victim would have been contradicted by the email. Had the victim been asked about telling anyone that the victim had lied about the defendant, and denied doing so, the email might have been admitted for impeachment. Hollie v. State, 298 Ga. App. 1, 679 S.E.2d 47, 2009 Ga. App. LEXIS 575 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642, 2010 Ga. LEXIS 497 (2010) (decided under former O.C.G.A. § 24-9-83).

Inadmissible testimony. — When the testimony of the former trial is inadmissible in evidence, that testimony may not be resorted to for purposes of impeachment. Mitchum v. State, 11 Ga. 615, 1852 Ga. LEXIS 72 (1852) (decided under former law).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under former O.C.G.A.

§§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284, 2006 Ga. LEXIS 987 (2006), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-83).

Proving testimony by notes or memoranda. — For the purpose of impeaching witnesses, their testimony of the committing trial may be proved as well by one who heard it as by the notes or memoranda of the evidence taken by the court. Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84, 1953 Ga. App. LEXIS 1007 (1953) (decided under former Code 1933, § 38-1803).

Document introduced in absence of witness. — If the foundation for impeaching documentary evidence was properly laid, it is immaterial that the witness had concluded the witness's testimony and was absent from the courthouse at the time the document was finally introduced in evidence. Hartley v. Sanders, 45 Ga. App. 273, 164 S.E. 232, 1932 Ga. App. LEXIS 282 (1932) (decided under former Civil Code 1910, § 5881).

Admission by witness of previous statement. — Once a witness has unequivocally admitted having previously made inconsistent statements in a written report, the written report becomes inadmissible as proof of the inconsistency is no longer necessary or material. Choate v. Carter, 98 Ga. App. 375, 105 S.E.2d 909, 1958 Ga. App. LEXIS 589 (1958) (decided under former Code 1933, § 38-1803); Pethel v. Waters, 220 Ga. 543, 140 S.E.2d 252, 1965 Ga. LEXIS 558 (1965) (decided under former Code 1933, § 38-1803); Dickey v. State, 240 Ga. 634, 242 S.E.2d 55, 1978 Ga. LEXIS 743 (1978), overruled in part, Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201, 1997 Ga. LEXIS 713 (1997).

When a witness admits making prior inconsistent statements, the witness has impeached oneself and it is not error to exclude the statements themselves from evidence. Daniels v. State, 203 Ga. App. 873, 418 S.E.2d 137, 1992 Ga. App. LEXIS 562 (1992) (decided under former O.C.G.A. § 24-9-83).

Whether the witness admits or denies making the prior inconsistent statement in writing, the written statement may be admissible and considered as substantive evidence. Language in cases that prior inconsistent statements are not admissible solely because the witness admits he or she made the statements is disapproved. Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201 (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in allowing the prosecutor to play the entire tape of an out-of-court police interview of a witness for the state because the fact that the witness admitted that the witness made the inconsistent pre-trial statement did not render the statement inadmissible. Johnson v. State, 289 Ga. 106, 709 S.E.2d 768, 2011 Ga. LEXIS 286 (2011) (decided under former O.C.G.A. § 24-9-83).

Denial of prior statement. — Witness's prior statement which is inconsistent on a material matter with the witness's trial testimony is properly admitted into evidence to impeach the witness's trial testimony when the witness denies having made such a statement. Dickey v. State, 240 Ga. 634, 242 S.E.2d 55, 1978 Ga. LEXIS 743 (1978), overruled in part, Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201, 1997 Ga. LEXIS 713 (1997) (decided under former Code 1933, § 38-1803).

Even if a witness's out-of-court statement to a detective was hearsay under former O.C.G.A. § 24-3-1(a), it was admissible as a prior inconsistent statement under former O.C.G.A. § 24-9-83 because the witness testified the witness did not remember meeting with the detective and the witness did not tell the detective that the witness's previous statement was incomplete. Welch v. State, 298 Ga. 320, 781 S.E.2d 768, 2016 Ga. LEXIS 67 (2016).

Inconsistent statement admissible only after witness's denial. — Prior inconsistent statement becomes admissible only if the witness denies having

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made the statement. Harden v. State, 166 Ga. App. 536, 304 S.E.2d 748, 1983 Ga. App. LEXIS 3248 (1983) (decided under former O.C.G.A. § 24-9-83).

Fact that former O.C.G.A. § 24-9-83 did not mandate that a prior inconsistent statement be admitted into evidence before the statement was used for impeachment did not render erroneous a trial court's admission of such a statement after cross-examination. Williams v. State, 236 Ga. App. 351, 511 S.E.2d 910 (decided under former O.C.G.A. § 24-9-83).

Witness failing to deny former statement. — Trial court erred in refusing to allow the appellant to impeach a witness's testimony simply because the witness failed to deny making the witness's former statements. Sprouse v. State, 250 Ga. 174, 296 S.E.2d 584, 1982 Ga. LEXIS 1005 (1982) (decided under former O.C.G.A. § 24-9-83).

Admissible as substantive evidence. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717, 1982 Ga. LEXIS 1096 (1982) (decided under former O.C.G.A. § 24-9-83); Sprouse v. State, 250 Ga. 174, 296 S.E.2d 584, 1982 Ga. LEXIS 1005 (1982) (decided under former O.C.G.A. § 24-9-83); Belcher v. State, 188 Ga. App. 244, 372 S.E.2d 650, 1988 Ga. App. LEXIS 982 (1988) (decided under former O.C.G.A. § 24-9-83).

Witness's prior statement which is inconsistent on a material matter with the witness's trial testimony is proper evidence to impeach the witness's trial testimony. Such an inconsistent statement of a witness is not limited in value only to impeachment purposes but is likewise admissible as substantive evidence. Truitt v. State, 168 Ga. App. 616, 309 S.E.2d 895, 1983 Ga. App. LEXIS 2868 (1983) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence. Lumpkin v. State, 255 Ga. 363, 338 S.E.2d 431, 1986 Ga. LEXIS 503 (1986), overruled in part, Woodard v. State, 269 Ga. 317, 496 S.E.2d 896, 1998 Ga. LEXIS 289 (1998) (decided under former O.C.G.A. § 24-9-83).

It was proper to allow the state to introduce prior inconsistent statements as substantive evidence with regard to three witnesses who claimed to have suffered memory loss as well as three other witnesses who equivocated regarding their statements. Spann v. State, 248 Ga. App. 419, 546 S.E.2d 368, 2001 Ga. App. LEXIS 281 (2001) (decided under former O.C.G.A. § 24-9-83).

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62, 2016 Ga. LEXIS 790 (2016).

Evidence which is admissible for impeachment purposes only cannot serve as evidence in support of an essential factual contention. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717, 1982 Ga. LEXIS 1096 (1982) (decided under former O.C.G.A. § 24-9-83).

Prior incriminatory statement is admissible for impeachment purposes even if Miranda warnings have not been given. Graham v. State, 175 Ga. App. 411, 333 S.E.2d 664, 1985 Ga. App. LEXIS 2107 (1985) (decided under former O.C.G.A. § 24-9-83).

Valuation made two years prior to condemnation not admissible. — In a condemnation proceeding, statements concerning the value of the subject property on a date approximately two years prior to the taking may be excluded as impeaching evidence since the value of the property two years prior is not shown to be relevant to the issue of the value of the property at the time of the property's subsequent taking. DOT v. Wright, 169 Ga. App. 332, 312 S.E.2d 824, 1983 Ga.

App. LEXIS 3063 (1983) (decided under former O.C.G.A. § 24-9-83).

Falsity partially conceded. — Written document previously made and signed by a witness, which is contrary to the witness's testimony, may be introduced in evidence for the purpose of impeachment on the ground of contradictory statements; and this may be done even though the witness admits signing the document, and testifies that most of the statements contained therein are false since the document contains other statements whose falsity is not admitted. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485, 1944 Ga. LEXIS 326 (1944) (decided under former Code 1933, § 38-1803); Hodges v. Haverty, 115 Ga. App. 199, 154 S.E.2d 276, 1967 Ga. App. LEXIS 1059 (1967) (decided under former Code 1933, § 38-1803).

Statement not admissible as prior inconsistent statement. — See Garrett v. State, 169 Ga. App. 327, 312 S.E.2d 621, 1983 Ga. App. LEXIS 3061 (1983) (decided under former O.C.G.A. § 24-9-83).

Refusal to admit prior statement harmless error. — Even if the trial court erred in refusing to permit the defendant to read aloud part of the defendant's prior statement, since the defendant's entire custodial statement was admitted into evidence and the jury was free to determine what meaning, weight, and credibility to accord that statement, any error was harmless. O'Hara v. State, 241 Ga. App. 855, 528 S.E.2d 296, 2000 Ga. App. LEXIS 60 (2000) (decided under former O.C.G.A. § 24-9-83).

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Writing admissible. — Any writing previously made by a witness, which is in conflict with the witness's testimony, is admissible for the purpose of impeachment. State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96, 1973 Ga. App. LEXIS 906 (1973) (decided under former Code 1933, § 38-1803); Redd v. State, 242 Ga. 876, 252 S.E.2d 383, 1979 Ga. LEXIS 769, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Depositions. — Words "written statements made under oath in connection with some judicial proceedings" include previously taken depositions of a witness in a case. Williams v. Chapman, 7 Ga. 467, 1849 Ga. LEXIS 166 (1849) (decided under former law); Georgia R.R. & Banking Co. v. Smith, 85 Ga. 530, 11 S.E. 859, 1890 Ga. LEXIS 87 (1890) (decided under former Code 1882, §§ 3871, 3872, and 3875); Raleigh & G.R.R. v. Bradshaw, 113 Ga. 862, 39 S.E. 555, 1901 Ga. LEXIS 400 (1901) (decided under former Civil Code 1895, § 5292); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552, 1922 Ga. LEXIS 133 (1922) (decided under former Civil Code 1895, § 5292); Phillips v. Howard, 109 Ga. App. 404, 136 S.E.2d 473, 1964 Ga. App. LEXIS 882 (1964) (decided under former Code 1933, § 38-1803).

Deposition concerning same issues. — Witness may be contradicted and thus discredited by the witness's depositions previously taken in the same case or in a different case involving the same issues. Lexington Developers, Inc. v. O'Neal Constr. Co., 145 Ga. App. 309, 243 S.E.2d 577, 1978 Ga. App. LEXIS 1963 (1978) (decided under former Code 1933, § 38-1803).

Testimony concerning lost deposition. — When depositions were never properly transmitted to the court and were lost, the court properly allowed oral testimony as to what the interrogated persons said before the court commissioner, not for the purpose of establishing their previous testimony given in the case, but merely for the purpose of proving alleged previous contradictory statements, and properly permitted counsel for the defendants to refer to what purported to be a carbon copy of the previous questions and answers, in questioning the witnesses in order to lay a foundation for their impeachment and in testifying personally as to what answers were previously given, counsel at last testifying from counsel's own recollection after having counsel's memory thus refreshed. Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250, 1935 Ga. App. LEXIS 224 (1935) (decided under former Code 1933, § 38-1803).

Testimony at former trial. — When properly authenticated and proper preliminary proof for its introduction has been made, testimony given in a previous trial of the case is admissible for the purpose of impeaching a witness. Butler v.

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State, 142 Ga. 286, 82 S.E. 654, 1914 Ga. LEXIS 685 (1914) (decided under former Penal Code 1910, § 1052).

Prior statement of witness who later suffered head injury. — In a cruelty to children action, the trial court did not err in allowing the investigating detective to testify to the contents of out-of-court statements made to the detective by the putative father because the putative father had suffered a combat-related head injury that caused the putative father to have trouble recalling certain details during the putative father's testimony, including what occurred on the day the putative father discovered the child's injury. Hines v. State, 353 Ga. App. 710, 839 S.E.2d 208, 2020 Ga. App. LEXIS 71 (2020).

Statement made in different case. — Rule stated is not restricted to contradictory statements made in the same case and is applicable to contradictory statements made in different cases. Jones v. State, 70 Ga. App. 431, 28 S.E.2d 373, 1943 Ga. App. LEXIS 324 (1943) (decided under former Code 1933, § 38-1803).

Prior testimony from committing trial may be used. Brown v. State, 76 Ga. 623, 1886 Ga. LEXIS 71 (1886) (decided under former Code 1882,§§ 3871, 2872, and 3875).

Testimony from Jackson v. Denno hearing. — Defendant's testimony given during a Jackson v. Denno hearing was admissible at trial for the jury's consideration both as incriminatory testimony and as prior contradictory, inconsistent statements. Brown v. State, 226 Ga. App. 140, 486 S.E.2d 370 (decided under former O.C.G.A. § 24-9-83).

Prior statements implicating accused. — Trial court did not err in allowing the prosecution to cross-examine two state witnesses after their testimony differed from their prior statements implicating the appellant in a murder and after the witnesses had repudiated the prior statements as having been made under duress. Burney v. State, 252 Ga. 25, 310 S.E.2d 899, 1984 Ga. LEXIS 571 (1984) (decided under former O.C.G.A. § 24-9-83).

Hospital intake record was admissible to impeach a defense witness by proof of a prior inconsistent statement regarding the identity of the driver in a DUI prosecution. Gee v. State, 210 Ga. App. 60, 435 S.E.2d 275, 1993 Ga. App. LEXIS 1035 (1993) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement. — In a prosecution for child molestation and related offenses, the prior inconsistent statement of a witness that the witness thought defendant "done it" was admissible to impeach the witness's direct testimony that the witness didn't believe the victim when the victim first reported the sexual assaults. Shropshire v. State, 226 Ga. App. 669, 487 S.E.2d 384 (decided under former O.C.G.A. § 24-9-83).

Trial court erred when the court prohibited the defendant from questioning a witness regarding a prior inconsistent statement contained in a document not admitted into evidence. Whitehead v. State, 232 Ga. App. 140, 499 S.E.2d 922 (decided under former O.C.G.A. § 24-9-83).

State was entitled to impeach the testimony of defendant's cousin denying that the defendant participated in a theft as it was entitled to do so using a contradictory statement previously made by the cousin as to matters relevant to the cousin's testimony and to the case. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432, 2002 Ga. App. LEXIS 1378 (2002) (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290, 2014 Ga. App. LEXIS 845 (2014).

Trial court properly allowed — over the defendant's hearsay objection — an investigating officer to testify about the content of the statement of the defendant's sister

because, at trial, the sister testified that, although the sister remembered placing the 911 call and giving a statement to investigators, the sister could not recall the details of the shooting itself or the content of the sister's statement; and, even if there were some error in the admission of that testimony, it was — as the defendant conceded — cumulative of other evidence (including a recording of the 911 call), and any such error was harmless. Murdock v. State, 299 Ga. 177, 787 S.E.2d 184, 2016 Ga. LEXIS 403 (2016).

Witness's written statement and the video interview were admissible as prior inconsistent statements after the state laid the foundation for those prior statements by giving the witness an opportunity to explain or deny the statements, which the witness contended the witness could not recall. London v. State, 308 Ga. 63, 838 S.E.2d 768, 2020 Ga. LEXIS 82 (2020).

Defendant did not show violations of O.C.G.A. § 24-6-613(b) as to a witness's out-of-court statements to a detective because the witness's testimony that the witness saw the defendant's vehicle being stolen, did not see the shooter prior to the day of the shooting, and did not give the detective any descriptions of the shooter or tell her anything the shooter said was inconsistent with the witness's out-of-court statements that the shooter was the one whose vehicle was stolen and the shooter mentioned the theft before killing the victim. Bridgewater v. State, 309 Ga. 882, 848 S.E.2d 865, 2020 Ga. LEXIS 659 (2020).

Trial court did not err when the court admitted the second victim's out-of-court statements because the second victim testified at trial that the second victim did not see the driver of the stolen vehicle and that the shooter did not say anything to the second victim or the first victim, which was inconsistent with the second victim's out-of-court statements that the shooter was the same person whose vehicle was stolen and that the shooter mentioned the stolen vehicle before killing the first victim. Bridgewater v. State, 309 Ga. 882, 848 S.E.2d 865, 2020 Ga. LEXIS 659 (2020).

Witness's alleged lack of memory was a sufficient foundation to allow an investigator to testify as to the content of the witness's statements during a meeting with the prosecutor before trial. Neloms v. State, 313 Ga. 781, 873 S.E.2d 125, 2022 Ga. LEXIS 147 (2022).

In an aggravated cruelty to animals case, the trial court did not err in admitting a friend's prior statement to police as the statement was inconsistent with the friend's trial testimony as the friend told the police that the friend woke up to find the defendant fighting with the dog after the dog bit the defendant, and the friend's statement at trial was that the defendant intervened when the dog unexpectedly attacked the friend; and the friend was given an opportunity to explain or deny the friend's prior statement before the trial court admitted it into evidence. Rozier v. State, 365 Ga. App. 178, 877 S.E.2d 855, 2022 Ga. App. LEXIS 410 (2022).

Allegation of inconsistent statements by witness. — Trial court did not err in admitting a witness's prior consistent statements because the defendant attacked the witness's veracity by suggesting there were inconsistencies between the witness's trial testimony and the witness's written statement, and that the witness fabricated the witness's testimony after giving the written statement; furthermore, because the thrust of the defendant's cross-examination was a charge that the witness fabricated a different version of events after giving the witness's written statement, the trial court did not err in admitting the witness's videotaped interview with the police. Dorsey v. State, 303 Ga. 597, 814 S.E.2d 378, 2018 Ga. LEXIS 293 (2018).

Prior consistent statement of co-defendant. — Defendant's trial counsel was not ineffective as counsel did not perform deficiently by failing to object on the grounds of hearsay and improper bolstering when two witnesses testified that the co-defendant told them within days of the shooting that the defendant shot the victim because the co-defendant's statements to the co-defendant's sister and to the mother of the co-defendant's two children were prior consistent statements, not hearsay, and were admissible to rehabilitate, rather than improperly bolster, the co-defendant's credibility. Brown v. State,

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302 Ga. 454, 807 S.E.2d 369, 2017 Ga. LEXIS 935 (2017).

Defendant's trial counsel was not ineffective for failing to object when the investigator offered testimony about the investigator's interview with the second codefendant that was consistent with the second codefendant's earlier testimony as counsel did not object because counsel wanted the jury to see not only that the second codefendant was unreliable, but also that the prosecution knew the second codefendant was unreliable, and that the prosecution wanted the jury to believe only certain parts of the second codefendant's testimony; counsel argued that point in counsel's closing argument; and counsel's strategy was coherent and reasonable. Bernard v. State, 362 Ga. App. 142, 866 S.E.2d 864, 2021 Ga. App. LEXIS 576 (2021).

Admission of letter as prior inconsistent statement. — Trial counsel was not ineffective for failing to object to a letter signed by the victim and the victim's mother admitted into evidence stating they were hurt by someone they love, but chose to forgive and not feel resentment because the letter was admissible as a prior inconsistent statement, thus, counsel was not ineffective for failing to object to the letter's admission. Bradley v. State, 342 Ga. App. 486, 804 S.E.2d 144, 2017 Ga. App. LEXIS 366 (2017).

Hearsay testimony of detective admissible. — Hearsay testimony of a detective regarding statements made by a coconspirator after the coconspirator denied remembering the crime or giving the police any information was admissible as substance evidence under the prior inconsistent statement exception to the hearsay rule. Robinson v. State, 278 Ga. 31, 597 S.E.2d 386, 2004 Ga. LEXIS 469 (2004) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement of detective admissible. — Both the defendant's trial and appellate counsel rendered ineffective assistance in failing to call a detective to testify that, contrary to the testimony another detective gave at trial, the testifying detective stated that the defendant had mentioned the defendant's alibi in the defendant's first post-arrest interview; a habeas court erred in denying the defendant's petition. Cartwright v. Caldwell, 305 Ga. 371, 825 S.E.2d 168, 2019 Ga. LEXIS 128 (2019).

Proper admission of prior inconsistent statement. — When a witness at the defendant's trial contradicted statements the witness had made to others about the defendant's involvement in a murder, the trial court properly admitted testimony about the earlier statements as prior inconsistent statements. Paige v. State, 281 Ga. 504, 639 S.E.2d 478, 2007 Ga. LEXIS 20 (2007) (decided under former O.C.G.A. § 24-9-83).

Witness's testimony that the brother of a juvenile defendant told the witness, "My brother just shot someone," was not inadmissible hearsay; the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as it was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527, 2007 Ga. App. LEXIS 379 (2007) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement to police admitted. — Trial court properly admitted a witness's pretrial statements to police in which the witness stated that the witness had observed another person have sex with the defendant in exchange for drugs, and that the defendant had been cutting and packaging the drugs into small bags. At trial, the witness denied the facts set forth in these statements and further denied making these statements to the police; thus, the prior inconsistent statements were properly admitted over the defendant's hearsay objection as impeachment evidence and as substantive evidence of the defendant's guilt. Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366, 2008 Ga. App. LEXIS 110 (2008) (decided under former O.C.G.A. § 24-9-83).

Defendant did not establish plain error because the recording of the witness's police interview was admitted to impeach the witness, not to bolster the detective; the defendant did not identify any admitted prior statements that were outside the

scope of the witness's direct examination; the witness had some recollection of the relevant events; and, in light of the compelling evidence presented at trial, the defendant did not establish that the errors probably affected the outcome of the defendant's trial. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Prior inconsistent statement of victim admitted. — Whether or not the trial court erred by refusing to allow the admission of an assault victim's prior inconsistent statement, any error was harmless as defense counsel thoroughly cross-examined the victim about inconsistencies between the victim's written statement and trial testimony, and elicited testimony from a responding officer concerning a statement that the victim made to the officer shortly after the incident occurred, which likewise was inconsistent with the victim's trial testimony. Cash v. State, 293 Ga. App. 702, 667 S.E.2d 691, 2008 Ga. App. LEXIS 1055 (2008) (decided under former O.C.G.A. § 24-9-83).

Use of employment application as prior inconsistent statement. — In a negligence action against a dump truck driver and the driver's employer, given the driver's trial testimony regarding the driver's driving experience, the trial court did not abuse the court's discretion in admitting testimony regarding statements in the driver's purported employment application regarding the driver's truck driving experience as prior inconsistent statements. A & G Trucking, Inc. v. Pitts, 306 Ga. App. 718, 703 S.E.2d 134, 2010 Ga. App. LEXIS 1035 (2010) (decided under former O.C.G.A. § 24-9-83).

Reason victim left job irrelevant, collateral matter. — Trial court did not abuse the court's discretion in refusing to allow the defendant to introduce a prior statement to attempt to impeach the victim on a collateral matter because the reason why the victim left the victim's job was not relevant to the issues in the defendant's trial for robbery by force. Daniels v. State, 349 Ga. App. 681, 824 S.E.2d 754, 2019 Ga. App. LEXIS 152 (2019), cert. denied, No. S19C1070, 2019 Ga. LEXIS 909 (Ga. Dec. 23, 2019), cert. denied, 141 S. Ct. 299, 208 L. Ed. 2d 52, 2020 U.S. LEXIS 4263 (2020).

Inconsistent statement of defendant admitted. — Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous." Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721, 2011 Ga. App. LEXIS 31 (2011) (decided under former O.C.G.A. § 24-9-83).

Prior consistent statement of victim. — Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant asserted in opening statement that the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex with the parent's old significant other, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791, 2006 Ga. App. LEXIS 1384 (2006), overruled in part, Middleton v. State, 309 Ga. 337, 846 S.E.2d 73, 2020 Ga. LEXIS 476 (2020) (decided under former O.C.G.A. § 24-9-83).

Because the defendant attacked the victim's credibility by suggesting that the victim had misidentified the defendant's weapon during a 911 call and that the victim's account of the events was not believable due to the victim's heightened emotional state, the victim's prior state-

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ment to an officer that the assailant had wielded a knife logically rebutted the defendant's suggestion that the victim had misidentified the weapon, and the victim's prior statement that the victim did not scream and flee until the defendant pulled the knife logically rebutted the defendant's claim that the victim was so upset when the defendant initially approached the victim that the victim misconstrued the defendant's intentions. Walters v. State, 335 Ga. App. 12, 780 S.E.2d 720, 2015 Ga. App. LEXIS 745 (2015).

Although the defendant objected to the testimony of two of the four outcry witnesses, because the defendant's trial counsel challenged the veracity of the victim's trial testimony and questioned the victim about a meeting between the victim and the district attorney that had taken place shortly before trial, implying that the meeting might have shaped the victim's testimony, the trial court did not err in holding that that line of questioning raised the issue of recent fabrication, thereby permitting the admission of evidence of the victim's earlier statements that were consistent with the victim's testimony at trial. Jones v. State, 340 Ga. App. 568, 798 S.E.2d 87, 2017 Ga. App. LEXIS 101 (2017).

Witness's recorded statement to a detective was admissible as a prior consistent statement because the witness, who was an inmate in the jail, was present at trial and was cross-examined, during which defense counsel endeavored to show that the witness had a motive to fabricate — as the witness was facing serious criminal charges — that arose subsequent to the time the witness made a statement to the detective. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359, 2016 Ga. LEXIS 237 (2016).

Prior consistent statement of accomplice admissible. — Because an accomplice testified at the defendant's trial and the accomplice's testimony was consistent with a witness's testimony that the accomplice told the witness the defendant shot the victim, the admission of the testimony of a prior consistent statement was not error. Mosley v. State, 298 Ga. 849, 785 S.E.2d 297, 2016 Ga. LEXIS 258 (2016).

Testimony of police officers as to prior statements of a witness is admissible as substantive evidence of guilt of the accused in the nature of an admission. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717, 1982 Ga. LEXIS 1096 (1982) (decided under former O.C.G.A. § 24-9-83).

Confession of codefendant. — In a prosecution for assault with intent to rape, when, on cross-examination, it was brought out that the codefendant had made a signed confession, and the state then placed the codefendant on the stand and, after the codefendant had denied the codefendant's and defendant's guilt, confronted the codefendant with a sworn confession for purposes of impeachment, such confession was admissible in view of conflicting evidence as to whether or not the statement was voluntarily made and was made without fear of injury or hope of reward. Elliott v. State, 87 Ga. App. 456, 74 S.E.2d 366, 1953 Ga. App. LEXIS 768 (1953) (decided under former Code 1933, § 38-1803).

Confession of coconspirator. — Admission into evidence of the alleged confession of a coconspirator was not error since the coconspirator had been called by the defense and the district attorney stated that the testimony would be for the sole purpose of impeachment. Hodge v. State, 149 Ga. App. 326, 254 S.E.2d 478, 1979 Ga. App. LEXIS 1839 (1979) (decided under former Code 1933, § 38-1803).

Hearsay statements inadmissible. — Statements made by the defendant in the course of an earlier recorded meeting with the witness were hearsay and could not be used to impeach the witness. Willett v. State, 223 Ga. App. 866, 479 S.E.2d 132 (decided under former O.C.G.A. § 24-9-83).

Hearsay admissible for impeachment. — Testimony which consisted of declarations by one who was not a party to the case is ordinarily classed as hearsay but is admissible for the sole purpose of impeachment. Wiggins v. Lord, 87 Ga. App. 486, 74 S.E.2d 389, 1953 Ga. App. LEXIS 776 (1953) (decided under former Code 1933, § 38-1803); Simmons v. State, 139 Ga. App. 180, 228 S.E.2d 185, 1976

Ga. App. LEXIS 1728 (1976) (decided under former Code 1933, § 38-1803).

Inconsistent statement of victim not admissible. — Victim advocate's testimony that a domestic abuse victim had told the advocate that the defendant was drunk when the defendant hit the victim was hearsay and not admissible as a prior inconsistent statement of the victim because the victim did not testify as to whether or not the defendant was drunk. However, counsel's failure to object was not ineffective assistance because there was no showing of a reasonable probability that the result would have been different if the jury thought the defendant was drunk or not at the time of the incident. Miller v. State, 300 Ga. App. 652, 686 S.E.2d 302, 2009 Ga. App. LEXIS 1237 (2009) (decided under former O.C.G.A. § 24-9-83).

Defendant's prior temporary protective order (TPO) petitions and statements about the prior abuse by the victim, the defendant's husband, was inadmissible as the statements would not have logically rebutted any suggestion by a detective that the defendant's description of the victim's actions just before the shooting did not match the physical evidence; and, assuming that the detective's testimony implied that the defendant fabricated the claim that the victim had abused the defendant on prior occasions, any error in not admitting the documents was harmless as the TPOs and the photographs were admitted into evidence, and the state conceded during the state's opening statement and closing argument that the victim had abused the defendant previously. Smith v. State, 309 Ga. 240, 845 S.E.2d 598, 2020 Ga. LEXIS 463 (2020).

Prior consistent statement on domestic violence inadmissible. — Even if the statements of the defendant's family members regarding the victim's abuse of the defendant could have served to rebut a detective's testimony that the defendant's pretrial account of the victim's behavior prior to the shooting was not consistent with the physical evidence and that the detective was unable to gain access to photos showing that the victim, the defendant's husband, had abused the defendant on a prior occasion, those statements were not admissible as prior consistent statements because the family members did not testify at trial; thus, the trial court did not plainly err in not admitting those statements. Smith v. State, 309 Ga. 240, 845 S.E.2d 598, 2020 Ga. LEXIS 463 (2020).

Silence as previous statement. — It is error to permit cross-examination of a defendant for impeachment purposes regarding the defendant's silence or failure to offer an exculpatory statement at the time of the defendant's arrest, including a defendant who was not apprised of the defendant's Miranda rights. Harrison v. State, 154 Ga. App. 343, 268 S.E.2d 396, 1980 Ga. App. LEXIS 2156 (1980) (decided under former Code 1933, § 38-1803).

Effect of counteraffidavit, see Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876) (decided under former Code 1873, §§ 3871, 3872, and 3875); Brantley v. State, 16 Ga. App. 6, 84 S.E. 131, 1915 Ga. App. LEXIS 475 (1915) (decided under former Penal Code 1910, § 1052).

Officer's statement on intoxications. — In a defendant's second trial for driving under the influence, it was not error to prevent the defendant from cross-examining a deputy under former O.C.G.A. § 24-9-83 about a statement the deputy made at the first trial about the defendant's level of intoxication; at the second trial, the state did not ask the deputy about the defendant's level of intoxication or about field sobriety tests and, thus, there was no contradiction between the deputy's testimony at the second trial and the deputy's testimony at the first trial. Davidson v. State, 284 Ga. App. 333, 643 S.E.2d 848, 2007 Ga. App. LEXIS 311 (2007) (decided under former O.C.G.A. § 24-9-83).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

Admission of videotape statement. — There was no requirement under for-

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mer O.C.G.A. § 24-9-83 that the witness deny making any statement at all, and a trial court properly allowed the state to introduce a videotape of a pretrial statement given by the state's own witness who admitted during the witness's testimony that the witness made the statement, but testified that the witness lied to the police when doing so; the prior inconsistent statement was admissible as substantive evidence, and no instruction that the statement was admitted solely for purposes of impeachment, but not as substantive evidence, would have been appropriate. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152, 2006 Ga. LEXIS 464 (2006) (decided under former O.C.G.A. § 24-9-83).

Foundation

Purpose of foundation. — Foundation that statute requires be laid before contradictory statements may be proved to impeach a witness is for the purpose of giving the witness the opportunity to correct and explain the witness's evidence. Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552, 1922 Ga. LEXIS 133 (1922) (decided under former Civil Code 1910, § 5881); State Farm Mut. Auto. Ins. Co. v. Rogers, 105 Ga. App. 778, 125 S.E.2d 893, 1962 Ga. App. LEXIS 1038 (1962) (decided under former Code 1933, § 38-1803).

Laying foundation required. — Witness cannot be impeached by proof of contradictory statements without laying a foundation with the particularity prescribed by statute. Williams v. Turner, 7 Ga. 348, 1849 Ga. LEXIS 143 (1849) (decided under former law); Floyd v. Wallace, 31 Ga. 688, 1861 Ga. LEXIS 263 (1861) (decided under former law); Taylor v. State, 110 Ga. 150, 35 S.E. 61 (1900) (decided under former Penal Code 1895, § 1026); Raleigh & G.R.R. v. Bradshaw, 113 Ga. 862, 39 S.E. 555, 1901 Ga. LEXIS 400 (1901) (decided under former Civil Code 1895, § 5292); Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505, 1908 Ga. App. LEXIS 271 (1908) (decided under former Civil Code 1895, § 5292); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110, 1908 Ga. App. LEXIS 471 (1908) (decided under former Civil Code 1895, § 5292); Glover v. State, 137 Ga. 82, 92 S.E. 926 (1911) (decided under former Penal Code 1910, § 1052); White v. Knapp, 31 Ga. App. 344, 120 S.E. 796, 1923 Ga. App. LEXIS 941 (1923) (decided under former Civil Code 1910, § 5881); Stewart v. Avery, 38 Ga. App. 431, 144 S.E. 218, 1928 Ga. App. LEXIS 271 (1928) (decided under former Civil Code 1910, § 5881); Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232, 1953 Ga. App. LEXIS 1131 (1953) (decided under former Code 1933, § 38-1803); Morris v. State, 228 Ga. 39, 184 S.E.2d 82, 1971 Ga. LEXIS 458 (1971).

Foundation for impeachment by prior inconsistent statements is as follows: the cross-examiner will ask the witness whether the witness made the alleged statement, giving the statement's substance, and naming the time, the place, and the person to whom made; if the witness denies the making of the statement, or fails to admit the statement, then the requirement of "laying the foundation" is satisfied and the cross-examiner, at the next stage of giving evidence, may prove the making of the alleged statement. Carter v. State, 244 Ga. 803, 262 S.E.2d 109, 1979 Ga. LEXIS 1425 (1979) (decided under former Code 1933, § 38-1803); Sell v. State, 156 Ga. App. 333, 274 S.E.2d 723, 1980 Ga. App. LEXIS 2968 (1980) (decided under former Code 1933, § 38-1803).

Statement of victim not admitted without foundation. — Trial court did not err in failing to allow the defendant to testify as to a prior inconsistent statement made by the victim during a preliminary inquiry hearing when the foundation requirement of former O.C.G.A. § 24-9-83 was not met since the victim was not questioned about the victim's prior inconsistent statement, and thus was afforded no opportunity to explain or deny the statement before the statement was offered at trial to impeach the victim. Horne v. State, 204 Ga. App. 81, 418 S.E.2d 441, 1992 Ga. App. LEXIS 689 (1992) (decided under former O.C.G.A. § 24-9-83); Searcy v. State, 214 Ga. App. 620, 448 S.E.2d 468, 1994 Ga. App. LEXIS 985 (1994) (decided under former O.C.G.A. § 24-9-83).

Impeachment with recorded statement not permitted. — Trial court did

not err in refusing to allow impeachment of the plaintiff with a statement made in a tape recorded interview after the investigator who conducted the interview was not available to testify, the transcript contained many indications of omissions and indecipherable speech, and the tape itself was barely audible. Georgia Ports Auth. v. Harris, 243 Ga. App. 508, 533 S.E.2d 404, 2000 Ga. App. LEXIS 452 (2000), cert. denied, No. S00C1367, 2000 Ga. LEXIS 934 (Ga. Nov. 30, 2000), aff'd, 274 Ga. 146, 549 S.E.2d 95, 2001 Ga. LEXIS 532 (2001) (decided under former O.C.G.A. § 24-9-83).

Counsel failed to lay proper foundation. — Police report of an investigating officer, which allegedly contained prior inconsistent statements of witnesses, was not allowed into evidence because defense counsel failed to lay the proper foundation for the admission of the report. Armour v. State, 265 Ga. App. 569, 594 S.E.2d 765, 2004 Ga. App. LEXIS 192 (2004) (decided under former O.C.G.A. § 24-9-83).

Inconsistent statement admitted on other grounds when no foundation laid. — Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83, was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803) because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905, 2008 Ga. App. LEXIS 1045 (2008) (decided under former O.C.G.A. § 24-9-83).

Impeachment inappropriate when inadequate foundation laid. — Trial court's decision to foreclose the defendant from impeaching two of the state's witnesses during defendant's crossexamination of the responding police officer with the witnesses prior recorded statements was appropriate because the door to impeachment was never opened since the witnesses never denied making a contradictory statement; even assuming the witnesses denied making a contradictory statement, the defense never laid a proper foundation for the use of any such statement for impeachment purposes. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788, 2010 Ga. App. LEXIS 751 (2010) (decided under former O.C.G.A. § 24-9-83).

Witness given opportunity to admit, explain, or deny. — Trial court did not err in allowing hearsay testimony from the defendant's siblings regarding their father's prior inconsistent statements about the incidents leading up to the charges filed, and the state laid the proper foundation for this testimony as: (1) the statements at issue contradicted the victim's in-court testimony and were certainly relevant; (2) the victim denied making these statements; and (3) the victim's explanation of the incident as an accident was elicited on cross-examination, and hence, such was sufficient to provide the foundational requirement that the witness be given the opportunity to admit, explain, or deny the prior statements. Therefore, the three requirements for admissibility were met. Buchanan v. State, 282 Ga. App. 298, 638 S.E.2d 436, 2006 Ga. App. LEXIS 1372 (2006) (decided under former O.C.G.A. § 24-9-83).

Trial court properly allowed the state to question a detective about one victim's initial statement identifying the defendant and co-defendant as assailants, and to admit a recording of that statement into evidence because a proper foundation was laid as through the testimony, the witness demonstrated that the state sufficiently called to the witness' mind the time, place, person, and circumstances of the statement such that the witness could explain or deny the statement. Williams v. State, 335 Ga. App. 841, 783 S.E.2d 362, 2016 Ga. App. LEXIS 97 (2016).

Admission of witness's prior contradictory statement. — With regard to a defendant's convictions for murder, felony murder, aggravated assault, and armed robbery, the trial court did not err by admitting certain prior inconsistent statements made by a witness with regard to seeing the defendant with a gun as both impeachment and substantive evidence because the witness was presented with the witness's prior contradictory statement and was allowed to fully review the

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statement after being reminded of the time, place, person, and circumstance of the statement. After that review, the witness testified that the witness was both familiar with the statement and that the statement was fair and accurate, although the witness continued to question the statement's contents; therefore, under those circumstances, an adequate foundation was laid for the statement to be used as impeachment evidence, and, since the witness was available at trial for cross-examination, the statement was also properly admitted as substantive evidence for the jury's consideration. McKnight v. State, 283 Ga. 56, 656 S.E.2d 830, 2008 Ga. LEXIS 33 (2008) (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in admitting the victim's prior inconsistent statements to law-enforcement officers because a foundation was laid when the victim gave testimony inconsistent with those statements in which the victim denied that the defendant had attacked the victim. Chambers v. State, 351 Ga. App. 771, 833 S.E.2d 155, 2019 Ga. App. LEXIS 491 (2019).

Statement need not be introduced prior to questioning. — It is not necessary to admit the alleged inconsistent statement into evidence before questioning the witness about the statement. Harden v. State, 166 Ga. App. 536, 304 S.E.2d 748, 1983 Ga. App. LEXIS 3248 (1983) (decided under former O.C.G.A. § 24-9-83).

Trial court erred by limiting defendant's cross-examination of a witness by not allowing the use of an alleged prior inconsistent statement contained in a document which the defendant refused to tender into evidence. Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201 (decided under former O.C.G.A. § 24-9-83).

Trial court's error in requiring defendant to tender statements of victims into evidence before using prior inconsistencies allegedly contained therein for impeachment purposes was harmless since the subsequently tendered statements were used in cross-examination of the victims. Maxwell v. State, 233 Ga. App. 419, 503 S.E.2d 668 (decided under former O.C.G.A. § 24-9-83).

In order to lay the foundation for impeaching a witness with a prior inconsistent statement, the cross-examiner must show the written contradictory statement to the witness or read the statement in his or her hearing; the attorney need not introduce the prior written statement into evidence before using the statement to impeach the witness. Robinson v. State, 265 Ga. App. 481, 594 S.E.2d 696, 2004 Ga. App. LEXIS 160 (2004) (decided under former O.C.G.A. § 24-9-83).

Requirements as to laying of foundation fulfilled. — See Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447, 1983 Ga. App. LEXIS 2308 (1983) (decided under former O.C.G.A. § 24-9-83); Meschino v. State, 259 Ga. 611, 385 S.E.2d 281, 1989 Ga. LEXIS 466 (1989) (decided under former O.C.G.A. § 24-9-83); Ward v. State, 271 Ga. 648, 520 S.E.2d 205 (decided under former O.C.G.A. § 24-9-83).

Witnesses' viewing of recordings of the witnesses' earlier statements satisfies the requirement that the time, place, person, and circumstances attending the former statements shall be called to the witness's mind with as much certainty as possible pursuant to former O.C.G.A. § 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613). Williams v. State, 304 Ga. App. 592, 696 S.E.2d 512, 2010 Ga. App. LEXIS 580 (2010), cert. dismissed, No. S10C1853, 2011 Ga. LEXIS 42 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-4-8).

Proper foundation for a child molestation victim's prior inconsistent statement to police and authorities was laid under former O.C.G.A. § 24-9-83 by the victim acknowledging making the prior statements, conceding that the statements were contradictory to the victim's trial testimony, and explaining that the allegations were fabricated to anger the defendant's spouse. Gunter v. State, 313 Ga. App. 756, 722 S.E.2d 450, 2012 Ga. App. LEXIS 68 (2012) (decided under former O.C.G.A. § 24-9-83).

Proper foundation was laid before evidence impeaching defendant admitted. Eller v. State, 183 Ga. App. 724, 360 S.E.2d 53, 1987 Ga. App. LEXIS 2734 (1987) (decided under former O.C.G.A. § 24-9-83).

Trial court properly admitted a portion of a witness's written statement as a prior

inconsistent statement under former O.C.G.A. § 24-9-83 because the state laid the appropriate foundation for the admission of the statement and the witness attempted to explain the inconsistency. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398, 2006 Ga. App. LEXIS 146 (2006), cert. denied, No. S06C1363, 2006 Ga. LEXIS 739 (Ga. Sept. 8, 2006), overruled in part, Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-9-83).

Proper foundation for videotaped statement laid. — Foundation for the use of a prior videotaped statement by a defendant's accomplice to impeach the accomplice's trial testimony was established by the accomplice when the accomplice testified that the accomplice had in fact given a videotaped statement in which the accomplice stated that the defendant was the one who shot and killed a community service officer, and there was no requirement that the accomplice actually reviewed the videotape before the videotape was used to impeach the accomplice. Byrum v. State, 282 Ga. 608, 652 S.E.2d 557, 2007 Ga. LEXIS 780 (2007) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement of victim admitted. — Trial court's admission of the victim's prior inconsistent statement to a police investigator regarding the events surrounding the crime charged was proper as the prosecutor questioned the victim at considerable length regarding the statement, a tape recording of the victim's 9-1-1 call was played, and then the prosecutor questioned the victim in detail regarding the contents of the earlier statement which the victim denied making. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214, 2007 Ga. App. LEXIS 1333 (2007) (decided under former O.C.G.A. § 24-9-83).

No proper foundation was laid for proof of contradictory statement. Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth., 168 Ga. App. 202, 308 S.E.2d 547, 1983 Ga. App. LEXIS 2728 (1983) (decided under former O.C.G.A. § 24-9-83).

Although witness one, who made a prior inconsistent statement was present and available for cross-examination, introduction of the prior inconsistent statement through witness two was improper because witness one testified before the issue of the alleged statement to witness two had been raised, and witness one was never questioned with the specificity necessary to establish the foundation for admission of the alleged prior inconsistent statement. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520, 2008 Ga. LEXIS 427 (2008) (decided under former O.C.G.A. § 24-9-83).

Defendant failed to properly impeach defendant's witness by proof of previous contradictory statement, for while defendant put another witness on the stand who proffered that the witness overheard the allegedly inconsistent statement, the defendant never, on direct examination, asked the original witness questions concerning the time, place, or circumstances attending the former statement, nor did the defendant bring the witness back to the witness stand for further questioning along this line. Smith v. State, 171 Ga. App. 758, 321 S.E.2d 213, 1984 Ga. App. LEXIS 3004 (1984) (decided under former O.C.G.A. § 24-9-83).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845, 2010 Ga. LEXIS 607 (2010) (decided under former O.C.G.A. § 24-9-83).

It was not error to exclude a preliminary hearing transcript offered to impeach a witness when a proper founda-

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tion was not laid. Sosebee v. State, 169 Ga. App. 370, 312 S.E.2d 853, 1983 Ga. App. LEXIS 3070 (1983) (decided under former O.C.G.A. § 24-9-83).

Circumstances attending statement. — If the witness made a contradictory statement, it was proper for counsel for defendants to call to the witness's attention the name of the person or company to whom made, and the circumstances attending the statement. Sweet v. Awtrey, 70 Ga. App. 334, 28 S.E.2d 154, 1943 Ga. App. LEXIS 311 (1943) (decided under former Code 1933, § 38-1803).

Recall of witness to lay foundation. — Trial court erred in refusing to allow the defense to recall a prosecution witness to lay a foundation for admission of prior contradictory statements; the court's ruling forced the defendant to choose between testifying personally or foregoing the admission of relevant evidence. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (decided under former O.C.G.A. § 24-9-83).

Reading statement to witness. — Though a written statement not under oath must be read in the hearing of the witness, one under oath and made in connection with some judicial proceeding need not be read to the witness. Wilkerson v. State, 73 Ga. 799, 1884 Ga. LEXIS 229 (1884) (decided under former Code 1882, §§ 3871, 3872, and 3875); Washington v. State, 124 Ga. 423, 52 S.E. 910, 1905 Ga. LEXIS 733 (1905) (decided under former Penal Code 1895, § 1026).

To lay the proper foundation for the admission of a prior written inconsistent statement, the statement must be shown to the witness, or read in the witness's hearing. Davis v. State, 235 Ga. App. 256, 510 S.E.2d 537 (decided under former O.C.G.A. § 24-9-83).

Cross examination of officers from reports. — After counsel read five sentences from a police officer's report during crossexamination of that witness, it was held not to be evidence, but foundational language as contemplated by former O.C.G.A. § 24-9-83. Davis v. State, 235 Ga. App. 256, 510 S.E.2d 537 (decided under former O.C.G.A. § 24-9-83).

Court would reject the contention that the defendant had two deputies read paragraphs from their police reports into evidence simply to lay the required evidentiary foundation for impeaching the deputies with their prior inconsistent statements since defense counsel went beyond "mere cross-examination" and did more than recall a contradiction to the deputies by reading their prior inconsistent statements to the deputies when counsel had each deputy read into evidence paragraphs taken from police reports that had been marked and handled before the jury as defense exhibits and, further, those paragraphs contained information addressing matters other than the challenged contradictory statements. Aldridge v. State, 237 Ga. App. 209, 515 S.E.2d 397, 1999 Ga. App. LEXIS 117 (1999) (decided under former O.C.G.A. § 24-9-83).

Technical variance in the name stated by the witness as that of the person to whom a statement had been made and the witness's name when introduced for purposes of impeachment will not prevent the laying of a proper foundation when there is no real doubt that the two names belong to the same person. Taylor v. State, 135 Ga. 622, 70 S.E. 237, 1911 Ga. LEXIS 24 (1911) (decided under former Penal Code 1910, § 1052).

Witness failing to recall previous statements. — Proof that a witness made previous statements contradictory to the statements the witness made while testifying is admissible, though the witness testifies the witness does not remember whether or not the witness made such previous contradictory statements. Waycaster v. State, 136 Ga. 95, 70 S.E. 883, 1911 Ga. LEXIS 425 (1911) (decided under former Penal Code 1910, § 1052); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552, 1922 Ga. LEXIS 133 (1922) (decided under former Civil Code 1910, § 5881); Lexington Developers, Inc. v. O'Neal Constr. Co., 145 Ga. App. 309, 243 S.E.2d 577, 1978 Ga. App. LEXIS 1963 (1978) (decided under former Code 1933, § 38-1803).

Impeaching evidence not called to witness's mind. — When a written statement of a witness is introduced in evidence by agreement of counsel, admitting

not that the statement is true, but that the writing shows what the witness would testify at the trial if present, the statement is subject to impeachment even though the impeaching evidence cannot be called to the witness's mind on cross-examination in the manner provided by statute. Travelers Ins. Co. v. Miller, 104 Ga. App. 554, 122 S.E.2d 268, 1961 Ga. App. LEXIS 736 (1961) (decided under former Code 1933, § 38-1803).

No contradictory statement. — When no statement was made by the witness which could be contradicted, no foundation could be laid for impeachment purposes. Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375, 1974 Ga. App. LEXIS 1000 (1974) (decided under former Code 1933, § 38-1803); Hardeman v. Metropolitan Atlanta Rapid Transit Auth., 157 Ga. App. 271, 277 S.E.2d 65, 1981 Ga. App. LEXIS 1776 (1981) (decided under former Code 1933, § 38-1803).

No foundation for admission of audiotape. — Since the police officer made no statement on an audiotape that differed materially from the officer's in-court testimony, and the officer did not deny any statement made earlier, the foundation for the admission of the audiotape was not made, and it was properly excluded. Ow v. State, 255 Ga. App. 98, 564 S.E.2d 512, 2002 Ga. App. LEXIS 492 (2002) (decided under former O.C.G.A. § 24-9-83).

Inaccessibility of witness at the time it is sought to lay this foundation does not justify a departure from statute. Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505, 1908 Ga. App. LEXIS 271 (1908) (decided under former Civil Code 1895, § 5292).

Testimony only by deposition. — When the plaintiff testified only by deposition, and plaintiff had not been examined in respect to the statements contained in the document, and plaintiff had not been confronted with the document by which it was sought to impeach plaintiff's testimony, or apprised of the contention that its effect was to contradict plaintiff's statements, the rule forbidding use of contradictory statements to impeach evidence taken by deposition was applicable. Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 5 S.E.2d 214, 1939 Ga. LEXIS 647 (1939) (decided under former Code 1933, § 38-1803).

Time. — When the foundation has been laid for impeaching a witness, the witness called to prove the different statements will not be confined to any particular time. Thomasson v. Driskell, 13 Ga. 253, 1853 Ga. LEXIS 74 (1853) (decided under former law).

No obligation to listen to prior audiotape. — State was not obliged to let a witness listen to the witness's taped prior inconsistent statement before playing back the recording to impeach the witness. As the prosecutor questioned the witness in detail about the time, place, person, and circumstances attending the former statement, including the inconsistency at issue, this line of questioning established an ample foundation for introduction of the statement. Cade v. State, 289 Ga. 805, 716 S.E.2d 196, 2011 Ga. LEXIS 717 (2011) (decided under former O.C.G.A. § 24-9-83).

Jury should be sent out. — If it is necessary to read the statement in order to determine whether the witness signed the statement, the jury should be sent out while the reading takes place. Robinson v. State, 120 Ga. 311, 47 S.E. 968, 1904 Ga. LEXIS 535 (1904) (decided under former Penal Code 1895, § 1026).

Harmless error. — When the time, place, person, and circumstances attending a former contradictory statement made by a witness is not called to the witness's mind with as much certainty as possible, the subsequent statement cannot be impeached; however, when this evidence was admissible as a matter of substantive law, though the procedure through which the evidence was admitted was not correct, the improper admission was harmless error. Felts v. State, 244 Ga. 503, 260 S.E.2d 887, 1979 Ga. LEXIS 1309 (1979) (decided under former Code 1933, § 38-1803).

Reversible error not found. — Even though the defendant failed to lay a foundation prior to using contradictory statements to impeach plaintiff's expert witness, it was not reversible error because the questioning complained of was elicited by the plaintiff during cross-examination of the witness. Spearman v. Georgia Bldg.

Foundation (Cont'd)

Auth., 224 Ga. App. 801, 482 S.E.2d 463 (decided under former O.C.G.A. § 24-9-83).

Sustaining Witness

Introduction of entire former statement. — When it is sought to impeach a witness by proving contradictory statements made by the witness under oath, it is competent to bring out all the testimony given by the witness on the former hearing, upon the point in question, in order to show that on the whole it is not inconsistent with the testimony of the witness given at the trial in progress. Lowe v. State, 97 Ga. 792, 25 S.E. 676, 1895 Ga. LEXIS 583 (1895) (decided under former Penal Code 1895, § 1026); Wynes v. State, 182 Ga. 434, 185 S.E. 711, 1936 Ga. LEXIS 378 (1936) (decided under former Code 1933, § 38-1803).

No variance in testimony. — It is a defense to the witness to show there is no variance in the testimony. Brantley v. State, 133 Ga. 264, 65 S.E. 426, 1909 Ga. LEXIS 205 (1909), aff'd, 217 U.S. 284, 30 S. Ct. 514, 54 L. Ed. 768, 1910 U.S. LEXIS 1961 (1910) (decided under former Penal Code 1895, § 1026).

Prior consistent statement of officer inadmissible. — Since the victim admitted to telling the officer that methamphetamine made the victim do crazy things and no other evidence was introduced to show that methamphetamine did not make the victim crazy, the trial court did not abuse the court's discretion by holding that the prior consistent statement by the officer was inadmissible. Watkins v. State, 361 Ga. App. 55, 862 S.E.2d 720, 2021 Ga. App. LEXIS 428 (2021).

Prior consistent statements. — Witness sought to be impeached by proof of contradictory statements cannot be supported by proof that the witness made elsewhere other statements consistent with the witness's testimony on the stand. Fussell v. State, 93 Ga. 450, 21 S.E. 97, 1893 Ga. LEXIS 457 (1893) (decided under former Code 1882, §§ 3871, 3872, and 3875); Cook v. State, 124 Ga. 653, 53 S.E. 104, 1906 Ga. LEXIS 572 (1906) (decided under former Penal Code 1895, § 1026); Smith v. State, 7 Ga. App. 252, 66 S.E. 556, 1909 Ga. App. LEXIS 622 (1909); Cobb v. State, 11 Ga. App. 52, 74 S.E. 702, 1912 Ga. App. LEXIS 252 (1912) (decided under former Penal Code 1910, § 1052); Douglas v. Herringdine, 117 Ga. App. 72, 159 S.E.2d 711, 1967 Ga. App. LEXIS 1307 (1967) (decided under former Code 1933, § 38-1803).

Trial counsel was not ineffective for failing to object to hearsay testimony because a witness's testimony that the mother told the witness about the fight with the defendant before the child's death rebutted the attack made by trial counsel on the mother's credibility, and the statements were therefore prior consistent statements, not hearsay. Sawyer v. State, 308 Ga. 375, 839 S.E.2d 582, 2020 Ga. LEXIS 130 (2020).

Prior inconsistent statement admitted and counsel not ineffective for failing to object. — Appellant's claim of ineffective assistance of counsel due to trial counsel's failure to make an objection failed because the witness testimony challenged was properly admitted as a prior inconsistent statement under O.C.G.A. § 24-6-613(b); thus, the failure to make a meritless objection did not provide a basis upon which to find ineffective assistance of counsel. Burney v. State, 299 Ga. 813, 792 S.E.2d 354, 2016 Ga. LEXIS 649 (2016).

Because the neighbor was not called as a witness at the hearing on the motion for new trial, and the appellate court did not know what the neighbor would have said had the neighbor been given the opportunity to explain or deny the neighbor's prior statements, trial counsel was not ineffective as the defendant did not show that the defendant was prejudiced by counsel's failure to introduce extrinsic evidence of the neighbor's alleged prior statements. Espinosa v. State, 352 Ga. App. 698, 834 S.E.2d 558, 2019 Ga. App. LEXIS 652 (2019).

Officers testimony consistent with dates of victim not bolstering. — Admission of testimony by an officer who spoke with a child molestation victim was proper to show that the victim's prior statement of what occurred that was made to the officer was consistent with the

dates the victim testified to on direct examination and which were directly challenged during cross-examination; the officer's testimony was limited to the credibility issue raised in the victim's cross-examination and was not a bolstering of the victim's general credibility. Joines v. State, 264 Ga. App. 558, 591 S.E.2d 454, 2003 Ga. App. LEXIS 1508 (2003), cert. denied, No. S04C0692, 2004 Ga. LEXIS 299 (Ga. Mar. 29, 2004) (decided under former O.C.G.A. § 24-9-83).

Admission of conversation between officers. — Testimony by one officer regarding what a witness told another officer was admissible under the prior consistent statement exception to the hearsay rule since the witness's veracity was placed in issue and the witness was subject to cross-examination. Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625, 2004 Ga. App. LEXIS 257 (2004) (decided under former O.C.G.A. § 24-9-83).

Instructions

Charging statute not required. — There is no error in failing to charge this statute in the absence of an appropriate written request. Western & Atl. R.R. v. Holt, 22 Ga. App. 187, 95 S.E. 758, 1918 Ga. App. LEXIS 229 (1918) (decided under former Civil Code 1910, § 5881); Carson v. State, 22 Ga. App. 743, 97 S.E. 202, 1918 Ga. App. LEXIS 731 (1918) (decided under former Penal Code 1910, § 1052); Lee v. State, 37 Ga. App. 632, 141 S.E. 317, 1928 Ga. App. LEXIS 540 (1928) (decided under former Penal Code 1910, § 1052); Smith v. State, 79 Ga. App. 595, 54 S.E.2d 378, 1949 Ga. App. LEXIS 699 (1949) (decided under former Code 1933, § 38-1803); Hinton v. State, 85 Ga. App. 249, 69 S.E.2d 116, 1952 Ga. App. LEXIS 705 (1952) (decided under former Code 1933, § 38-1803); Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276, 1954 Ga. App. LEXIS 736 (1954) (decided under former Code 1933, § 38-1803).

Failure to charge all modes of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, was not reversible error in the absence of a request. Hall v. Burpee, 176 Ga. 270, 168 S.E. 39, 1933 Ga. LEXIS 59 (1933) (decided under former Code 1933, § 38-1803); Milwaukee Mechanics Ins. Co. v. Davis, 79 Ga. App. 70, 52 S.E.2d 643, 1949 Ga. App. LEXIS 588 (1949) (decided under former Code 1933, § 38-1803).

Failure to give pattern instruction on impeachment proper. — In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518, 2008 Ga. App. LEXIS 1106 (2008) (decided under former O.C.G.A. § 24-9-83).

Charge on relevant testimony not required. — Charge need not be qualified by a statement that only relevant testimony could be contradicted when impeachment of irrelevant evidence was not attempted. Tucker v. Central of Ga. Ry., 122 Ga. 387, 50 S.E. 128, 1905 Ga. LEXIS 219 (1905) (decided under former Civil Code 1895, § 5292); Goldberg v. State, 22 Ga. App. 122, 95 S.E. 541, 1918 Ga. App. LEXIS 186 (1918) (decided under former Penal Code 1910, § 1052).

Corroboration unnecessary. — When instructing the jury on the method of impeachment provided for by statute it was error for the court to instruct the jury that, if the jury believed a witness had made previous statements contradictory

Instructions (Cont'd)

to the witness's testimony delivered on the trial, such testimony should be disregarded, unless the testimony was corroborated by other credible evidence, or was corroborated by the proven circumstances in the case. Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303, 1943 Ga. App. LEXIS 321 (1943) (decided under former Code 1933, § 38-1803).

Former trial. — In criminal prosecution, court's charge to the effect that the jury should not consider anything said or done in the former trial of the case was not an infringement and invasion of the province of the jury trying the case, notwithstanding the contention that had the jury been allowed to consider testimony from the former trial, the jury could have concluded that the evidence in the present trial was inconsistent and contradictory to evidence and statements made by prosecution witness previously and thus could have believed the statement of the defendant. Crosby v. State, 92 Ga. App. 335, 88 S.E.2d 523, 1955 Ga. App. LEXIS 587 (1955) (decided under former Code 1933, § 38-1803).

Charge alluding to particular witness. — When there exists a difference between opposing counsel as to whether there is a discrepancy between the testimony of a witness and a previous statement alleged to be contradictory of the testimony, the court in the charge may allude to the particular witness. Walker v. State, 137 Ga. 397, 137 Ga. 398, 73 S.E. 368, 1911 Ga. LEXIS 393 (1911) (decided under former Penal Code 1910, § 1052).

Limiting instruction required for Miranda-violating prior statements. — When prior inconsistent statements are used to impeach trial statements, a limiting instruction is required even absent a request. The significance of not so limiting the jury's consideration would be to allow a Miranda-violating statement to be used as substantive evidence. However, if the statement is found by the trial court not to have been obtained in violation of the defendant's rights against self-incrimination, the court need not give a limiting instruction absent defendant's request. Fussell v. State, 187 Ga. App. 134, 369 S.E.2d 511, 1988 Ga. App. LEXIS 563 (1988) (decided under former O.C.G.A. § 24-9-83).

Function of Jury

Impeachment and credibility are questions for jury when a witness is sought to be impeached by reason of having previously made contradictory statements out of court as to matters relevant to the witness's testimony and to the case. King v. State, 163 Ga. 313, 136 S.E. 154, 1926 Ga. LEXIS 73 (1926) (decided under former Penal Code 1910, § 1052); United Motor Freight Term Co. v. Hixon, 78 Ga. App. 638, 51 S.E.2d 679, 1949 Ga. App. LEXIS 950 (1949) (decided under former Code 1933, § 38-1803); Champion v. State, 84 Ga. App. 163, 65 S.E.2d 280, 1951 Ga. App. LEXIS 653 (1951) (decided under former Code 1933, § 38-1803); Wynn v. Johns, 97 Ga. App. 605, 104 S.E.2d 150, 1958 Ga. App. LEXIS 839 (1958) (decided under former Code 1933, § 38-1803); Travelers Ins. Co. v. Miller, 104 Ga. App. 554, 122 S.E.2d 268, 1961 Ga. App. LEXIS 736 (1961) (decided under former Code 1933, § 38-1803).

Question for jury or court. — When contradictory statements are established as having been made by a witness, it then becomes a question for the jury as to whether or not such witness has been successfully impeached; if such contradiction is not on matters relevant to the witness's testimony and to the case, or if the prior statement fails to amount to a contradiction at all, the question of whether or not the witness has been successfully impeached is then one of law for the court. Travelers Ins. Co. v. Bailey, 76 Ga. App. 698, 47 S.E.2d 103, 1948 Ga. App. LEXIS 444 (1948) (decided under former Code 1933, § 38-1803).

Testimony need not be excluded. — When a state's witness is impeached, the effect of the impeaching evidence is to be determined by the jury, and the testimony of the witness need not be excluded. Henrich v. McCouley, 151 Ga. 138, 106 S.E. 94, 1921 Ga. LEXIS 174 (1921) (decided under former Civil Code 1910, § 5881); Griffin v. State, 123 Ga. App. 820, 182 S.E.2d 498, 1971 Ga. App. LEXIS 1400 (1971) (decided under former Code 1933, § 38-1803).

Jury may believe witness. — Question of credibility is always for the jury, and though a witness swore falsely on the other trial, the witness's contention that the witness was under duress may cause the jury to believe the witness. Williams v. State, 69 Ga. 11, 1882 Ga. LEXIS 173 (1882) (decided under former Code 1882, §§ 3871, 3872, and 3875).

Accepting part of testimony. — Jury may believe part of the testimony and disbelieve other parts. Atlantic Coast Line R.R. v. Heyward, 82 Ga. App. 337, 60 S.E.2d 641, 1950 Ga. App. LEXIS 1104 (1950) (decided under former Code 1933, § 38-1803).

When testimony is disregarded, the jury must place that testimony in the same category as if the witness had not testified at all. Harper v. State, 85 Ga. App. 252, 69 S.E.2d 102, 1952 Ga. App. LEXIS 707 (1952) (decided under former Code 1933, § 38-1803).

When prior statement fails to amount to contradiction, the fact-finding tribunal cannot disregard the testimony of the witness, and when facts sufficient to support an issue have thus been testified to, such issue has, prima facie, been established. Travelers Ins. Co. v. Bailey, 76 Ga. App. 698, 47 S.E.2d 103, 1948 Ga. App. LEXIS 444 (1948) (decided under former Code 1933, § 38-1803).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 350, 353 et seq. 81 Am. Jur. 2d, Witnesses, § 686 et seq.

ALR.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 66 A.L.R. 289; 158 A.L.R. 820.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 A.L.R. 1454.

Right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding, 2 A.L.R.2d 1297.

Binding effect, upon party litigant, of testimony of his witnesses at a former trial, 74 A.L.R.2d 521.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 A.L.R.2d 478.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 A.L.R.3d 934.

Admissibility of affidavit to impeach witness, 14 A.L.R.4th 828.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case — modern state cases, 30 A.L.R.4th 414.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 A.L.R.4th 985; 59 A.L.R.4th 1000.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness's prior consistent statement, 47 A.L.R. Fed 639.

24-6-614. Calling and interrogation of witnesses by court.

(a) The court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.

(b) The court may interrogate witnesses whether called by itself pursuant to subsection (a) of this Code section or by a party.

(c) Objections to the calling of witnesses by the court or to interrogation by the court may be made at the time or at the next available opportunity when the jury is not present.

History.
Code 1981, § 24-6-614, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Court's calling or examining a witness, Fed. R. Evid. 614.

JUDICIAL DECISIONS

Testimony about home environment and lack of medical care relevant. — Order adding conditions to juvenile's probation and requiring medical care for juvenile and minor child was upheld because the juvenile did not show that the juvenile court abused the court's discretion by allowing testimony about the home environment and the lack of medical care as that testimony was relevant to determining the scope of the disposition best suited to the juvenile's treatment, rehabilitation, and welfare. In the Interest of M. B., 366 Ga. App. 402, 883 S.E.2d 156, 2023 Ga. App. LEXIS 15 (2023).

24-6-615. Exclusion of witnesses.

Except as otherwise provided in Code Section 24-6-616, at the request of a party the court shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses, and it may make the order on its own motion. This Code section shall not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

History.
Code 1981, § 24-6-615, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Excluding witnesses, Fed. R. Evid. 615.

Law reviews.
For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Right of Sequestration
Exceptions to Sequestration Rule
Testimony of Witnesses Not Sequestered

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3863, former Code 1882, § 3863, former Civil Code 1895, § 5280, former Penal Code 1895, § 1017, former Civil Code 1910, § 5869, former Penal Code 1910, § 1043, former Code 1933, § 38-1703, and former O.C.G.A. § 24-9-61 are included in the annotations for this Code section.

Purpose. — Purpose of the rule of sequestration is to prevent a witness who has not testified, or who has not completed his or her testimony, from overhearing and having his or her testimony affected by the testimony of another witness. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400, 1965 Ga. LEXIS 604 (1965) (decided under former Code 1933, § 38-1703); General Oglethorpe Hotel Co. v. Lanier, 99 Ga. App. 401, 109 S.E.2d 769 (1959) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258, 1975 Ga. LEXIS 1151 (1975), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-1703); Byrd v. Brand, 140 Ga. App. 135, 230 S.E.2d 113, 1976 Ga. App. LEXIS 1373 (1976) (decided under former Code 1933, § 38-1703); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, 1979 Ga. LEXIS 821 (1979), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 425, 1979 U.S. LEXIS 4099 (1979), overruled in part, Blankenship v. State, 247 Ga. 590, 280 S.E.2d 623, 1981 Ga. LEXIS 1077 (1981) (decided under former Code 1933, § 38-1703); Lackey v. State, 246 Ga. 331, 271 S.E.2d 478, 1980 Ga. LEXIS 1130 (1980) (decided under former Code 1933, § 38-1703).

Import of former O.C.G.A. § 24-9-61 was to preserve the integrity of testimony with the ultimate goal of arriving at the truth; thus, the rule extended to communications, direct and indirect, between witnesses outside the courtroom. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838, 1985 Ga. App. LEXIS 2818 (1985) (decided under former O.C.G.A. § 24-9-61).

Purpose of the rule of sequestration was to prevent a witness who had testified from influencing the witness who had not. Whether the witness had been excused after testifying was of no relevance to the witness's duty to refrain from discussing the witness's testimony with another witness. Rogers v. State, 257 Ga. 590, 361 S.E.2d 814, 1987 Ga. LEXIS 982 (1987) (decided under former O.C.G.A. § 24-9-61).

Sequestration rule literally prohibits only witnesses from being examined in the hearing of each other. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356, 1989 Ga. LEXIS 70 (1989) (decided under former O.C.G.A. § 24-9-61).

Right to testimony of witnesses unaffected. — Party's right to have the testimony of any witness, when material to the assertion of the party's rights, was unaffected by the provisions which related to the sequestration of witnesses. Higdon v. State, 46 Ga. App. 346, 167 S.E. 782, 1933 Ga. App. LEXIS 59 (1933) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785, 1961 Ga. LEXIS 412 (1961) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79, 1974 Ga. App. LEXIS 1322 (1974) (decided under former Code 1933, § 38-1703).

Contact between attorney and witness. — Rule of sequestration did not prohibit discussions between an attorney for a party in the case and a prospective witness, at least so long as the attorney talked to the witness separately from the other witnesses and did not inform the witness of previous testimony. Norman v. State, 212 Ga. App. 105, 441 S.E.2d 94, 1994 Ga. App. LEXIS 156 (1994) (decided under former O.C.G.A. § 24-9-61).

Spectators not excluded. — Rule of sequestration was not applicable to spectators and it is not designed to exclude nonwitnesses from the courtroom. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478, 1980 Ga. LEXIS 1130 (1980) (decided under former Code 1933, § 38-1703).

Trial court did not commit prejudicial error in allowing witnesses testifying on behalf of a child molestation victim to remain in the courtroom during the

General Consideration (Cont'd)

victim's testimony since the witnesses' testimony did not bolster the victim's testimony. Mullis v. State, 184 Ga. App. 525, 362 S.E.2d 90, 1987 Ga. App. LEXIS 2329 (1987) (decided under former O.C.G.A. § 24-9-61).

Victim/witness conversing with spectator. — Rule of sequestration was not violated after victim/witness conversed with spectator during recess. Kirkland v. State, 173 Ga. App. 687, 327 S.E.2d 808, 1985 Ga. App. LEXIS 2667 (1985) (decided under former O.C.G.A. § 24-9-61).

Violation of rule of sequestration. — In a juvenile court deprivation proceeding, evidence that father discussed his testimony with his mother before her testimony in violation of the rule of sequestration justified finding of contempt. In re A.L.L., 211 Ga. App. 767, 440 S.E.2d 517, 1994 Ga. App. LEXIS 72 (1994) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration was not violated by allowing a witness to testify who was in the courtroom at the time defendant attempted to plead guilty. Cook v. State, 221 Ga. App. 831, 472 S.E.2d 686 (decided under former O.C.G.A. § 24-9-61).

Sequestration of the victim's spouse was not required since, although the spouse's name appeared on the state's witness list originally, the spouse was removed from the list and did not testify. Edwards v. State, 224 Ga. App. 14, 479 S.E.2d 754 (decided under former O.C.G.A. § 24-9-61).

Even though a police officer, who was a witness for the state, spoke to defense witnesses during the trial, there was no violation of this rule, since there was no allegation that the officer spoke with the witnesses about their testimony or that any witness heard the officer's testimony. Bayer v. State, 230 Ga. App. 708, 497 S.E.2d 266 (decided under former O.C.G.A. § 24-9-61).

Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give the victim's own testimony was fully within the court's discretion and did not constitute reversible error. Shepherd v. State, 245 Ga. App. 386, 537 S.E.2d 777, 2000 Ga. App. LEXIS 953 (2000) (decided under former O.C.G.A. § 24-9-61).

Trial court did not violate former O.C.G.A. § 24-9-61 by permitting three prior difficult witnesses to remain in the courtroom together while the court instructed each of them on the limitation to be placed on their testimony since each was then examined out of the hearing of each other. Williams v. State, 277 Ga. 853, 596 S.E.2d 597, 2004 Ga. LEXIS 412 (2004) (decided under former O.C.G.A. § 24-9-61).

Because the target of the invocation of the rule of sequestration did not testify, the trial court's failure to enforce the rule against that person was not an abuse of discretion. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130, 2011 Ga. LEXIS 377 (2011) (decided under former O.C.G.A. § 24-9-61).

Witness sequestration rule violated in driving under the influence case. — Trial court erred in denying the defendant's request to invoke the rule of sequestration and, thus, the defendant was granted a new trial with regard to the defendant's driving under the influence conviction because the trial court did not use the court's discretion to decide that a witness could remain to assist the state or to allow testimony despite an infraction of the rule; the court simply held, incorrectly, that the rule of sequestration did not apply until the first witness was called for trial. Smith v. State, 324 Ga. App. 100, 749 S.E.2d 395, 2013 Ga. App. LEXIS 803 (2013).

Curing violation of rule of sequestration. — In a medical malpractice action, violation of an order on sequestration, indicated by defendant's expert when the expert revealed that defendant's attorney had discussed with the expert testimony of one of plaintiff's attorneys, did not warrant a new trial since the court gave curative instructions to the jury, admonishing defendant's attorney and advising that the violation could be considered in assessing the witness's credibility. Bean v. Landers, 215 Ga. App. 366, 450 S.E.2d 699, 1994 Ga. App. LEXIS 1248 (1994),

cert. denied, No. S95C0505, 1995 Ga. LEXIS 483 (Ga. Feb. 24, 1995) (decided under former O.C.G.A. § 24-9-61).

Appropriate remedy in a case where a witness violated the rule of sequestration when the witness spoke to another witness outside the courtroom was to admit testimony regarding the violation and failure to do so was reversible error. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (decided under former O.C.G.A. § 24-9-61).

Witness who has finished testifying. — Once a witness who has been sequestered has testified and is excused and neither side intends to recall the witness, the witness can do as the witness pleases and leave or remain in the courtroom. Bigby v. State, 184 Ga. App. 94, 360 S.E.2d 751, 1987 Ga. App. LEXIS 2144 (1987).

Mutual observations of witnesses outside courtroom following testimony not prejudicial. — Mutual observation of two witnesses outside the courtroom that they could not identify a suspicious party by one's shoes constituted only innocuous remarks which could not have been prejudicial even to appellant's codefendant, about whom the observation ostensibly related, especially given the fact that the two witnesses had already testified when their conversation took place. Almond v. State, 173 Ga. App. 423, 326 S.E.2d 798, 1985 Ga. App. LEXIS 1565 (1985) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration was not violated when witnesses discuss their testimony outside of courtroom, as the rule only prevented a potential witness from being present in the courtroom while any other witness was testifying. Boyd v. State, 168 Ga. App. 246, 308 S.E.2d 626, 1983 Ga. App. LEXIS 3388 (1983) (decided under former O.C.G.A. § 24-9-61).

Out-of-court violation. — Witness's violation of the rule of sequestration when the witness spoke to another witness outside the courtroom was relevant to the issue of the witness's credibility and could be considered by the jury in assessing the credit to be given the testimony of the violator, irrespective of the violating witness's success in affecting the testimony of the other witness. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (decided under former O.C.G.A. § 24-9-61).

Sequestration of defendant's wife. — Trial court did not abuse the court's discretion in sequestering defendant's wife when it appeared she would be called as a witness. Norman v. State, 255 Ga. 313, 338 S.E.2d 249, 1986 Ga. LEXIS 486 (1986) (decided under former O.C.G.A. § 24-9-61).

Sequestration of juvenile's parent. — Parent was not a party to criminal proceedings in which a juvenile was being tried as an adult and the court had discretion to grant a motion to sequester a parent who was a witness. Appling v. State, 221 Ga. App. 162, 470 S.E.2d 761 (decided under former O.C.G.A. § 24-9-61).

Sequestering of defendant's experts. — In a prosecution for driving under the influence, the trial court did not abuse the court's discretion by sequestering defendant's expert on field sobriety evaluations during the presentation of the state's case. McNeil v. State, 229 Ga. App. 149, 493 S.E.2d 570 (decided under former O.C.G.A. § 24-9-61).

Sequestration of plaintiff. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, the trial court did not abuse the court's discretion by not forcing the plaintiff to either testify first or to leave the courtroom until the plaintiff testified after the rule of sequestration had been invoked as it was within the trial court's broad discretion to allow the plaintiff to remain in the courtroom during the presentation of the case and to testify at a later point in that presentation. MARTA v. Doe, 292 Ga. App. 532, 664 S.E.2d 893, 2008 Ga. App. LEXIS 811 (2008) (decided under former O.C.G.A. § 24-9-61).

Court erred in declaring mistrial due to violation of sequestration rule. — Denial of the plea in bar, which asserted double jeopardy grounds after the first trial of the defendant ended with the trial judge's sua sponte declaration of a mistrial due to a violation of the sequestration rule, was erroneous as there was no manifest necessity for a mistrial because there was no evidence that the rule

General Consideration (Cont'd)

was violated; even if two defense witnesses could have heard testimony from the witness stand, there was no evidence of prejudice from any presumed overhearing of testimony as there was no evidence showing that either of the witnesses would have changed their testimony to match that of other witnesses; and the mere absence of an objection to the mistrial, without more, did not constitute consent to the mistrial. Brown v. State, 354 Ga. App. 493, 841 S.E.2d 125, 2020 Ga. App. LEXIS 199 (2020), cert. denied, No. S20C1448, 2021 Ga. LEXIS 96 (Ga. Mar. 1, 2021).

Appellate review. — In the absence of an offer of proof as to expert's testimony, the appellate court could not review the defendant's claim of error based on the trial court's actions in invoking the sequestration rule and threatening the defendant's attorney and expert with contempt, whereupon the defendant's counsel withdrew the expert from the witness list so that the expert could remain in the courtroom and assist counsel during the state's case. Pittman v. State, 274 Ga. 260, 553 S.E.2d 616, 2001 Ga. LEXIS 775 (2001) (decided under former O.C.G.A. § 24-9-61).

Ineffective assistance of counsel not established by failure to object to lack of sequestering admonition. — Defendant's counsel did not provide ineffective assistance because counsel did not object to the trial court's failure to admonish sequestered witnesses not to talk to each other as former O.C.G.A. § 24-9-61 did not prohibit the witnesses from having any contact, but merely prohibited them from discussing their testimony and/or the charges. Ogle v. State, 256 Ga. App. 26, 567 S.E.2d 700, 2002 Ga. App. LEXIS 802 (2002) (decided under former O.C.G.A. § 24-9-61).

Right of Sequestration

Right of sequestration was absolute, subject only to the discretion of the trial judge in making exceptions thereto. Johnson v. State, 14 Ga. 55, 1853 Ga. LEXIS 192 (1853) (decided under former law); Bird v. State, 50 Ga. 585, 1874 Ga. LEXIS 22 (1874), overruled in part, Shelton v. State, 220 Ga. 610, 140 S.E.2d 839, 1965 Ga. LEXIS 571 (1965) (decided under former Code 1873, § 3863); Hughes v. State, 128 Ga. 19, 57 S.E. 236, 1907 Ga. LEXIS 4 (1907) (decided under former Civil Code 1895, § 5280); Hill-Atkinson Co. v. Hasty, 17 Ga. App. 569, 87 S.E. 839, 1916 Ga. App. LEXIS 788 (1916) (decided under former Civil Code 1910, § 5869); Blitch-Everett Co. v. Jackson, 29 Ga. App. 440, 116 S.E. 47, 1923 Ga. App. LEXIS 57 (1923) (decided under former Civil Code 1910, § 5869); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792, 1956 Ga. LEXIS 524 (1956), overruled in part, White v. State, 273 Ga. 787, 546 S.E.2d 514, 2001 Ga. LEXIS 346 (2001) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688, 1959 Ga. LEXIS 388 (1959) (decided under former Code 1933, § 38-1703); Spurlin v. State, 222 Ga. 179, 149 S.E.2d 315, 1966 Ga. LEXIS 430 (1966) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203, 1971 Ga. App. LEXIS 977 (1971) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121, 1973 Ga. App. LEXIS 918 (1973) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874, 1974 Ga. App. LEXIS 1177 (1974) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975 Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404, 1975 Ga. LEXIS 853 (1975) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149, 1977 Ga. App. LEXIS 2468 (1977) (decided under former Code 1933, § 38-1703);

Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189, 1977 Ga. App. LEXIS 2499 (1977) (decided under former Code 1933, § 38-1703).

Former O.C.G.A. § 24-9-61 gave either party the right to have witnesses sequestered, but it was subject to the discretion of the trial judge, who may make exceptions. Welch v. State, 251 Ga. 197, 304 S.E.2d 391, 1983 Ga. LEXIS 763 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court was vested with broad discretion in enforcement of the sequestration rule. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398, 1981 Ga. LEXIS 834 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398, 1983 U.S. LEXIS 4712 (1983); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981) (decided under former Code 1933, § 38-1703).

Application of the rule of sequestration was within the sound discretion of the trial court. Wilson v. State, 158 Ga. App. 174, 279 S.E.2d 345, 1981 Ga. App. LEXIS 2115 (1981) (decided under former Code 1933, § 38-1703).

Enforcement of former O.C.G.A. § 24-9-61 long had been vested in the discretion of the trial court. Croom v. State, 165 Ga. App. 676, 302 S.E.2d 598, 1983 Ga. App. LEXIS 3178 (1983) (decided under former O.C.G.A. § 24-9-61).

Both parties have the right of sequestration of witnesses, but the enforcement of the rule is vested in the discretion of the trial court; the orderly presentation of evidence being a proper reason for an exception to the rule. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647, 1987 Ga. App. LEXIS 2591 (1987) (decided under former O.C.G.A. § 24-9-61).

State's explanation of the state's need for the deputy sheriff's assistance during trial can provide an acceptable reason for the trial court's exercise of the court's discretion in permitting the state's witness to remain in the courtroom and testify after another state witness has testified. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647, 1987 Ga. App. LEXIS 2591 (1987) (decided under former O.C.G.A. § 24-9-61).

Rule not enforced until presentation of evidence began. — Trial court was not required to enforce the rule of sequestration until the presentation of evidence began. Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265, 1988 Ga. LEXIS 143, cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152, 1988 U.S. LEXIS 3665 (1988); Chastain v. State, 244 Ga. App. 84, 535 S.E.2d 25, 2000 Ga. App. LEXIS 630 (2000) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration did prohibit persons from remaining in courtroom during proceedings, but merely gave a right to either party to have the witnesses for the other party examined out of the hearing of each other. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398, 1981 Ga. LEXIS 834 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398, 1983 U.S. LEXIS 4712 (1983) (decided under former O.C.G.A. § 24-9-61).

Witnesses may not be told what prior witnesses have said. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838, 1985 Ga. App. LEXIS 2818 (1985).

Request denied when no previous notice that witness considered hostile or adverse. — In a garnishment proceeding, court did not err in denying plaintiff's request to sequester a witness (president of the judgment debtor) since the witness had been subpoenaed by plaintiff and when plaintiff did not announce or request that the witness be considered a hostile or an adverse witness. Travelers Ins. Co. v. Trans State, Inc., 172 Ga. App. 763, 324 S.E.2d 585, 1984 Ga. App. LEXIS 2658 (1984) (decided under former O.C.G.A. § 24-9-61).

Failure of the district attorney to invoke sequestration of witnesses at the outset of the presentation of evidence constituted a ground for new trial. Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975 Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703).

When the rule of sequestration was never invoked by either the state or defendant, the trial court did not err by permitting a witness to testify as a rebuttal witness for the state after the witness had sat through the trial and heard the testimony of the state's previous witnesses. Watson v. State, 222 Ga. App. 158,

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473 S.E.2d 262 (decided under former O.C.G.A. § 24-9-61).

Trial counsel was not deficient in failing to properly invoke sequestration because the trial court did not abuse the court's discretion in allowing the state's expert to testify in rebuttal based in part on their review of the recorded testimony of the appellant's expert; accordingly, even if the appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused the court's discretion in excepting the state's expert from the rule. Davis v. State, 299 Ga. 180, 787 S.E.2d 221, 2016 Ga. LEXIS 407 (2016).

Time of request. — Since statute devolves upon each party who wishes to obtain the benefit of the rule to invoke the statute with respect to the separation of the witnesses of the party's adversary, the fact that the demand of the plaintiff was not entered until after one's own witnesses had testified would not militate against one's "right to have the witnesses of the other party examined out of the hearing of each other." Blitch-Everett Co. v. Jackson, 29 Ga. App. 440, 116 S.E. 47, 1923 Ga. App. LEXIS 57 (1923) (decided under former Civil Code 1910, § 5869).

When at the close of evidence for propounders of a will, the propounders moved that witnesses for the caveator be sequestered and this was opposed by the caveator, on the ground that the motion came too late, the court was correct in ordering that the witnesses be sequestered. Chedel v. Mooney, 158 Ga. 297, 123 S.E. 300, 1924 Ga. LEXIS 135 (1924) (decided under former Civil Code 1910, § 5869).

Judge may sequester witnesses on own motion. Meeks v. State, 51 Ga. 429, 1874 Ga. LEXIS 154 (1874) (decided under former Code 1873, § 3863).

Waiver of right. — When a defendant could not have known whether the district attorney was going to call the FBI agent even though the defendant was listed on the indictment it cannot be held as a matter of law that the defendant waived defendant's objection to the witness being in the courtroom by not objecting until the witness was called. Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975 Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703).

Application of the rule to a particular witness is within the sound discretion of the trial court and since the defendant did not object to allowing the victim's father to remain in the courtroom, the defendant thereby waived the issue on appeal; without a showing of manifest abuse of discretion, the trial judge's decision will not be disturbed. Earnest v. State, 262 Ga. 494, 422 S.E.2d 188, 1992 Ga. LEXIS 937 (1992) (decided under former O.C.G.A. § 24-9-61).

Defendant waived the defendant's argument regarding an alleged violation of the rule of sequestration, former O.C.G.A. § 24-9-61, caused by the courtroom sound system being loud enough to be heard in the hallway outside, by failing to object and continuing the defendant's examination of the witness. Watson v. State, 304 Ga. App. 128, 695 S.E.2d 416, 2010 Ga. App. LEXIS 464 (2010) (decided under former O.C.G.A. § 24-9-61).

Sequestration at interlocutory hearing for injunction. — Since in all cases, either party shall have the right to have the witnesses of the other party examined out of the hearing of each other, the rule was applicable and mandatory in an interlocutory hearing for injunction. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209, 1962 Ga. App. LEXIS 564 (1962) (decided under former Code 1933, § 38-1703).

Sequestration during videotaped testimony of expert witness. — Requiring sequestration of plaintiff's expert witness during the videotaped testimony of defendant's expert witness was not error since plaintiff's expert had already been allowed to review a transcript of the testimony. Simonds v. Conair Corp., 185 Ga. App. 664, 365 S.E.2d 507, 1988 Ga. App. LEXIS 194 (1988) (decided under former O.C.G.A. § 24-9-61).

Enforcement of rule by court. — When the rule of sequestration of witnesses is invoked by a defendant, it is the duty of the court to enforce the rule.

Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119, 1970 Ga. App. LEXIS 1344 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240, 1971 U.S. LEXIS 2831 (1971); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Nance v. State, 123 Ga. App. 410, 181 S.E.2d 295, 1971 Ga. App. LEXIS 1244 (1971) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258, 1975 Ga. LEXIS 1151 (1975), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404, 1975 Ga. LEXIS 853 (1975) (decided under former Code 1933, § 38-1703); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, 1979 Ga. LEXIS 821 (1979), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 425, 1979 U.S. LEXIS 4099 (1979), overruled in part, Blankenship v. State, 247 Ga. 590, 280 S.E.2d 623, 1981 Ga. LEXIS 1077 (1981) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-1703); Mize v. State, 152 Ga. App. 190, 262 S.E.2d 492, 1979 Ga. App. LEXIS 2862 (1979) (decided under former Code 1933, § 38-1703); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, 1980 Ga. LEXIS 812 (1980).

Effect of denial of sequestration. — Refusal of the trial judge to grant sequestration when requested deprived the party of substantial and positive rights and was in absolute ground for new trial. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688, 1959 Ga. LEXIS 388 (1959) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400, 1965 Ga. LEXIS 604 (1965) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203, 1971 Ga. App. LEXIS 977 (1971) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874, 1974 Ga. App. LEXIS 1177 (1974) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149, 1977 Ga. App. LEXIS 2468 (1977) (decided under former Code 1933, § 38-1703); Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189, 1977 Ga. App. LEXIS 2499 (1977) (decided under former Code 1933, § 38-1703).

Sequestration at later stage of trial. — Fact that the witnesses were sequestered at a later stage of the trial did not cure the error of the court in refusing to invoke the rule of sequestration upon timely request prior to allowing the defendant's witnesses to testify. Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209, 1962 Ga. App. LEXIS 564 (1962) (decided under former Code 1933, § 38-1703).

Solitary defense expert witness. — Former O.C.G.A. § 24-9-61 authorized sequestration of a solitary defense expert witness to prevent the expert's hearing the testimony of the other witnesses. Accordingly, the trial court did not err in presenting defense counsel with a choice of whether to use the defense expert to assist in cross-examination or as a witness, but forbidding the expert's use for both roles. Greenway v. State, 207 Ga. App. 511, 428 S.E.2d 415, 1993 Ga. App. LEXIS 259 (1993) (decided under former O.C.G.A. § 24-9-61).

Counsel not ineffective for failing to invoke rule of sequestration. — Defendant did not show prejudice due to trial counsel's failure to invoke the rule of sequestration because the jury was informed of the earlier presence of the victim's father in the courtroom, defense counsel thoroughly cross-examined the father, and the trial court properly instructed the jurors on their role in resolving conflicts in the evidence and in determining the credibility of witnesses, the weight of the evidence, and whether a witness was impeached; thus, the jury was able to gauge the father's credibility and make a determination as to the weight, if any, it would give to the father's testimony. Pennington v. State, 313 Ga.

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App. 764, 723 S.E.2d 13, 2012 Ga. App. LEXIS 69 (2012) (decided under former O.C.G.A. § 24-9-61).

Trial counsel was not ineffective for failing to invoke the rule of sequestration at the beginning of the trial because the defendant failed to show any harm that resulted from the admission of the testimony of the victim's father; the evidence presented by both the state and the defense showed that the father's testimony about what happened did not conflict with the defendant's claim. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13, 2012 Ga. App. LEXIS 69 (2012) (decided under former O.C.G.A. § 24-9-61).

Exceptions to Sequestration Rule

In general. — Whether such witnesses should be instructed not to converse with other persons or with each other, and whether the witnesses who have been examined should be allowed to return to the room in which the others were waiting, were questions within the sound discretion of the trial judge, to be determined in the light of one's knowledge of the witnesses and of the case. Kelly v. State, 118 Ga. 329, 45 S.E. 413, 1903 Ga. LEXIS 552 (1903) (decided under former Civil Code 1895, § 5280); Turbaville v. State, 58 Ga. 545, 1877 Ga. LEXIS 163 (1877) (decided under former Code 1873, § 3863); Carson v. State, 80 Ga. 170, 5 S.E. 295, 1887 Ga. LEXIS 351 (1887) (decided under former Code 1882, § 3863); Talley v. State, 2 Ga. App. 395, 58 S.E. 667, 1907 Ga. App. LEXIS 389 (1907) (decided under former Civil Code 1895, § 5280); Hudgins v. State, 13 Ga. App. 489, 79 S.E. 367, 1913 Ga. App. LEXIS 229 (1913) (decided under former Penal Code 1910, § 1043).

Nothing prohibited anything other than the examination of witnesses out of the hearing of each other; former statute said nothing about other types of contact. Byrd v. Brand, 140 Ga. App. 135, 230 S.E.2d 113, 1976 Ga. App. LEXIS 1373 (1976) (decided under former Code 1933, § 38-1703).

In the absence of some allegation of impropriety as the result of granting an exception to the sequestration order the court will not find prejudicial harm. Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703); Smith v. State, 244 Ga. 814, 262 S.E.2d 116, 1979 Ga. LEXIS 1428 (1979) (decided under former Code 1933, § 38-1703).

No harmful error was shown in a case when, after the witnesses have been sequestered, the solicitor general (now district attorney) interviewed a witness before placing the witness on the stand in the absence of an allegation that such witness was informed of what other witnesses had testified or what the witness was expected to testify. Smith v. State, 244 Ga. 814, 262 S.E.2d 116, 1979 Ga. LEXIS 1428 (1979) (decided under former Code 1933, § 38-1703).

Trial court had discretion in permitting, upon request, counsel for one of the parties an opportunity to converse with a witness in the case for limited purposes, and that discretion will not be controlled unless abused. Smith v. State, 244 Ga. 814, 262 S.E.2d 116, 1979 Ga. LEXIS 1428 (1979) (decided under former Code 1933, § 38-1703).

Orderly presentation of evidence was a proper reason for an exception to the rule of sequestration. Hardy v. State, 245 Ga. 673, 266 S.E.2d 489, 1980 Ga. LEXIS 886 (1980) (decided under former Code 1933, § 38-1703).

When the prosecutor stated that the prosecutor needed a witness for presentation of a case and that to require the witness to testify first would interfere with the orderly presentation of a case, the trial judge had discretion to except such witness from the rule of sequestration. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477, 1983 Ga. LEXIS 537 (1983) (decided under former O.C.G.A. § 24-9-61); Fowler v. State, 179 Ga. App. 492, 347 S.E.2d 322, 1986 Ga. App. LEXIS 2643 (1986) (decided under former O.C.G.A. § 24-9-61); Denny v. State, 210 Ga. App. 406, 436 S.E.2d 526, 1993 Ga. App. LEXIS 1205 (1993) (decided under former O.C.G.A. § 24-9-61).

Former O.C.G.A. § 24-9-61 did not prohibit the state from stating the case and allegations in front of the witnesses prior

to sequestration. Brewer v. State, 162 Ga. App. 228, 291 S.E.2d 87, 1982 Ga. App. LEXIS 2122 (1982) (decided under former O.C.G.A. § 24-9-61).

Orderly presentation of evidence is a proper reason for permitting an unsequestered witness, who is assisting the prosecutor, to testify after other witnesses. Croom v. State, 165 Ga. App. 676, 302 S.E.2d 598, 1983 Ga. App. LEXIS 3178 (1983) (decided under former O.C.G.A. § 24-9-61).

Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court was authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, 1983 Ga. App. LEXIS 3189, aff'd, 251 Ga. 525, 307 S.E.2d 904, 1983 Ga. LEXIS 899 (1983) (decided under former O.C.G.A. § 24-9-61).

It was within the discretion of the trial court to make exceptions in regard to the sequestration of nonparty witnesses, and unless that discretion was abused it will not be reversed. Batten v. Batten, 182 Ga. App. 442, 356 S.E.2d 228, 1987 Ga. App. LEXIS 1720 (1987) (decided under former O.C.G.A. § 24-9-61).

Request for exception. — Proper procedure in situations when the former statute had been invoked and a party needed the assistance of a witness during the prosecution of a case was to specifically request that the trial judge made an exception to the rule at the commencement of the evidence. Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25, 1979 Ga. App. LEXIS 2151 (1979) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779, 1979 Ga. App. LEXIS 2720 (1979) (decided under former Code 1933, § 38-1703).

Exceptions are granted at court's discretion. — It was within the trial court's discretion to make exceptions to the sequestration rule, and unless that discretion had been abused the court's decision will not be reversed on appeal. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465, 1964 Ga. LEXIS 464 (1964) (decided under former Code 1933, § 38-1703); Cooper v. Butler, 223 Ga. 797, 158 S.E.2d 244, 1967 Ga. LEXIS 702 (1967) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258, 1975 Ga. LEXIS 1151 (1975), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975 Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703); Disby v. State, 238 Ga. 178, 231 S.E.2d 763, 1977 Ga. LEXIS 948 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697, 1978 Ga. App. LEXIS 2466 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443, 1979 Ga. LEXIS 765 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819, 1980 U.S. LEXIS 1790 (1980) (decided under former Code 1933, § 38-1703); Horton v. Wayne County, 243 Ga. 789, 256 S.E.2d 775, 1979 Ga. LEXIS 1068 (1979) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324, 1979 Ga. App. LEXIS 2251 (1979) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779, 1979 Ga. App. LEXIS 2720 (1979) (decided under former Code 1933, § 38-1703).

Excepted witnesses testify first. — When a witness had been excepted from the sequestration rule, that witness should be presented first or explanation made to the trial court why the witness cannot be called first. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779, 1979 Ga. App. LEXIS 2720 (1979) (decided under former Code 1933, § 38-1703); Walker v. State, 132 Ga. App. 274, 208 S.E.2d 5, 1974 Ga. App. LEXIS 1673 (1974) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258, 1975 Ga. LEXIS 1151 (1975), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975

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Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703); Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842, 1977 Ga. App. LEXIS 1414 (1977) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149, 1977 Ga. App. LEXIS 2468 (1977) (decided under former Code 1933, § 38-1703); Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189, 1977 Ga. App. LEXIS 2499 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697, 1978 Ga. App. LEXIS 2466 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443, 1979 Ga. LEXIS 765 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819, 1980 U.S. LEXIS 1790 (1980) (decided under former Code 1933, § 38-1703); Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25, 1979 Ga. App. LEXIS 2151 (1979) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324, 1979 Ga. App. LEXIS 2251 (1979) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-1703).

Court may allow witness for prosecution to remain in courtroom in violation of the sequestration rule, if the prosecuting attorney stated that the witness was needed to aid in the presentation of the case and that in the orderly presentation of the case cannot testify first. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845, 1992 Ga. App. LEXIS 503 (1992) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in defendant's criminal trial when the court denied defendant's sequestration request regarding one of the police officers involved in the arrest as the state's request that the officer stay in the court to assist was deemed reasonable given that defendant's trial counsel had the assistance of two other attorneys as well as a recent law graduate. Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671, 2006 Ga. App. LEXIS 1085 (2006), cert. denied, No. S07C0095, 2006 Ga. LEXIS 1007 (Ga. Nov. 20, 2006) (decided under former O.C.G.A. § 24-9-61).

State's lead detective was properly excepted from the rule of sequestration as the state adequately demonstrated that the state needed the presence of the primary investigator in the courtroom for an orderly presentation of the case. Morgan v. State, 287 Ga. App. 569, 651 S.E.2d 833, 2007 Ga. App. LEXIS 1025 (2007) (decided under former O.C.G.A. § 24-9-61).

Prosecutor requested that the chief investigating detective be excepted from the rule of sequestration to permit the detective to assist the prosecutor in presenting the case because of the detective's familiarity with the facts and the crime scene. In light of the prosecutor's request, allowing the detective to remain in the courtroom during the presentation of the state's case was not an abuse of discretion. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487, 2009 Ga. App. LEXIS 30 (2009) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in allowing the lead investigative officer to stay in the courtroom throughout a defendant's marijuana possession trial, although the defendant invoked sequestration, because the prosecutor designated the officer as the state's prosecuting witness. Moreover, defense counsel made no objection at the time of the designation. Sirmans v. State, 301 Ga. App. 756, 688 S.E.2d 669, 2009 Ga. App. LEXIS 1437 (2009) (decided under former O.C.G.A. § 24-9-61).

Witness allowed to remain in courtroom. — When lead investigator testified first and was then permitted to remain in the courtroom during the remainder of the trial, and was twice recalled to the stand after having heard the testimony of the other witnesses, it was not an abuse of the trial court's discretion to permit the detective's testimony. Dunbar v. State, 209 Ga. App. 97, 432 S.E.2d 829, 1993 Ga. App. LEXIS 775 (1993) (decided under former O.C.G.A. § 24-9-61); Mitchell v. State, 222 Ga. App. 878, 476 S.E.2d 604 (decided under former O.C.G.A. § 24-9-61).

In a prosecution for child molestation, it was not an abuse of discretion to allow the

mother of the victim to remain in the courtroom after the victim became upset while testifying. Peters v. State, 224 Ga. App. 837, 481 S.E.2d 898 (decided under former O.C.G.A. § 24-9-61).

Parties as witnesses. — When a party to an action intended to be a witness personally and the court directs that the party's witnesses be separately examined, it was the proper rule, unless there be special reasons to the contrary, that such party should first be examined in the absence of the party's other witnesses, in order that the party may thereby be present, as was the party's right, during the whole trial of the party's case. Tift v. Jones, 52 Ga. 538, 1874 Ga. LEXIS 342 (1874) (decided under former Code 1873, § 3863); Georgia R.R. & Banking Co. v. Tice, 124 Ga. 459, 52 S.E. 916, 1905 Ga. LEXIS 751 (1905) (decided under former Civil Code 1895, § 5280); Massey v. State, 220 Ga. 883, 142 S.E.2d 832, 1965 Ga. LEXIS 658 (1965) (decided under former Code 1933, § 38-1703); Cochran v. State, 151 Ga. App. 436, 260 S.E.2d 391 (1979) (decided under former Code 1933, § 38-1703).

In juvenile court trials the parents are parties and therefore not subject to sequestration. D.C.A. v. State, 135 Ga. App. 234, 217 S.E.2d 470, 1975 Ga. App. LEXIS 1629 (1975) (decided under former Code 1933, § 38-1703).

When the plaintiff elects to call the plaintiff's own witnesses before testifying personally, the trial court has broad discretion to require either that the plaintiff testify prior to presenting the testimony of plaintiff's witnesses, or that the plaintiff be excluded from the courtroom prior to the time plaintiff chooses to testify. Barber v. Barber, 257 Ga. 488, 360 S.E.2d 574, 1987 Ga. LEXIS 907 (1987) (decided under former O.C.G.A. § 24-9-61).

Assistance to either party. — It is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either party and the action of the court in this respect will not be reviewed. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1703); Justice v. State, 213 Ga. 166, 97 S.E.2d 569, 1957 Ga. LEXIS 329 (1957) (decided under former Code 1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465, 1964 Ga. LEXIS 464 (1964) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324, 1979 Ga. App. LEXIS 2251 (1979) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Walker v. State, 132 Ga. App. 274, 208 S.E.2d 5, 1974 Ga. App. LEXIS 1673 (1974) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493, 1975 Ga. App. LEXIS 1660 (1975) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149, 1977 Ga. App. LEXIS 2468 (1977) (decided under former Code 1933, § 38-1703).

Assistance to opposite party. — Court may permit witnesses to remain in the courtroom to advise the opposite party, but the record must show that such was done for that purpose. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792, 1956 Ga. LEXIS 524 (1956), overruled in part, White v. State, 273 Ga. 787, 546 S.E.2d 514, 2001 Ga. LEXIS 346 (2001) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688, 1959 Ga. LEXIS 388 (1959) (decided under former Code 1933, § 38-1703); Spurlin v. State, 222 Ga. 179, 149 S.E.2d 315, 1966 Ga. LEXIS 430 (1966) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874, 1974 Ga. App. LEXIS 1177 (1974) (decided under former Code 1933, § 38-1703).

Officer of the court. — When the rule requiring sequestration is invoked and one of the witnesses is an officer of the court the judge may allow that witness to remain in the courtroom so as not to impair the efficiency of the court. Hoxie v. State, 114 Ga. 19, 39 S.E. 944, 1901 Ga.

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LEXIS 544 (1901) (decided under former Penal Code 1895, § 1017); Askew v. State, 3 Ga. App. 79, 59 S.E. 311, 1907 Ga. App. LEXIS 554 (1907) (decided under former Penal Code 1895, § 1017); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785, 1946 Ga. LEXIS 302 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792, 1956 Ga. LEXIS 524 (1956), overruled in part, White v. State, 273 Ga. 787, 546 S.E.2d 514, 2001 Ga. LEXIS 346 (2001) (decided under former Code 1933, § 38-1703); Cornett v. State, 218 Ga. 405, 128 S.E.2d 317, 1962 Ga. LEXIS 515, 1962 Ga. LEXIS 558 (1962) (decided under former Code 1933, § 38-1703); Head v. State, 111 Ga. App. 14, 140 S.E.2d 291, 1965 Ga. App. LEXIS 865 (1965) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121, 1973 Ga. App. LEXIS 918 (1973) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874, 1974 Ga. App. LEXIS 1177 (1974) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149, 1977 Ga. App. LEXIS 2468 (1977) (decided under former Code 1933, § 38-1703).

Prosecutor. — Court may permit the prosecutor in the indictment to remain at the state's counsel table to assist in the trial of the case, even though the prosecutor may be used as a witness. Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119, 1970 Ga. App. LEXIS 1344 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240, 1971 U.S. LEXIS 2831 (1971); Howard v. State, 144 Ga. App. 31, 240 S.E.2d 589, 1977 Ga. App. LEXIS 2570 (1977) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779, 1979 Ga. App. LEXIS 2720 (1979) (decided under former Code 1933, § 38-1703).

One long-standing exception to the sequestration rule exists in criminal cases for the prosecutor, that is, the one who signs the indictment bringing the charges. The prosecutor may testify as a witness after other witnesses for the state have testified. Chastain v. State, 255 Ga. 723, 342 S.E.2d 678, 1986 Ga. LEXIS 680 (1986) (decided under former O.C.G.A. § 24-9-61); Anderson v. State, 200 Ga. App. 29, 406 S.E.2d 791, 1991 Ga. App. LEXIS 734 (1991) (decided under former O.C.G.A. § 24-9-61); Jackson v. State, 222 Ga. App. 843, 476 S.E.2d 615 (decided under former O.C.G.A. § 24-9-61).

Prosecuting witness. — It is within the trial court's discretion to allow the prosecuting witness to remain in the courtroom as an exception to the sequestration rule. Jefferson v. State, 159 Ga. App. 740, 285 S.E.2d 213, 1981 Ga. App. LEXIS 2736 (1981) (decided under former Code 1933, § 38-1703).

It is within the trial court's discretion to allow a prosecuting witness to remain in the courtroom as an exception to the sequestration rule. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, 1983 Ga. App. LEXIS 3189, aff'd, 251 Ga. 525, 307 S.E.2d 904, 1983 Ga. LEXIS 899 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court may, in the court's discretion permit the prosecutor in the indictment to remain in the courtroom to assist in the trial of the case, even though the prosecutor may be used as a witness. Edwards v. State, 171 Ga. App. 264, 319 S.E.2d 101, 1984 Ga. App. LEXIS 2185 (1984) (decided under former O.C.G.A. § 24-9-61).

It was within the trial court's discretion to allow a police officer who was the nominal prosecutor to remain in the courtroom based on the district attorney's statement that the officer's presence was necessary for the orderly administration of the state's case. Davis v. State, 239 Ga. App. 318, 521 S.E.2d 368, 1999 Ga. App. LEXIS 1009 (1999), rev'd in part, 273 Ga. 14, 537 S.E.2d 663, 2000 Ga. LEXIS 777 (2000) (decided under former O.C.G.A. § 24-9-61).

Victim's assistance coordinator. — Because the state's victim assistance coordinator was not a witness subject to se-

questration, the trial court did not err in allowing the coordinator to remain in the courtroom during the trial. Clements v. State, 279 Ga. App. 773, 632 S.E.2d 702, 2006 Ga. App. LEXIS 697 (2006) (decided under former O.C.G.A. § 24-9-61).

Reopening state's case so victim could make in-court identification. — Allowing the state to reopen the state's case so a robbery victim could make an in-court identification based on the sound of defendant's voice did not violate the rule of sequestration since the victim was not recalled in order to further or alter the substance of defendant's own recounting of the incident in light of the substance of defendant's testimony but was recalled merely to testify about the similarity of the sound of defendant's voice to the sound of the gunman's voice during commission of the crime. Stith v. State, 201 Ga. App. 621, 411 S.E.2d 532, 1991 Ga. App. LEXIS 1511 (1991) (decided under former O.C.G.A. § 24-9-61).

Excepting witness testifying as to post-arrest event not error. — Trial court's excepting a state's witness from the rule of sequestration and, having done so, not requiring the witness to testify first was not an abuse of discretion, since the witness testified only about post-arrest events and not about the crime itself. Mathews v. State, 183 Ga. App. 224, 358 S.E.2d 639, 1987 Ga. App. LEXIS 2699 (1987) (decided under former O.C.G.A. § 24-9-61).

Investigating officer. — Appellate courts have found no abuse of discretion when the trial court permits the investigating officer to remain in the courtroom to assist in the trial of the case and testify after other state witnesses have testified. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842, 1977 Ga. App. LEXIS 1414 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697, 1978 Ga. App. LEXIS 2466 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443, 1979 Ga. LEXIS 765 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819, 1980 U.S. LEXIS 1790 (1980) (decided under former Code 1933, § 38-1703); Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25, 1979 Ga. App. LEXIS 2151 (1979) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-1703).

When a witness police detective was permitted to remain in the courtroom to assist the prosecutor in spite of a sequestration order, and when during the course of the trial the prosecutor sent the detective to telephone another police officer witness whose presence was needed, the rule of sequestration was not violated. McGarl v. State, 165 Ga. App. 323, 301 S.E.2d 58, 1983 Ga. App. LEXIS 1862 (1983) (decided under former O.C.G.A. § 24-9-61).

When defendants contended that it was improper to exempt from the sequestration order two prospective prosecution witnesses, the county sheriff and the police officer who investigated the case, it was held that these exceptions were not an abuse of the court's discretion as the sheriff never testified and the investigator was shown to be needed to assist the district attorney in the trial of the case, an approved exception. Welch v. State, 251 Ga. 197, 304 S.E.2d 391, 1983 Ga. LEXIS 763 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court may permit the investigating officer to remain at the counsel table and to testify at trial. Edwards v. State, 171 Ga. App. 264, 319 S.E.2d 101, 1984 Ga. App. LEXIS 2185 (1984) (decided under former O.C.G.A. § 24-9-61).

Trial court is vested with the discretion to make an exception to the sequestration rule for the chief investigating officer and the discretion will not be reversed on appeal unless abused. Norman v. State, 255 Ga. 313, 338 S.E.2d 249, 1986 Ga. LEXIS 486 (1986); Watson v. State, 222 Ga. App. 814, 476 S.E.2d 96 (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in allowing an investigator to sit at counsel table with the prosecutor after the rule of sequestration had been invoked, even though the investigator was the last witness to testify for the state, since the prosecutor stated the prosecutor needed the investigator's assistance during the trial and that to compel the inves-

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tigator to testify first would require the state to present the state's case out of sequence. Mullen v. State, 197 Ga. App. 26, 397 S.E.2d 487, 1990 Ga. App. LEXIS 1157 (1990) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in allowing an investigating officer to sit with the state's attorney during a trial as an exception to the rule of sequestration or in failing to require the officer to testify first as the trial court expressly recognized that the court was vested with discretion to do so; moreover, the investigating officer's testimony was primarily directed at the playing of the videotape interview with the child victim. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869, 2005 Ga. App. LEXIS 466 (2005) (decided under former O.C.G.A. § 24-9-61).

Despite the defendant's contrary claims on appeal, the trial court properly allowed the lead investigating officer to remain in the courtroom during the presentation of evidence, based on the prosecutor's statement that the officer was necessary to assist in the orderly presentation of the case. Stafford v. State, 288 Ga. App. 733, 655 S.E.2d 221, 2007 Ga. App. LEXIS 1166 (2007), cert. denied, No. S08C0654, 2008 Ga. LEXIS 489 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in permitting the state to have the investigating agent from the Georgia Bureau of Investigation remain in the courtroom at counsel table during the entire trial, thereby violating the rule of sequestration under former O.C.G.A. § 24-9-61. Since the state maintained that the state needed the presence of the primary investigator for the orderly presentation of the case, excepting the investigator from the rule of sequestration was within the trial court's discretion. Holloman v. State, 291 Ga. 338, 729 S.E.2d 344, 2012 Ga. LEXIS 643 (2012) (decided under former O.C.G.A. § 24-9-61).

Trial court's decision to allow the primary investigator to sit at the prosecution table during trial did not violate the rule of sequestration as the prosecutor explained that the investigator was needed to assist in the orderly presentation of the case. Moore v. State, 297 Ga. 773, 778 S.E.2d 210, 2015 Ga. LEXIS 695 (2015).

Trial court did not abuse the court's discretion by allowing the lead investigator to remain in the courtroom after the rule of sequestration was invoked. Miller v. State, 359 Ga. App. 380, 857 S.E.2d 830, 2021 Ga. App. LEXIS 202 (2021).

Sheriff may be excepted on court's motion. — Since the sheriff is an officer of the court and may be excepted from the rule of sequestration on the court's own initiative, it is not necessary to evaluate the state's asserted need for the assistance of the sheriff, as a demonstration of such was unnecessary to the court's exercise of discretion. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 1987 Ga. LEXIS 781, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406, 1987 U.S. LEXIS 5018 (1987) (decided under former O.C.G.A. § 24-9-61).

Expert witnesses. — When it was necessary to offer a considerable body of technical information relating to the alleged eavesdropping device for jury consideration, and the solicitor (now district attorney) stated in the solicitor's place that the solicitor needed to confer with an expert in this field during the trial, it was not an abuse of discretion to allow such witness to remain in the courtroom after a motion for the sequestration of witnesses had in other respects been granted. Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703).

Trial court did not err by refusing to allow defendant's accident reconstruction expert to hear the testimony of other witnesses, since the rule of sequestration was invoked, in view of the court's conclusion that granting the request would give the defense an unfair advantage. Bartell v. State, 181 Ga. App. 148, 351 S.E.2d 495, 1986 Ga. App. LEXIS 2352 (1986) (decided under former O.C.G.A. § 24-9-61).

An expert is not automatically excepted from the rule on sequestration because ordinarily it is not necessary for the expert to hear the testimony of other wit-

nesses in order to form an opinion. Bean v. Landers, 215 Ga. App. 366, 450 S.E.2d 699, 1994 Ga. App. LEXIS 1248 (1994), cert. denied, No. S95C0505, 1995 Ga. LEXIS 483 (Ga. Feb. 24, 1995) (decided under former O.C.G.A. § 24-9-61).

Member of local police. — City or county police officer is not an officer of the court so as to merit an exception to the rule of sequestration as such. Head v. State, 111 Ga. App. 14, 140 S.E.2d 291, 1965 Ga. App. LEXIS 865 (1965) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121, 1973 Ga. App. LEXIS 918 (1973) (decided under former Code 1933, § 38-1703).

Rape victim. — In the absence of any such showing or statement of the solicitor general (now district attorney) and where the record is silent as to any reason a rape victim should be excepted from the rule of sequestration and allowed to remain in the courtroom, none will be assumed to exist. Massey v. State, 220 Ga. 883, 142 S.E.2d 832, 1965 Ga. LEXIS 658 (1965) (decided under former Code 1933, § 38-1703).

Former O.C.G.A. § 24-9-61 did not prohibit discussions between attorney to the case and a prospective witness, at least so long as the attorney talked to the witness separately from the other witnesses and did not inform the witness of previous testimony. Ross v. State, 254 Ga. 22, 26-27, 326 S.E.2d 194, 1985 Ga. LEXIS 588 (1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623, 1985 U.S. LEXIS 2994 (1985), overruled in part, O'Kelley v. State, 278 Ga. 564, 604 S.E.2d 509, 2004 Ga. LEXIS 936 (2004) (decided under former O.C.G.A. § 24-9-61).

Testimony of Witnesses Not Sequestered

Liberal interpretation. — Legislative statement that "no mere irregularity shall exclude the witness" imports that a liberal interpretation should be given when applying the former provisions. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842, 1977 Ga. App. LEXIS 1414 (1977) (decided under former Code 1933, § 38-1703).

Presumption of injury to party. — When a sequestration order is violated, there is a presumption of injury to the rights of a party unless the contrary plainly appears. Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209, 1962 Ga. App. LEXIS 564 (1962) (decided under former Code 1933, § 38-1703).

Witness disregarding sequestration order. — When a witness was competent to testify, and the testimony was relevant, material, and necessary to an adequate defense of the charges against the defendant; only the witness's credibility as a witness, not the witness's competence, is affected by the witness's disregard of a sequestration order. Rooks v. State, 65 Ga. 330, 1880 Ga. LEXIS 190 (1880) (decided under former Code 1873, § 3863); Lassiter v. State, 67 Ga. 739, 1881 Ga. LEXIS 269 (1881) (decided under former Code 1873, § 3863); Bone v. State, 86 Ga. 108, 12 S.E. 205, 1890 Ga. LEXIS 193 (1890) (decided under former Code 1873, § 3863); May v. State, 90 Ga. 793, 17 S.E. 108, 1892 Ga. LEXIS 249 (1892) (decided under former Code 1873, § 3863); Hoxie v. State, 114 Ga. 19, 39 S.E. 944, 1901 Ga. LEXIS 544 (1901) (decided under former Penal Code 1895, § 1017); McWhorter v. State, 118 Ga. 55, 44 S.E. 873, 1903 Ga. LEXIS 436 (1903) (decided under former Penal Code 1895, § 1017); Phillips v. State, 121 Ga. 358, 49 S.E. 290, 1904 Ga. LEXIS 149 (1904) (decided under former Penal Code 1895, § 1017); Davis v. State, 120 Ga. 843, 48 S.E. 305, 1904 Ga. LEXIS 713 (1904) (decided under former Penal Code 1895, § 1017); Green v. State, 125 Ga. 742, 54 S.E. 724, 1906 Ga. LEXIS 254 (1906) (decided under former Penal Code 1895, § 1017); Carter v. State, 2 Ga. App. 254, 58 S.E. 532, 1907 Ga. App. LEXIS 340 (1907) (decided under former Penal Code 1895, § 1017); Thomas v. State, 7 Ga. App. 615, 67 S.E. 707, 1910 Ga. App. LEXIS 427 (1910) (decided under former Penal Code 1895, § 1017); Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114, 1911 Ga. LEXIS 10 (1911) (decided under former Penal Code 1910, § 1043); Benton v. State, 9 Ga. App. 291, 71 S.E. 8, 1911 Ga. App. LEXIS 513 (1911) (decided under former Penal Code 1910, § 1043); Higdon v. State, 46 Ga. App. 346, 167 S.E. 782, 1933 Ga. App. LEXIS 59 (1933) (decided under former Penal Code 1910, § 1043);

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Edwards v. State, 55 Ga. App. 187, 189 S.E. 678, 1937 Ga. App. LEXIS 34 (1937) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785, 1961 Ga. LEXIS 412 (1961) (decided under former Code 1933, § 38-1703); Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209, 1962 Ga. App. LEXIS 564 (1962) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400, 1965 Ga. LEXIS 604 (1965) (decided under former Code 1933, § 38-1703); Shelton v. State, 111 Ga. App. 351, 141 S.E.2d 776, 1965 Ga. App. LEXIS 967, cert. denied, 382 U.S. 917, 86 S. Ct. 291, 15 L. Ed. 2d 232, 1965 U.S. LEXIS 287 (1965); Pippins v. State, 224 Ga. 462, 162 S.E.2d 338, 1968 Ga. LEXIS 823 (1968) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525, 1971 Ga. App. LEXIS 1385 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203, 1971 Ga. App. LEXIS 977 (1971) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79, 1974 Ga. App. LEXIS 1322 (1974) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404, 1975 Ga. LEXIS 853 (1975) (decided under former Code 1933, § 38-1703); Still v. State, 142 Ga. App. 312, 235 S.E.2d 737, 1977 Ga. App. LEXIS 1593 (1977) (decided under former Code 1933, § 38-1703); Watts v. State, 239 Ga. 725, 238 S.E.2d 894, 1977 Ga. LEXIS 1312 (1977) (decided under former Code 1933, § 38-1703); Banks v. State, 144 Ga. App. 471, 241 S.E.2d 587, 1978 Ga. App. LEXIS 1638 (1978) (decided under former Code 1933, § 38-1703); Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338, 1978 Ga. App. LEXIS 3182 (1978) (decided under former Code 1933, § 38-1703); Dudley v. State, 148 Ga. App. 560, 251 S.E.2d 815, 1978 Ga. App. LEXIS 3211 (1978) (decided under former Code 1933, § 38-1703); International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438, 1979 Ga. App. LEXIS 1881 (1979) (decided under former Code 1933, § 38-1703); Smith v. State, 244 Ga. 814, 262 S.E.2d 116, 1979 Ga. LEXIS 1428 (1979) (decided under former Code 1933, § 38-1703); Stroming v. State, 152 Ga. App. 129, 262 S.E.2d 193, 1979 Ga. App. LEXIS 2838 (1979) (decided under former Code 1933, § 38-1703); Wright v. State, 246 Ga. 53, 268 S.E.2d 645, 1980 Ga. LEXIS 1015 (1980) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224, 1981 Ga. LEXIS 692 (1981) (decided under former Code 1933, § 38-1703); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593, 1981 Ga. LEXIS 723 (1981) (decided under former Code 1933, § 38-1703); Harper v. State, 249 Ga. 519, 292 S.E.2d 389, 1982 Ga. LEXIS 1156 (1982) (decided under former Code 1933, § 38-1703).

When the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness's testimony. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356, 1989 Ga. LEXIS 70 (1989) (decided under former O.C.G.A. § 24-9-61); Lee v. State, 214 Ga. App. 164, 447 S.E.2d 323, 1994 Ga. App. LEXIS 820 (1994), cert. denied, No. S94C1831, 1994 Ga. LEXIS 1177 (Ga. Dec. 2, 1994) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion when the court permitted witnesses to testify after violating a sequestration order as the court gave a curative charge to the jury, informing the jury that the jury could consider the violation in assessing credibility. Mule v. State, 355 Ga. App. 239, 843 S.E.2d 894, 2020 Ga. App. LEXIS 296 (2020).

In criminal cases, the violation of the rule of sequestration of any witness either for the defense or for the prosecution goes to the credibility rather than to the admissibility of the witness's testimony. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838, 1985 Ga. App. LEXIS 2818 (1985) (decided under former O.C.G.A. § 24-9-61); State v. Marshall, 195 Ga. App. 535, 394 S.E.2d 379, 1990 Ga. App. LEXIS 607 (1990) (decided under former O.C.G.A. § 24-9-61); Weathers v. State, 202 Ga. App. 849, 415 S.E.2d 690, 1992 Ga. App. LEXIS 199 (1992), cert. denied, No. S92C0671, 1992 Ga. LEXIS 315 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-9-61).

Violation of sequestration does not render the offending witness incompetent to testify; defendant's recourse is to seek instructions from the court informing the jury that the violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. Bradford v. State, 182 Ga. App. 337, 355 S.E.2d 735, 1987 Ga. App. LEXIS 2618 (1987) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err by refusing to exclude the testimony of a state's witness for the witness's alleged violation of the rule of sequestration, as exclusion of testimony simply is not an appropriate remedy for a violation of the rule. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, 1987 Ga. LEXIS 634 (1987) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in denying defendant's motion for mistrial after the court learned that witnesses in the witness room had been discussing testimony with each other in violation of the rule of sequestration, since the only witness in the room who had not yet testified when these conversations allegedly occurred was a deputy who did not personally observe the crime but merely took the defendant into custody. Hicks v. State, 256 Ga. 715, 352 S.E.2d 762, 1987 Ga. LEXIS 581 (1987), cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706, 1987 U.S. LEXIS 2716 (1987), writ denied, 494 U.S. 1074, 110 S. Ct. 1797, 108 L. Ed. 2d 798, 1990 U.S. LEXIS 1716 (1990) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in allowing the state to present a witness in violation of the sequestration rule as defense counsel's cross-examination cast doubt upon the witness's testimony and the jury knew that the witness was present during previous testimony. Rakestrau v. State, 278 Ga. 872, 608 S.E.2d 216, 2005 Ga. LEXIS 38 (2005) (decided under former O.C.G.A. § 24-9-61).

Party's remedy for a violation of the sequestration rule is to request the trial court to charge the jury that the violation should be considered in determining the weight and credit to be given the testimony of the witness. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356, 1989 Ga. LEXIS 70 (1989) (decided under former O.C.G.A. § 24-9-61).

Witness not automatically disqualified if rule violated. — Generally, the testimony of a witness who has violated the rule of sequestration is admissible although the witness may be guilty of contempt. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981) (decided under former Code 1933, § 38-1703).

Even if the rule of sequestration has been violated, this does not automatically disqualify the witness or render the witness incompetent; the trial court is vested with broad discretion in this regard. Stancil v. State, 158 Ga. App. 147, 279 S.E.2d 457, 1981 Ga. App. LEXIS 2106 (1981) (decided under former O.C.G.A. § 24-9-61); Hayes v. State, 175 Ga. App. 135, 332 S.E.2d 917, 1985 Ga. App. LEXIS 2038 (1985) (decided under former O.C.G.A. § 24-9-61).

Because a witness did not expect to be called as a witness when the witness was present for the testimony of other witnesses, it seemed unlikely that the witness would have been observing their testimony with an eye toward the witness's own testimony, and the trial court did not abuse the court's discretion when the court allowed the witness to testify even though the witness violated the rule of sequestration. Franklin v. State, 306 Ga. 872, 834 S.E.2d 53, 2019 Ga. LEXIS 634 (2019).

Admitting testimony of witnesses not placed under rule when invoked. — Witnesses who have not been called and put under the rule may testify in rebuttal of a prisoner's statement if the court is satisfied that the ends of justice require such testimony. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49, 1892 Ga. LEXIS 210 (1892) (decided under former Code 1882, § 3863); Keiley v. Bristol, 30 Ga. App. 725, 119 S.E. 334, 1923 Ga. App. LEXIS 649 (1923); Edwards v. State, 55 Ga. App. 187, 189 S.E. 678, 1937 Ga. App. LEXIS 34 (1937) (decided under former Code 1933, § 38-1703); Ricks v. State, 209 Ga. 2, 70 S.E.2d 373, 1952 Ga. LEXIS 382 (1952) (decided un-

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der former Code 1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465, 1964 Ga. LEXIS 464 (1964) (decided under former Code 1933, § 38-1703); Shelton v. State, 220 Ga. 610, 140 S.E.2d 839, 1965 Ga. LEXIS 571 (1965) (decided under former Code 1933, § 38-1703); Pippins v. State, 224 Ga. 462, 162 S.E.2d 338, 1968 Ga. LEXIS 823 (1968) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581, 1971 Ga. App. LEXIS 1207, 1971 Ga. App. LEXIS 1419, 1971 Ga. App. LEXIS 1428 (1971) (decided under former Code 1933, § 38-1703); Still v. State, 142 Ga. App. 312, 235 S.E.2d 737, 1977 Ga. App. LEXIS 1593 (1977) (decided under former Code 1933, § 38-1703); Banks v. State, 144 Ga. App. 471, 241 S.E.2d 587, 1978 Ga. App. LEXIS 1638 (1978) (decided under former Code 1933, § 38-1703); Stroming v. State, 152 Ga. App. 129, 262 S.E.2d 193, 1979 Ga. App. LEXIS 2838 (1979) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224, 1981 Ga. LEXIS 692 (1981) (decided under former Code 1933, § 38-1703); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593, 1981 Ga. LEXIS 723 (1981) (decided under former Code 1933, § 38-1703).

After the trial court conducted an evidentiary hearing out of the presence of the jury before permitting a witness to testify as a rebuttal witness, and although the witness had not been present in the courtroom prior to the time at which the witness was called to testify, the witness admitted to having conversations with fellow officers who had already testified or been present during testimony, there was no abuse of discretion in permitting the witness to testify. Gibby v. State, 166 Ga. App. 413, 304 S.E.2d 518, 1983 Ga. App. LEXIS 3235 (1983) (decided under former O.C.G.A. § 24-9-61).

When the assistant district attorney tried a case in another courtroom and was not present when the rule of sequestration was invoked, the fact that the assistant district attorney entered the courtroom and sat at the prosecution table, and was subsequently called to testify did not require the trial court to prohibit the assistant district attorney's testimony. Cheeks v. State, 203 Ga. App. 47, 416 S.E.2d 336, 1992 Ga. App. LEXIS 365 (1992), cert. denied, No. S92C0726, 1992 Ga. LEXIS 377 (Ga. Apr. 30, 1992) (decided under former O.C.G.A. § 24-9-61).

Unsequestered witness may be called after others testify. — Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court is authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. Jefferson v. State, 159 Ga. App. 740, 285 S.E.2d 213, 1981 Ga. App. LEXIS 2736 (1981) (decided under former Code 1933, § 38-1703).

Admitting testimony of witness who complied with sequestration rule after defendant insisted. — Trial court did not err in allowing the owner of a burglarized house to testify without a cautionary instruction to the jury because the owner had violated the rule of sequestration by being present in court when the arresting officer testified; defendant did not show that the defendant insisted upon the rule until after the arresting officer had begun to testify, at which point it appeared the witnesses complied. Johnson v. State, 275 Ga. App. 21, 619 S.E.2d 731, 2005 Ga. App. LEXIS 877 (2005) (decided under former O.C.G.A. § 24-9-61).

Excluding testimony of witnesses not sequestered. — Exclusion of testimony offered by a witness who has remained in the courtroom after grant of a sequestration order is within the discretion of the trial court. May v. State, 90 Ga. 793, 17 S.E. 108, 1892 Ga. LEXIS 249 (1892) (decided under former Code 1882, § 3863); Groover v. Simmons, 161 Ga. 93, 129 S.E. 778, 1925 Ga. LEXIS 308 (1925) (decided under former Penal Code 1910, § 1043); Star Jewelers, Inc. v. Durham, 147 Ga. App. 68, 248 S.E.2d 51, 1978 Ga. App. LEXIS 2617 (1978) (decided under former Code 1933, § 38-1703); Dowdy v. State, 154 Ga. App. 700, 269 S.E.2d 530, 1980 Ga. App. LEXIS 2347 (1980) (decided under former Code 1933, § 38-1703).

Disregard of a sequestration order may subject the offender to punish-

ment for contempt. Rooks v. State, 65 Ga. 330, 1880 Ga. LEXIS 190 (1880) (decided under former Code 1873, § 3863); Lassiter v. State, 67 Ga. 739, 1881 Ga. LEXIS 269 (1881) (decided under former Code 1873, § 3863); Bone v. State, 86 Ga. 108, 12 S.E. 205, 1890 Ga. LEXIS 193 (1890) (decided under former Code 1882, § 3863); Hoxie v. State, 114 Ga. 19, 39 S.E. 944, 1901 Ga. LEXIS 544 (1901) (decided under former Penal Code 1895, § 1017); McWhorter v. State, 118 Ga. 55, 44 S.E. 873, 1903 Ga. LEXIS 436 (1903) (decided under former Penal Code 1895, § 1017); Phillips v. State, 121 Ga. 358, 49 S.E. 290, 1904 Ga. LEXIS 149 (1904) (decided under former Penal Code 1895, § 1017); Green v. State, 125 Ga. 742, 54 S.E. 724, 1906 Ga. LEXIS 254 (1906) (decided under former Penal Code 1895, § 1017); Thomas v. State, 7 Ga. App. 615, 67 S.E. 707, 1910 Ga. App. LEXIS 427 (1910) (decided under former Penal Code 1910, § 1043); Higdon v. State, 46 Ga. App. 346, 167 S.E. 782, 1933 Ga. App. LEXIS 59 (1933) (decided under former Penal Code 1910, § 1043); Edwards v. State, 55 Ga. App. 187, 189 S.E. 678, 1937 Ga. App. LEXIS 34 (1937) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785, 1961 Ga. LEXIS 412 (1961) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203, 1971 Ga. App. LEXIS 977 (1971) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79, 1974 Ga. App. LEXIS 1322 (1974) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404, 1975 Ga. LEXIS 853 (1975) (decided under former Code 1933, § 38-1703); Watts v. State, 239 Ga. 725, 238 S.E.2d 894, 1977 Ga. LEXIS 1312 (1977) (decided under former Code 1933, § 38-1703); Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338, 1978 Ga. App. LEXIS 3182 (1978) (decided under former Code 1933, § 38-1703); International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438, 1979 Ga. App. LEXIS 1881 (1979) (decided under former Code 1933, § 38-1703).

Violation of sequestration by interested parties who are not witnesses. — By permitting persons actively interested in the result of the case to intermingle with witnesses who have been ordered to be sequestered there is a probability that their testimony may be influenced and molded to the prejudice of either of the parties in the cause. Hightower v. State, 14 Ga. App. 246, 80 S.E. 684, 1914 Ga. App. LEXIS 197 (1914) (decided under former Penal Code 1910, § 1043).

Violation of sequestration after testifying. — Sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. Lyman v. State, 69 Ga. 404, 1882 Ga. LEXIS 236 (1882) (decided under former Code 1873, § 3863); Taylor v. State, 132 Ga. 235, 63 S.E. 1116, 1909 Ga. LEXIS 69 (1909) (decided under former Penal Code 1895, § 1017).

Since state's witnesses to whom sheriff talked were witnesses who had already testified, and, the sheriff, who was a witness, was allowed to stay in the courtroom by consent, and the witnesses involved for the state were not called to the stand again, there was no violation of the sequestration rule. Talley v. State, 2 Ga. App. 395, 58 S.E. 667, 1907 Ga. App. LEXIS 389 (1907) (decided under former Penal Code 1895, § 1017); see also Heywood v. State, 12 Ga. App. 643, 77 S.E. 1130, 1913 Ga. App. LEXIS 677 (1913); Hudgins v. State, 13 Ga. App. 489, 79 S.E. 367, 1913 Ga. App. LEXIS 229 (1913) (decided under former Penal Code 1910, § 1043); Finley v. State, 101 Ga. App. 61, 113 S.E.2d 144, 1960 Ga. App. LEXIS 788 (1960) (decided under former Code 1933, § 38-1703).

Sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. Lyman v. State, 69 Ga. 404, 1882 Ga. LEXIS 236 (1882) (decided under former Code 1873, § 3863); Taylor v. State, 132 Ga. 235, 63 S.E. 1116, 1909 Ga. LEXIS 69 (1909) (decided under former Penal Code 1895, § 1017).

Preclusion of testimony of defendant's spouse under sequestration rule proper. — Application of the former O.C.G.A. § 24-9-61 sequestration rule was discretionary, and the trial court did not err by allowing the defendant's wife to

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sit at the defense table and assist in the defendant's defense of a driving under the influence charge, thereby precluding the wife's testimony under the sequestration rule; moreover, if there was error, the defendant induced the error. The issues were explained to the defendant, the defendant and the wife considered the pros and cons of the wife's role as a witness, and they decided that the wife would not testify. Hernandez v. State, 297 Ga. App. 177, 676 S.E.2d 795, 2009 Ga. App. LEXIS 378 (2009) (decided under former O.C.G.A. § 24-9-61).

Jury instructions. — Violation of the sequestration rule does not affect admissibility of the testimony, but the party's recourse is to seek instructions from the court informing the jury that the presence of the witness in the courtroom in violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. Wright v. State, 246 Ga. 53, 268 S.E.2d 645, 1980 Ga. LEXIS 1015 (1980) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224, 1981 Ga. LEXIS 692 (1981) (decided under former Code 1933, § 38-1703).

RESEARCH REFERENCES

ALR.

Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 A.L.R.2d 478.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Effect of witness's violation of order of exclusion, 14 A.L.R.3d 16.

Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal, 24 A.L.R.4th 488.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case, 74 A.L.R.4th 705.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 181 A.L.R. Fed. 549.

24-6-616. Presence in courtroom of victim of criminal offense.

Subject to the provisions of Code Section 17-17-9, the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense.

History.

Code 1981, § 24-6-616, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-61.1 are included in the annotations for this Code section.

Discretion of court. — In a prosecution for aggravated assault, the trial court did not abuse the court's discretion in allowing a victim, who was comatose and in a wheelchair, to remain in the courtroom since the victim's injuries as a result of the shooting were relevant to the accusation. Lewis v. State, 215 Ga. App. 161, 450 S.E.2d 448, 1994 Ga. App. LEXIS 1157 (1994) (decided under former O.C.G.A. § 24-9-61.1).

Trial court properly allowed the victim in defendant's child molestation trial to remain in court after the defense moved for sequestration because former O.C.G.A.

§ 24-9-61.1 provided that the victim of a criminal offense could be entitled to be present in any court exercising jurisdiction over such offense, and it was within the sole discretion of the trial judge to determine when to allow such victim to be present in such court, and as the prosecutor had requested that the victim remain present to assist in the case, the trial court did not abuse the court's discretion. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339, 2002 Ga. App. LEXIS 672 (2002) (decided under former O.C.G.A. § 24-9-61.1).

Rule of sequestration was not violated. — Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give testimony was fully within the court's discretion and did not constitute reversible error. Shepherd v. State, 245 Ga. App. 386, 537 S.E.2d 777, 2000 Ga. App. LEXIS 953 (2000) (decided under former O.C.G.A. § 24-9-61.1).

RESEARCH REFERENCES

ALR.

Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 A.L.R.5th 343.

ARTICLE 2

CREDIBILITY

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-6-620. Credibility a question for trier of fact.

The credibility of a witness shall be a matter to be determined by the trier of fact, and if the case is being heard by a jury, the court shall give the jury proper instructions as to the credibility of a witness.

History.

Code 1981, § 24-6-620, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-9-80, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Strozier v. Carroll, 31 Ga. 557 (1860).

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

JUDICIAL DECISIONS

Analysis

General Consideration
Civil Cases
Criminal Cases
Children
Appeals

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5294, former Penal Code 1895, § 1028, former Civil Code 1910, § 5883, former Penal Code 1910, § 1054, former Code 1933, § 38-1805, and former O.C.G.A. § 24-9-80 are included in the annotations for this Code section.

Weight of evidence and credibility of witnesses are matters for jury. — See Sindy v. State, 120 Ga. 202, 47 S.E. 554, 1904 Ga. LEXIS 505 (1904) (decided under former Penal Code 1895, § 1028); Trammell v. State, 183 Ga. 711, 189 S.E. 529, 1937 Ga. LEXIS 391 (1937) (decided under former Code 1933, § 38-1805); A.A.A. Highway Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462, 1945 Ga. App. LEXIS 627 (1945) (decided under former Code 1933, § 38-1805); Davis v. State, 424 Ga. 901, 252 S.E.2d 443 (1979) (decided under former Code 1933, § 38-1805); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22, 1979 Ga. App. LEXIS 2333 (1979) (decided under former Code 1933, § 38-1805); Parks v. State, 150 Ga. App. 446, 258 S.E.2d 66, 1979 Ga. App. LEXIS 2346 (1979) (decided under former Code 1933, § 38-1805); A & N Inv., Inc. v. Cronic, 151 Ga. App. 738, 261 S.E.2d 469, 1979 Ga. App. LEXIS 2776 (1979) (decided under former Code 1933, § 38-1805); Armour v. State, 154 Ga. App. 740, 270 S.E.2d 22, 1980 Ga. App. LEXIS 2368 (1980) (decided under former Code 1933, § 38-1805); Harris v. State, 155 Ga. App. 530, 271 S.E.2d 668, 1980 Ga. App. LEXIS 2657 (1980) (decided under former Code 1933, § 38-1805); Price v. State, 159 Ga. App. 662, 284 S.E.2d 676, 1981 Ga. App. LEXIS 2757 (1981) (decided under former O.C.G.A. § 24-9-80); Alonso v. State, 190 Ga. App. 26, 378 S.E.2d 354, 1989 Ga. App. LEXIS 131 (1989), overruled in part, Curtis v. State, 275 Ga. 576, 571 S.E.2d 376, 2002 Ga. LEXIS 918 (2002) (decided under former O.C.G.A. § 24-9-80); Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (decided under former O.C.G.A. § 24-9-80).

Determination of a witness's credibility is within the discretion of the trier of fact. Burnette v. State, 165 Ga. App. 768, 302 S.E.2d 621, 1983 Ga. App. LEXIS 3186 (1983) (decided under former O.C.G.A. § 24-9-80).

Any question as to credibility of a witness is for the jury to resolve. Murff v. State, 165 Ga. App. 808, 302 S.E.2d 697, 1983 Ga. App. LEXIS 3195, rev'd in part, 251 Ga. 478, 306 S.E.2d 267, 1983 Ga. LEXIS 815 (1983) (decided under former O.C.G.A. § 24-9-80).

In jury trial, jurors are sole judges of credibility of witnesses. Godfrey v. State, 187 Ga. App. 319, 370 S.E.2d 183, 1988 Ga. App. LEXIS 685 (1988); Ward v. State, 205 Ga. App. 584, 423 S.E.2d 288 (1992) (decided under former O.C.G.A. § 24-9-80).

Testimony that victim was "genuine". — Trial court did not abuse the court's discretion in refusing to grant defendant's motion for a mistrial after a witness improperly testified that a victim was "genuine" as defendant failed to renew the motion for a mistrial following a curative instruction; further, the curative instruction was the proper corrective measure as the credibility of the witness was a matter for the jury. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83, 2005 Ga. App. LEXIS 1371 (2005), cert. denied, No. S06C0784, 2006 Ga. LEXIS 302 (Ga. May 8, 2006) (decided under former O.C.G.A. § 24-9-80).

Resolution of conflicting theories drawn from evidence is for jury and it is not the court's province to reweigh the evidence and the jury's inferences drawn from the evidence. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, 1992 Ga. App. LEXIS 618 (1992), cert. denied, No. S92C0913, 1992 Ga. LEXIS 460 (Ga. June 4, 1992) (decided under former O.C.G.A. § 24-9-80).

Defendant's motion for a directed verdict of acquittal in trial for theft by taking a motor vehicle was properly denied since the jury properly assessed the evidence, although conflicting, and found each fact necessary to make out the state's case. Sherls v. State, 272 Ga. App. 152, 611 S.E.2d 780, 2005 Ga. App. LEXIS 240 (2005) (decided under former O.C.G.A. § 24-9-80).

Trial without jury. — When the judge tried the accused without intervention of a

jury, the credibility of the witnesses was for the judge's determination. Boynton v. State, 11 Ga. App. 268, 75 S.E. 9, 1912 Ga. App. LEXIS 365 (1912) (decided under former Penal Code 1910, § 1054).

Under former O.C.G.A. § 24-9-80, in a trial, the credibility of the witnesses was a matter which should be resolved by the jurors who have heard all of the relevant evidence, and not by the text of the pretrial order. Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572, 2002 Ga. LEXIS 1006 (2002) (decided under former O.C.G.A. § 24-9-80).

Alibi evidence need not be accepted. — When defendant's alibi witnesses were unimpeached, the trial court, sitting as trier of fact, was not bound to accept the evidence introduced of alibi as true, since the trier of fact determines the credibility of the witnesses and weight to be given their testimony. Gatling v. State, 203 Ga. App. 407, 416 S.E.2d 877, 1992 Ga. App. LEXIS 438 (1992) (decided under former O.C.G.A. § 24-9-80).

Value of testimony. — It was for the jury to determine whether the testimony of a witness was so vague, indefinite, and uncertain as to be worthless, or whether the testimony, though contradictory in some respects, possessed some degree of probative value. Sappington v. Bell, 115 Ga. 856, 42 S.E. 233, 1902 Ga. LEXIS 628 (1902) (decided under former Civil Code 1895, § 5294); O'Brien v. Ellarbee, 14 Ga. App. 333, 80 S.E. 864, 1914 Ga. App. LEXIS 251 (1914) (decided under former Civil Code 1910, § 5883); Sherman v. Stephens, 30 Ga. App. 509, 118 S.E. 567, 1923 Ga. App. LEXIS 519 (1923) (decided under former Civil Code 1910, § 5883); Reaves v. Columbus Elec. & Power Co., 32 Ga. App. 140, 122 S.E. 824, 1924 Ga. App. LEXIS 316 (1924).

In a negligence action seeking compensatory damages for a disabling injury, because the injured plaintiff's use of morphine at the time of trial raised a credibility issue, the trial court did not abuse the court's discretion in overruling plaintiff's relevance objection. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855, 2007 Ga. App. LEXIS 1032 (2007) (decided under former O.C.G.A. § 24-9-80).

Only limitation to power of jury to credit witnesses is when the facts testified to are inherently at variance with the common knowledge and experience of mankind. Haywood v. State, 114 Ga. 111, 39 S.E. 948, 1901 Ga. LEXIS 590 (1901) (decided under former Penal Code 1895, § 1028); Alexander v. State, 1 Ga. App. 289, 57 S.E. 996, 1907 Ga. App. LEXIS 220 (1907) (decided under former Penal Code 1895, § 1028); Reed v. State, 130 Ga. 52, 60 S.E. 191, 1908 Ga. LEXIS 224 (1908) (decided under former Penal Code 1895, § 1028); Watson v. State, 13 Ga. App. 181, 78 S.E. 1014, 1913 Ga. App. LEXIS 95 (1913) (decided under former Penal Code 1895, § 1054).

Contradictory statements as affecting credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. Hudson v. State, 163 Ga. App. 845, 295 S.E.2d 123, 1982 Ga. App. LEXIS 2675 (1982) (decided under former O.C.G.A. § 24-9-80).

Reconciliation of conflicts. — When there are conflicts in the testimony of witnesses, it is the duty of the jury to reconcile these conflicts if possible so as to make every witness speak the truth. However, if this cannot be done, it then becomes the duty of the jury to believe those whom the jury thinks most entitled to credit. Cotton v. State, 81 Ga. App. 753, 59 S.E.2d 741, 1950 Ga. App. LEXIS 988 (1950) (decided under former Code 1933, § 38-1805).

It is the function of the jury to determine the credibility of the witnesses, and the jurors must weigh and resolve any conflicts presented by the evidence; the appellate court must view the evidence in the light most favorable to the jury's verdict. King v. State, 157 Ga. App. 733, 278 S.E.2d 491, 1981 Ga. App. LEXIS 1994 (1981) (decided under former Code 1933, § 38-1805).

Jury may not arbitrarily disregard testimony. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that the jurors are obliged to believe testimony which the jurors in fact discredit, but means that the jurors

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are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. Fincher v. Harlow, 56 Ga. App. 578, 193 S.E. 452, 1937 Ga. App. LEXIS 169 (1937) (decided under former Code 1933, § 38-1805); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243, 1938 Ga. LEXIS 774 (1938) (decided under former Code 1933, § 38-1805); Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454, 1948 Ga. LEXIS 509 (1948) (decided under former Code 1933, § 38-1805); Wilson v. Professional Ins. Corp., 151 Ga. App. 712, 261 S.E.2d 450, 1979 Ga. App. LEXIS 2763 (1979) (decided under former Code 1933, § 38-1805).

Rejection of part of evidence. — Jury in arriving at a conclusion upon disputed issues of fact may believe part of the testimony of a witness or witnesses, and reject another part. Brown v. O'Neal, 59 Ga. App. 560, 1 S.E.2d 601, 1939 Ga. App. LEXIS 361 (1939) (decided under former Code 1933, § 38-1805); Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846, 1940 Ga. App. LEXIS 528 (1940) (decided under former Code 1933, § 38-1805); Johnson v. State, 69 Ga. App. 663, 26 S.E.2d 482, 1943 Ga. App. LEXIS 163 (1943) (decided under former Code 1933, § 38-1805); Johnson v. Woodward Lumber Co., 76 Ga. App. 152, 45 S.E.2d 294, 1947 Ga. App. LEXIS 395 (1947) (decided under former Code 1933, § 38-1805); Nashville, C. & St. L. Ry. v. Ham, 78 Ga. App. 403, 50 S.E.2d 831, 1948 Ga. App. LEXIS 746, 1948 Ga. App. LEXIS 747 (1948) (decided under former Code 1933, § 38-1805); Davis v. State, 205 Ga. 248, 53 S.E.2d 454 (1949) (decided under former Code 1933, § 38-1805); Frazier v. State, 152 Ga. App. 743, 264 S.E.2d 35, 1979 Ga. App. LEXIS 3027 (1979) (decided under former Code 1933, § 38-1805).

Jury may disbelieve witness. — If a witness is impeached or discredited in some legal manner, a jury, or a trial judge in a nonjury case, may disbelieve the witness altogether. Mustang Transp., Inc. v. W.W. Lowe & Sons, 123 Ga. App. 350, 181 S.E.2d 85, 1971 Ga. App. LEXIS 1219 (1971) (decided under former Code 1933, § 38-1805).

Sufficient evidence supported the defendant's convictions of false statements under O.C.G.A. § 16-10-20 and conspiracy to commit theft by shoplifting under O.C.G.A. § 16-4-8, as the co-conspirator testified as to the defendant's request for specific items to be stolen, the special agent testified about the defendant's false statements, and the defendant gave a statement admitting to the conduct; the testimony of the co-conspirator and of the special agent established the elements of the offenses, and the jury, under former O.C.G.A. § 24-9-80, had the right to disbelieve the defendant's testimony to the contrary. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814, 2006 Ga. App. LEXIS 1047 (2006) (decided under former O.C.G.A. § 24-9-80).

Single witness may be believed by jury in preference to any number of witnesses whose testimony may contradict the single witness. Pyles v. State, 3 Ga. App. 29, 59 S.E. 193, 1907 Ga. App. LEXIS 543 (1907) (decided under former Penal Code 1895, § 1028); Jolly v. State, 5 Ga. App. 454, 63 S.E. 520, 1909 Ga. App. LEXIS 20 (1909) (decided under former Penal Code 1895, § 1028); Gordon v. State, 7 Ga. App. 691, 67 S.E. 893, 1910 Ga. App. LEXIS 469 (1910) (decided under former Penal Code 1895, § 1028); Lambert v. State, 11 Ga. App. 764, 76 S.E. 73, 1912 Ga. App. LEXIS 164 (1912); Cook v. State, 13 Ga. App. 308, 79 S.E. 87, 1913 Ga. App. LEXIS 135 (1913) (decided under former Penal Code 1910, § 1054).

Rejection of defendant's explanation. — When defendant's statements are not consistent with and do not explain other direct and circumstantial evidence, defendant's explanation may be rejected by the trier of fact. Green v. State, 155 Ga. App. 795, 272 S.E.2d 761, 1980 Ga. App. LEXIS 2793 (1980) (decided under former Code 1933, § 38-1805).

Testimony and circumstances. — Jury is to look to the testimony itself, as well as to the circumstances attending the testimony's introduction, in determining the testimony's probative value. Smith v. State, 124 Ga. 213, 52 S.E. 329, 1905 Ga. LEXIS 687 (1905) (decided under former Penal Code 1895, § 1028).

Demeanor of witness. — Trier of facts in determining the worthiness of belief of

a witness may take into consideration the witness's appearance, the witness's demeanor, or the witness's manner upon the stand. Mustang Transp., Inc. v. W.W. Lowe & Sons, 123 Ga. App. 350, 181 S.E.2d 85, 1971 Ga. App. LEXIS 1219 (1971) (decided under former Code 1933, § 38-1805).

Interest of witness in the result of the suit may always be considered in passing upon the witness's credibility; and, if there are circumstances inconsistent with the truth of the witness's testimony, the jury is not obliged to believe the witness, even though the witness is not contradicted by any other witness. Fincher v. Harlow, 56 Ga. App. 578, 193 S.E. 452, 1937 Ga. App. LEXIS 169 (1937) (decided under former Code 1933, § 38-1805); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243, 1938 Ga. LEXIS 774 (1938); Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609, 1947 Ga. LEXIS 577 (1947) (decided under former Code 1933, § 38-1805); Dunagan v. Elder, 154 Ga. App. 728, 270 S.E.2d 18, 1980 Ga. App. LEXIS 2362 (1980) (decided under former Code 1933, § 38-1805).

Implications inconsistent with testimony may arise from proven facts; and in still other ways the question of what is the truth may remain as an issue of fact despite uncontradicted evidence in regard thereto. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969) (decided under former Code 1933, § 38-1805).

Allowance of impeachment of witness by prior inconsistent statement which is indirectly material to the issue in the case is not error. Hudson Properties, Inc. v. Citizens & S. Nat'l Bank, 168 Ga. App. 331, 308 S.E.2d 708, 1983 Ga. App. LEXIS 2765 (1983) (decided under former O.C.G.A. § 24-9-80).

Statement not admissible as prior inconsistent statement. — Doctor's conversation in the hospital with a patient was not admissible as a prior consistent statement to show that the patient had pointed out a lesion to the doctor as the excluded testimony was not as specific to that issue as the patient claimed; the doctor testified that the patient felt that the doctor had delayed the treatment and that the doctor told the patient that they should concentrate on the patient getting well and that the doctor would discuss it with the patient later in the office. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112, 2005 Ga. App. LEXIS 282 (2005) (decided under former O.C.G.A. § 24-9-80).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about it was not admissible as prior consistent statements as the doctor did not place the patient's veracity at issue; the fact that the doctor's testimony was at odds with the patient's testimony did not open the door to the admission of hearsay evidence and, further, the witnesses were allowed to testify that the patient showed the witnesses the lesion and that after the check-up, the patient was relieved. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112, 2005 Ga. App. LEXIS 282 (2005) (decided under former O.C.G.A. § 24-9-80).

Interference with verdict by court. — Only in very extreme cases ought the court to interfere with a verdict turning on the credit to be given to the witnesses testifying on the trial. Wright v. State, 34 Ga. 110, 1864 Ga. LEXIS 44 (1864) (decided under former law); Whitten v. State, 47 Ga. 297, 1872 Ga. LEXIS 329 (1872) (decided under former law); Crawford v. State, 50 Ga. 249, 1873 Ga. LEXIS 253 (1873) (decided under former law); May v. State, 94 Ga. 76, 20 S.E. 251, 1894 Ga. LEXIS 14 (1894) (decided under former law).

Credibility as basis for denial of summary judgment. — When, on motion for summary judgment, the credibility of a witness or witnesses upon whose testimony the grant of the summary judgment depends is at issue in the case, neither the trial court nor the Court of Appeals will resolve the matter or is concerned with the credibility but will leave this matter to the jury, rather than grant summary judgment. Raven v. Dodd's Auto Sales & Serv., Inc., 117 Ga. App. 416, 160 S.E.2d 633, 1968 Ga. App. LEXIS 1110 (1968) (decided under former Code 1933, § 38-1805).

Former Civil Code 1910, § 5884 (see now O.C.G.A. §§ 24-6-620 and 24-6-621) was not an abridgment of the

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absolute right of the jury to determine the credibility of witnesses. Brown v. State, 10 Ga. App. 50, 72 S.E. 537, 1911 Ga. App. LEXIS 644 (1911) (decided under former Civil Code 1910, § 5883).

State's repeated questions to the state's witness specifically pertaining to defendant's credibility were improper under former O.C.G.A. § 24-9-80. Griffin v. State, 267 Ga. 586, 481 S.E.2d 223 (decided under former O.C.G.A. § 24-9-80).

Improper bolstering cured by instruction. — Trial court properly denied defendant's motion for a mistrial pursuant to former O.C.G.A. § 24-9-80 during trial on a charge of child molestation as the trial court took remedial measures to cure testimony which tended to bolster the victim's credibility by giving a general instruction concerning improper bolstering of another witness's credibility. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398, 2006 Ga. App. LEXIS 146 (2006), cert. denied, No. S06C1363, 2006 Ga. LEXIS 739 (Ga. Sept. 8, 2006), overruled in part, Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-9-80).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740, 2008 Ga. App. LEXIS 228 (2008), overruled in part, Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-9-80).

Improper bolstering was prejudicial error. — It was improper bolstering of an officer's credibility for a special agent to testify that based upon the agent's experience and training, the agent thought that the officer had acted appropriately during a traffic stop of the defendant; special agent had not witnessed the stop, and agent's testimony was not admissible as an expert opinion on an issue beyond the ken of the average layperson, and because credibility of the officer and of defendant was the pivotal issue and there was no other disinterested testimony and no ameliorative instructions, error was not harmless. Bly v. State, 283 Ga. 453, 660 S.E.2d 713, 2008 Ga. LEXIS 353 (2008) (decided under former O.C.G.A. § 24-9-80).

Testimony by a defendant's sister, who was also a second victim's aunt, that the sister knew that the second victim was telling the truth when the second victim told the sister that the defendant wanted to have sex with the second victim should have been objected to as the credibility of the second victim was a matter for the jury's determination under former O.C.G.A. § 24-9-80; because the defendant denied touching the second victim and there was no evidence of the crime other than the second victim's testimony, defense counsel's error was prejudicial, and a conviction for child molestation against the second victim had to be reversed. Walker v. State, 296 Ga. App. 531, 675 S.E.2d 270, 2009 Ga. App. LEXIS 251 (2009) (decided under former O.C.G.A. § 24-9-80).

No improper bolstering of other witness's testimony. — Testimony of the treating psychologist of a child sexual abuse victim that the results of the psychologist's testing were "consistent" with the victim's statements that the victim had been sexually abused was not improper bolstering, and a caseworker who testified was not expressing an opinion about the victim's truthfulness when the caseworker testified that the caseworker's own investigation was closed with a determination of substantiated sexual abuse since the caseworker was testifying as to why the caseworker's investigation was closed and why the caseworker did not continue to follow the family; the caseworker's statement that the victim

seemed very truthful and honest violated former O.C.G.A. § 24-9-80, but since the trial court immediately gave a curative instruction, and it was highly probable that this testimony did not contribute to the verdict, this did not require a reversal. Williams v. State, 266 Ga. App. 578, 597 S.E.2d 621, 2004 Ga. App. LEXIS 431 (2004), cert. denied, No. S04C1346, 2004 Ga. LEXIS 751 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-9-80).

Defendant's argument that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to the testimony of two of the state's witnesses that bolstered the credibility of the victims in violation of former O.C.G.A. § 24-9-80, failed; one of the allegedly bolstering statements was stricken and the jury was instructed to disregard that statement, one of the statements did not express an opinion about whether the victims were telling the truth because that statement related to the officer's investigation and the implications of a probable cause finding, and the statement by the expert that the expert's findings were consistent with the sexual abuse allegations was a permissible comment on medical or scientific tests. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569, 2005 Ga. App. LEXIS 1285 (2005), cert. denied, No. S06C0610, 2006 Ga. LEXIS 224 (Ga. Mar. 27, 2006), overruled in part, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56, 2007 Ga. LEXIS 182 (2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-80).

With regard to a defendant's conviction for terroristic threats, an officer's testimony that indicated the victim's statements were consistent with the officer's observations of the victim's injuries and the disarray in a hotel room where the alleged incident occurred did not constitute improper bolstering or a comment on the victim's veracity. Mullins v. State, 298 Ga. App. 368, 680 S.E.2d 474, 2009 Ga. App. LEXIS 685 (2009) (decided under former O.C.G.A. § 24-9-80).

Because the detective's testimony was responsive to questions about the manner in which the detective conducted the investigation and whether that investigation produced other evidence that was consistent with information provided by an accomplice witness, the testimony did not constitute improper bolstering, and the trial court did not plainly err by permitting the detective to compare the statements given by the accomplice witness with those of the first defendant and the other codefendants. Pender v. State, 311 Ga. 98, 856 S.E.2d 302, 2021 Ga. LEXIS 87 (2021).

Despite improper bolstering, no prejudice to defendant. — Trial court erred in admitting a child molestation victim's prior consistent statements made to her mother and to an expert on child abuse because the statements did not predate her alleged motive to fabricate her claims against her step-father so that he would be removed from her home; however, the defendant failed to show prejudice from the statements. Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82, 2011 Ga. App. LEXIS 606 (2011) (decided under former O.C.G.A. § 24-9-80).

Failure to charge statute is not error in the absence of a timely written request. Fraser v. State, 52 Ga. App. 92, 182 S.E. 418, 1935 Ga. App. LEXIS 58 (1935) (decided under former Code 1933, § 38-1805); Benton v. State, 185 Ga. 254, 194 S.E. 166, 1937 Ga. LEXIS 672 (1937) (decided under former Code 1933, § 38-1805); Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688, 1940 Ga. App. LEXIS 499 (1940) (decided under former Code 1933, § 38-1805); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834, 1940 Ga. App. LEXIS 554 (1940) (decided under former Code 1933, § 38-1805); Tiller v. State, 196 Ga. 508, 26 S.E.2d 883, 1943 Ga. LEXIS 371 (1943) (decided under former Code 1933, § 38-1805); Grier v. State, 196 Ga. 515, 26 S.E.2d 889, 1943 Ga. LEXIS 374 (1943) (decided under former Code 1933, § 38-1805); Hodnett v. State, 197 Ga. 730, 30 S.E.2d 606, 1944 Ga. LEXIS 331 (1944) (decided under former Code 1933, § 38-1805); Shewmade v. State, 71 Ga. App. 349, 30 S.E.2d 816, 1944 Ga. App. LEXIS 363 (1944) (decided under former Code 1933, § 38-1805); Guy v. State, 72 Ga. App. 395, 33 S.E.2d 853, 1945 Ga. App. LEXIS 590 (1945) (decided under former Code 1933, § 38-1805);

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Summerour v. State, 85 Ga. App. 94, 68 S.E.2d 158, 1951 Ga. App. LEXIS 1006 (1951) (decided under former Code 1933, § 38-1805); Wheeler v. State, 220 Ga. 535, 140 S.E.2d 258, 1965 Ga. LEXIS 557 (1965) (decided under former Code 1933, § 38-1805); Tanner v. State, 228 Ga. 829, 188 S.E.2d 512, 1972 Ga. LEXIS 925 (1972) (decided under former Code 1933, § 38-1805); Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904, 1974 Ga. App. LEXIS 1436 (1974) (decided under former Code 1933, § 38-1805).

Charge substantially in language of statute, in the absence of any request for a more specific charge on the subject, was sufficient. Central of Ga. Ry. v. McGuire, 10 Ga. App. 483, 73 S.E. 702, 1912 Ga. App. LEXIS 580 (1912) (decided under former Civil Code 1910, § 5883); Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317, 1961 Ga. App. LEXIS 731 (1961).

Instructions proper in the following cases: Hall v. Burpee, 176 Ga. 270, 168 S.E. 39, 1933 Ga. LEXIS 59 (1933); Coates v. State, 192 Ga. 130, 15 S.E.2d 240, 1941 Ga. LEXIS 455 (1941); Crosby v. State, 92 Ga. App. 335, 88 S.E.2d 523, 1955 Ga. App. LEXIS 587 (1955); Ward v. State, 239 Ga. 205, 236 S.E.2d 365, 1977 Ga. LEXIS 863 (1977) (decided under former Code 1933, § 38-1805).

Trial court's instruction that "you must not base your verdict on inferences or speculation or anything that is not supported by the evidence" was a correct statement of the law and was not plain error on the basis of a claim that such instruction interfered with the jury's function as sole arbiter of the credibility of witnesses. Caldwell v. State, 247 Ga. App. 191, 542 S.E.2d 564, 2000 Ga. App. LEXIS 1379 (2000) (decided under former O.C.G.A. § 24-9-80).

Use of jury instruction that the jury could consider the level of certainty shown by a witness about identification of the defendant is error. — Trial court erred in charging the jury that one of the factors to be considered when evaluating the reliability of an eyewitness identification is "the level of certainty shown by the witness about her identification." Brodes v. State, 279 Ga. 435, 614 S.E.2d 766, 2005 Ga. LEXIS 442 (2005) (decided under former O.C.G.A. § 24-9-80); Brown v. State, 277 Ga. App. 396, 626 S.E.2d 596, 2006 Ga. App. LEXIS 100 (2006) (decided under former O.C.G.A. § 24-9-80).

Civil Cases

Credibility when issue is attorney's fees. — When plaintiff, a former client of defendant attorney, appealed the grant of summary judgment to defendant in defendant's suit over unpaid attorney fees, and there was a dispute that defendant and plaintiff had agreed that defendant was to spend as much time as reasonable to produce a second brief, that there was no cap on the fee, and that $5,000 was reasonable, the matter of the parties' credibility was peculiarly for the jury. Brygider v. Atkinson, 192 Ga. App. 424, 385 S.E.2d 95, 1989 Ga. App. LEXIS 1059 (1989) (decided under former O.C.G.A. § 24-9-80).

Testimony in a lease agreement. — Verdict by jury for past rent owed to a landlord by a tenant who defaulted in the tenant's monthly lease payments, and as to the jury's finding that the tenant had failed to exercise an option to purchase in the lease, was supported by sufficient evidence since there was a showing by the landlord of a lease agreement and supporting testimony by the landlord; an alternate, allegedly forged lease submitted by the tenant, together with the tenant's testimony, were all issues that went to the weight and credibility and were properly resolved by the jury. Burnett v. Reeves, 258 Ga. App. 846, 575 S.E.2d 747, 2002 Ga. App. LEXIS 1587 (2002), cert. dismissed, No. S03C0720, 2003 Ga. LEXIS 448 (Ga. Apr. 29, 2003) (decided under former O.C.G.A. § 24-9-80).

Expert witness. — In an action to recover for disability, the jurors were not bound to credit an expert medical opinion since the rule prescribing the arbitrary rejection of testimony applies, by definition, to direct and positive testimony, as distinguished from circumstantial, opinion, or actually negative testimony. Wilson v. Professional Ins. Corp., 151 Ga. App. 712, 261 S.E.2d 450, 1979 Ga. App. LEXIS

2763 (1979) (decided under former Code 1933, § 38-1805).

In a child molestation case, the state's expert's testimony that the children the expert saw in therapy were kids who had made "some sort of disclosure" of sexual abuse that the police found credible was not improper bolstering of the victim's testimony because the testimony was not a clear comment on the victim's credibility. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357, 2016 Ga. App. LEXIS 370 (2016), cert. denied, No. S17C0059, 2017 Ga. LEXIS 287 (Ga. Apr. 17, 2017).

In a case in which the defendant was convicted of incest, rape, aggravated child molestation, child molestation, and reckless conduct, the trial court did not err in admitting the expert's testimony that the expert saw no signs of malingering by the victim during the psychological assessment as that testimony did not opine on the ultimate issue of whether the defendant had sexually abused the victim, but was instead testimony that the expert saw no signs indicating deception or fabrication during the interview, thereby leaving the issue of the victim's credibility in the exclusive province of the jury. Campbell v. State, 362 Ga. App. 337, 868 S.E.2d 471, 2022 Ga. App. LEXIS 34 (2022).

Judge's favorable comments in divorce case about witness required new trial. — Judgment in a divorce case was reversed and a new trial was ordered after the trial court, in comments made to the jury following the testimony of a witness, stated the court's high opinion of the witness and bolstered the witness's credibility, influencing an issue that was solely for the jury to determine. Hubbard v. Hubbard, 277 Ga. 729, 594 S.E.2d 653, 2004 Ga. LEXIS 278 (2004) (decided under former O.C.G.A. § 24-9-80).

Verdict precluded by jury's insufficient opportunity to determine credibility of witness testimony. — Verdict against an accountant was precluded by judicial admissions by an investor's cousin that the cousin alone took the investor's money because there were no admissions in pleadings or in response to requests for admissions from the cousin, only the cousin's testimony at trial; pursuant to former O.C.G.A. § 24-9-80, any witness's testimony was subject to a determination of credibility by the jury. McIntee v. Deramus, 313 Ga. App. 653, 722 S.E.2d 377, 2012 Ga. App. LEXIS 47 (2012) (decided under former O.C.G.A. § 24-9-80).

Criminal Cases

Credibility of victim in rape prosecution. — In a rape trial, the trial court properly sustained an objection to a question asked of the victim's examining physician which called for a comment on the credibility of the victim. Lamb v. State, 196 Ga. App. 665, 396 S.E.2d 497, 1990 Ga. App. LEXIS 1008 (1990) (decided under former O.C.G.A. § 24-9-80).

Testimony of rape victim. — Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, given the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement; hence, the jury had the right to accept the victim's testimony depicting non-consensual, forcible intercourse, as satisfying the requirements of O.C.G.A. § 16-6-1. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582, 2006 Ga. App. LEXIS 1012 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not abuse the court's discretion in admitting the testimony of the physician, the detective, and the victim's friend regarding the victim's prior consistent statements because part of the defendant's trial strategy was to discredit the victim by attacking the victim's memory of the assault due to smoking marijuana; thus, the prior consistent statements to the physician, the detective, and friend were admissible to logically rebut that the victim's memory was clouded. Wilson v. State, 351 Ga. App. 794, 833 S.E.2d 175, 2019 Ga. App. LEXIS 489 (2019).

Witnesses' credibility is for jury. — Evidence of defendant's conduct in confronting victim, that defendant stood over the victim just after the victim had been shot and announcing the victim had been warned about what would happen, and that defendant calmly walked away after

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that was sufficient to find defendant guilty of murder and aggravated assault even though a codefendant actually shot the victim even though defendant claimed that certain witness's testimony was unreliable since witness's credibility was an issue for the jury's determination. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777, 2002 Ga. LEXIS 954 (2002) (decided under former O.C.G.A. § 24-9-80).

Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871, 2010 Ga. App. LEXIS 809 (2010) (decided under former O.C.G.A. § 24-9-80).

Alleged improper comment on credibility of another witness. — In a criminal case, no harm and no reversible error occurred when the trial court allowed a witness to testify in a way that, appellant contended, amounted to an improper comment upon the credibility of another witness because the testimony was favorable to the appellant. Scudder v. State, 298 Ga. 438, 782 S.E.2d 638, 2016 Ga. LEXIS 138 (2016).

Assuming without deciding that trial counsel performed deficiently by failing to object or move for a mistrial with regard to a prosecutor's questions to a detective regarding the detective's belief of defendant's various versions of events surrounding the murder, the defendant could not show prejudice because the other evidence of defendat's guilt already indicated to the jury that not all of the stories that defendant told to police could be true. Newman v. State, 309 Ga. 171, 844 S.E.2d 775, 2020 Ga. LEXIS 457 (2020).

Misdemeanor theft conviction. — Evidence was legally sufficient to support defendant's convictions for misdemeanor theft in violation of O.C.G.A. § 16-8-2 and for practicing dentistry without a license in violation of an earlier version of O.C.G.A. § 43-11-50, after defendant held oneself out as a dentist to numerous individuals, obtained loans for business ventures involving a dentistry practice, obtained services for the dentist practice which the dentist did not pay for, and performed services on patients; the jury resolved the credibility and weight of the evidence issues pursuant to former O.C.G.A. § 24-9-80. McMillan v. State, 266 Ga. App. 729, 598 S.E.2d 17, 2004 Ga. App. LEXIS 344 (2004), overruled in part, Glidewell v. State, 279 Ga. App. 114, 630 S.E.2d 621, 2006 Ga. App. LEXIS 469 (2006) (decided under former O.C.G.A. § 24-9-80).

Criminal convictions supported. — On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under former O.C.G.A. § 24-9-80, the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62, 2006 Ga. App. LEXIS 1184 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not abuse the court's discretion by denying the defendant's motion for a new trial because sufficient evidence supported the defendant's convictions for arson and aggravated assault based on the testimony of the witnesses who testified that the witnesses could see the defendant starting the fire through the kitchen windows and witnessed the defendant shoot a shotgun in the direction

of a neighbor and four law enforcement officers who were at the scene as well as the defendant's admission that the defendant set the fire. Jackson v. State, 347 Ga. App. 199, 818 S.E.2d 268, 2018 Ga. App. LEXIS 485 (2018).

Failure to show ineffective assistance of counsel. — Despite the testimony of two witnesses improperly bolstering the testimony of the sex abuse victim, the defendant failed to show ineffective assistance of counsel as review of the record revealed that a reasonable lawyer might have decided not to object as sound trial strategy as one witness was an expert that may have hurt the defense if contradicted and the other was an emotional witness who cried and had no personal observations of anything testified to upon examination. Gilmer v. State, 339 Ga. App. 593, 794 S.E.2d 653, 2016 Ga. App. LEXIS 668 (2016), cert. denied, No. S17C0734, 2017 Ga. LEXIS 480 (Ga. May 30, 2017).

Trial counsel did not perform deficiently by failing to object to a statement made during the detective's testimony, which the defendant claimed improperly bolstered the co-defendant's testimony, because the detective did not say that the co-defendant told the detective the ultimate truth; instead, the detective was explaining that, in general, when interviewing suspects, the suspects often make inconsistent statements and it often takes considerable time to get the suspects to provide the complete story; and counsel could reasonably have believed that an objection to that part of the detective's testimony would fail, and counsel thus was not ineffective in not making such an objection. Brown v. State, 302 Ga. 454, 807 S.E.2d 369, 2017 Ga. LEXIS 935 (2017).

Trial counsel was not ineffective because, in cross-examining the detective, trial counsel pursued a line of questioning designed to show the jury that the police did not conduct a thorough investigation of the murder and instead simply took the co-defendant's version of events at face value; and defense counsel then returned to that point in closing argument; thus, counsel reasonably could have chosen not to object to the detective's statements regarding the detective's personal belief in the co-defendant's account because that testimony supported the defense theory that the state cut short its investigation based on blind faith in the co-defendant, whose credibility trial counsel had already thoroughly attacked on cross-examination. Brown v. State, 302 Ga. 454, 807 S.E.2d 369, 2017 Ga. LEXIS 935 (2017).

Trial counsel did not render ineffective assistance by failing to object to the bolstering of defendant's daughter's credibility because the investigator did not directly address the daughter's credibility, but rather was describing the daughter's mother's responses and conduct related to the witness's disclosure of defendant's sexual abuse. Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173, 2023 Ga. App. LEXIS 18 (2023).

Trial counsel did not render ineffective assistance by failing to object to the alleged bolstering of the victim's credibility because the victim's legal guardian's testimony was not a direct comment on the victim's credibility but rather was a recounting of a comment the victim made, and thus was not improper bolstering. Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173, 2023 Ga. App. LEXIS 18 (2023).

Credibility of witnesses at a probation revocation hearing is for the court. Caldwell v. State, 166 Ga. App. 657, 305 S.E.2d 407, 1983 Ga. App. LEXIS 2286 (1983) (decided under former O.C.G.A. § 24-9-80).

When self-defense is claimed. — Consideration of the uncorroborated testimony of the victim, non-recovery of the weapon used in an assault, and the defendant's claim of self-defense go only to the weight and credibility of the witnesses' testimony, not to the sufficiency of the evidence, and are solely within the domain of the jury. Landers v. State, 236 Ga. App. 368, 511 S.E.2d 889 (decided under former O.C.G.A. § 24-9-80).

Self-defense a jury question. — Witness credibility is to be determined by the jury, as is the question of self-defense when there is conflicting evidence on the issue. Holmes v. State, 273 Ga. 644, 543 S.E.2d 688, 2001 Ga. LEXIS 152 (2001) (decided under former O.C.G.A. § 24-9-80).

Instruction in criminal case. — Charge to the jury on the question of

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credibility of witnesses is a correct abstract principle of law applicable even in a criminal case. Blackston v. State, 209 Ga. 160, 71 S.E.2d 221, 1952 Ga. LEXIS 437 (1952) (decided under former Code 1933 § 38-1805).

Jury can disregard confession of another if evidence shows defendant's guilt. — When the evidence was sufficient to find the defendant guilty of armed robbery beyond a reasonable doubt, the confession of the defendant's brother to the commission of the crime was properly disregarded by the jury in the jury's capacity as fact-finder. Burkes v. State, 177 Ga. App. 90, 338 S.E.2d 522, 1985 Ga. App. LEXIS 2919 (1985) (decided under former O.C.G.A. § 24-9-80).

Police officer's testimony about commission of offense. — Police officer's testimony that the officer observed the defendant run a stop sign that was "clearly visible" to oncoming traffic was sufficient to authorize the trial court's finding that the defendant was guilty, beyond a reasonable doubt, of disregarding a stop sign. Evans v. State, 235 Ga. App. 877, 510 S.E.2d 619 (decided under former O.C.G.A. § 24-9-80).

Testimony of officer regarding belief of victim. — Permitting the state to introduce a police officer's testimony bolstering a child molestation victim's credibility was reversible error since the truthfulness or credibility of the victim was not beyond the ken of the jurors. Guest v. State, 201 Ga. App. 506, 411 S.E.2d 364, 1991 Ga. App. LEXIS 1447 (1991) (decided under former O.C.G.A. § 24-9-80).

Trial court erred in allowing an officer to testify regarding whether the officer believed or disbelieved what the victim said during an interview as the truthfulness of the victim's testimony was a question for the jury; since there was no physical evidence presented, the victim's testimony was the only evidence against defendant, and any bolstering of that testimony was harmful to defendant. Orr v. State, 262 Ga. App. 125, 584 S.E.2d 720, 2003 Ga. App. LEXIS 858 (2003) (decided under former O.C.G.A. § 24-9-80).

Defendant failed to establish ineffective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV due to defense counsel's failure to request a mistrial when a police officer testified that the officer believed that the victim in the child molestation case was telling the truth; while the witness was prohibited under former O.C.G.A. § 24-9-80 from bolstering the victim's testimony, it was not clear that the trial court would have granted a mistrial if the defendant requested one as the defense counsel objected to the statement and the trial court issued a curative instruction. Goldstein v. State, 283 Ga. App. 1, 640 S.E.2d 599, 2006 Ga. App. LEXIS 1350 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. Apr. 24, 2007) (decided under former O.C.G.A. § 24-9-80).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. Nichols v. State, 221 Ga. App. 600, 473 S.E.2d 491, 1996 Ga. App. LEXIS 497 (1996), cert. denied, No. S96C1548, 1996 Ga. LEXIS 1030 (Ga. Sept. 20, 1996) (decided under former O.C.G.A. § 24-9-80).

In a prosecution for statutory rape, the trial court properly prohibited the defendant from presenting evidence that the victim's family and friends did not believe her statements about the sexual assault by the defendant since credibility of a witness is a matter solely within the province of the jury. Patterson v. State, 233 Ga. App. 776, 505 S.E.2d 518 (decided under former O.C.G.A. § 24-9-80).

Expert witness. — Former O.C.G.A. § 24-9-80 was not violated by the testimony of a pediatrician, who gave an opinion that the results of an examination of a child victim were consistent with the victim's claim of child molestation. Harris v. State, 279 Ga. App. 570, 631 S.E.2d 772, 2006 Ga. App. LEXIS 645 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's

physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620, 2007 Ga. App. LEXIS 1075 (2007) (decided under former O.C.G.A. § 24-9-80).

Value of stolen property for purposes of restitution. — When an owner of stolen property is attempting to establish value for purposes of restitution by the thief, if there is any doubt as to whether the witness has shown a sufficient basis or foundation for the witness's opinion as to value, there are particularly sound reasons of justice why the evidence ought to be admitted, and the evidence's weight and credibility, and indeed the question of whether the witness has given sufficient foundation, should be left to the trier of fact. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480, 1981 Ga. App. LEXIS 1974 (1981) (decided under former O.C.G.A. § 24-9-80).

Impeachment of witness by conviction. — Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial even though the state's question to the defendant's parent was an improper attempt to impeach or destroy the credibility of the parent by showing that the parent was incarcerated in jail because the parent was not crucial to the defense as the parent was not an eyewitness to the crime and could not bolster any self-defense claim since the parent was not present when the crime occurred; the trial court instructed the jurors to disregard the question and struck the question from the consideration of the jury. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845, 2010 Ga. LEXIS 607 (2010) (decided under former O.C.G.A. § 24-9-80).

Claim that statute applied when defendant did not testify. — Trial counsel was not ineffective for failing to object to the lead detective's purported comments on the defendant's credibility that the defendant's explanation as to how the child victim got the injuries to the child's chin and chest were inconsistent as the defendant cited no authority for the proposition that O.C.G.A. § 24-6-620 applied when the defendant did not testify at trial and was therefore not a witness; and trial counsel's failure to raise a novel legal argument did not constitute ineffective assistance of counsel. Further, even if the defendant were a witness, the detective's comments did not directly address the defendant's credibility and were not improper. Sawyer v. State, 308 Ga. 375, 839 S.E.2d 582, 2020 Ga. LEXIS 130 (2020).

Children

Testimony from child molestation victim. — Although defendant testified that he had not molested the victim, the victim, his 15-year-old stepdaughter, testified that defendant had been molesting her since she was three years old, and other evidence indicated that the victim told several witnesses it was her half-brother who impregnated her, such conflicts in the evidence only raised issues of credibility, which were for the jury to decide, and the jury's verdict finding defendant guilty of two counts of molestation of the victim was upheld since sufficient evidence supported the convictions. Dowd v. State, 261 Ga. App. 306, 582 S.E.2d 235, 2003 Ga. App. LEXIS 618 (2003) (decided under former O.C.G.A. § 24-9-80).

Credibility of children. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the examination before the jury, are matters for the consideration of the jury. Young v. State, 122 Ga. 725, 50 S.E. 996, 1905 Ga. LEXIS 307 (1905) (decided under former Penal Code 1895, § 1028); Frasier v. State, 143 Ga. 322, 85 S.E. 124, 1915 Ga. LEXIS 417 (1915) (decided under former Penal Code 1910, § 1054).

In a prosecution for child molestation and aggravated rape, the trial court committed reversible error in allowing the victim's grandmother to testify that she had never had "any problems with the victim's telling stories." Lagana v. State, 219 Ga. App. 220, 464 S.E.2d 625, 1995

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Ga. App. LEXIS 1008 (1995) (decided under former O.C.G.A. § 24-9-80).

In a prosecution for child molestation, the trial court did not err in refusing defendant's requested instruction as follows: "The fact that one or more of the witnesses in this case is a child should not ... bring any more weight to her or their testimony." Patterson v. State, 222 Ga. App. 166, 473 S.E.2d 255 (decided under former O.C.G.A. § 24-9-80).

Testimony of an expert regarding the expert's conclusion that child victims' allegations of sexual abuse were the result of projection and payback was properly excluded. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (decided under former O.C.G.A. § 24-9-80).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that Smith v. State, 257 Ga. App. 88, 570 SE2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. Patterson v. State, 278 Ga. App. 168, 628 S.E.2d 618, 2006 Ga. App. LEXIS 268 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview; accordingly, it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility. Lynn v. State, 300 Ga. App. 170, 684 S.E.2d 325, 2009 Ga. App. LEXIS 1108 (2009) (decided under former O.C.G.A. § 24-9-80).

Expert witness on ability of child to distinguish truth. — An expert witness may testify generally about the ability of children of a certain age to distinguish truth from reality. The witness may also express an opinion as to whether medical or other objective evidence in the case is consistent with the victim's story. However, an expert witness may not put the expert's stamp of believability on the victim's story. State v. Oliver, 188 Ga. App. 47, 372 S.E.2d 256, 1988 Ga. App. LEXIS 886 (1988) (decided under former O.C.G.A. § 24-9-80); Roberson v. State, 214 Ga. App. 288, 447 S.E.2d 640 (1994); Buice v. State, 1999 Ga. App. 953, 239 Ga. App. 52, 520 S.E.2d 258 (decided under former O.C.G.A. § 24-9-80); Alford v. State, 243 Ga. App. 212, 534 S.E.2d 81, 2000 Ga. App. LEXIS 427 (2000) (decided under former O.C.G.A. § 24-9-80).

Credibility of recanting child witness. — Witnesses testified pursuant to former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. Harvey v. State, 295 Ga. App. 458, 671 S.E.2d 924, 2009 Ga. App. LEXIS 12 (2009) (decided under former O.C.G.A. § 24-9-80).

Child's inconsistent testimony. — Fact that a child's testimony may have been inconsistent does not render child incompetent to testify, but goes to the child's credibility as a witness. Hayes v. State, 152 Ga. App. 858, 264 S.E.2d 307, 1980 Ga. App. LEXIS 1629 (1980) (decided under former Code 1933, § 38-1805).

There was no abuse of discretion in the trial court's decision to allow a twenty-minute conference between the prosecutor and the defendant's eight-year-old son, especially given the tender age of the victim, the nature of the charges, and the child's admitted fear of the defendant. To the extent that the witness altered the witness's testimony after the recess, the credibility of the witness's testimony was

for the jury to determine. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746, 1990 Ga. App. LEXIS 579 (1990) (decided under former O.C.G.A. § 24-9-80).

Raising issue of victim's veracity. — Because it was necessary for trial counsel, as part of the trial strategy, to raise the issue of the minor sexual abuse victim's veracity, the trial counsel could not subsequently object to the victim's prior consistent statement, which was entered to verify the victim's testimony. Mealor v. State, 266 Ga. App. 274, 596 S.E.2d 632, 2004 Ga. App. LEXIS 162 (2004), cert. denied, No. S04C1281, 2004 Ga. LEXIS 770 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-9-80).

No improper bolstering of other witness's testimony. — In defendant's appeal from a verdict convicting defendant of voluntary manslaughter, the court rejected defendant's claim that a detective's testimony that the detective received no statements inconsistent with the testimony of other trial witnesses did not improperly bolster the opinion of another witness in violation of former O.C.G.A. § 24-9-80. Lester v. State, 262 Ga. App. 707, 586 S.E.2d 408, 2003 Ga. App. LEXIS 997 (2003), cert. denied, No. S03C1849, 2004 Ga. LEXIS 50 (Ga. Jan. 12, 2004) (decided under former O.C.G.A. § 24-9-80).

Directed verdict of acquittal unwarranted as: (1) the credibility of the child victim and any the conflicts in the trial testimony were matters solely within the province of the jury to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). Hutchinson v. State, 287 Ga. App. 415, 651 S.E.2d 523, 2007 Ga. App. LEXIS 988 (2007) (decided under former O.C.G.A. § 24-9-80).

Appeals

Test on appeal. — On appeal, the appellate tribunal does not determine the credibility of witnesses or the preponderance of the evidence, but rather utilizes the "any evidence test," which is not available to the trier of facts in deciding disputed factual issues. Crawley v. Marta, 147 Ga. App. 293, 248 S.E.2d 555, 1978 Ga. App. LEXIS 2658 (1978) (decided under former Code 1933, § 38-1805).

Acceptance by appellate court. — Unless it appears from the testimony itself that the fact testified to is a physical impossibility, contrary to known physical laws, or is incredible, impossible, or inherently improbable, the appellate court must accept its veracity as the jury has done. Bell v. State, 52 Ga. App. 249, 183 S.E. 93, 1935 Ga. App. LEXIS 125 (1935); Hayslip v. Liberty Mut. Ins. Co., 72 Ga. App. 509, 34 S.E.2d 319, 1945 Ga. App. LEXIS 623 (1945) (decided under former Code 1933, § 38-1805).

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ALR.

Cross-examination for purpose of showing bias or hostility on part of witness, 74 A.L.R. 1157.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 A.L.R. 742.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 A.L.R. 1266.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 A.L.R.2d 1045.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 A.L.R.2d 610.

Credibility of witness giving uncontradicted testimony as matter for court or jury, 62 A.L.R.2d 1191.

Propriety, and prejudicial effect of, comments by counsel vouching for credibility of witness, 81 A.L.R.2d 1240.

Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Necessity and admissibility of expert testimony as to credibility of witness, 20 A.L.R.3d 684.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 A.L.R.3d 617.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing, 84 A.L.R.3d 811.

Instructions to jury as to credibility of child's testimony in criminal case, 32 A.L.R.4th 1196.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602.

Propriety, and prejudicial effect, of comments by counsel vouching for credibility of witness—federal cases, 78 A.L.R. Fed. 23.

24-6-621. Impeachment by contradiction.

A witness may be impeached by disproving the facts testified to by the witness.

History.
Code 1981, § 24-6-621, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3871, former Code 1882, § 3871, former Civil Code 1895, § 5291, former Penal Code 1895, § 1025, former Civil Code 1910, § 5880, former Penal Code 1910, § 1051, former Code 1933, § 38-1802, and former O.C.G.A. § 24-9-82 are included in the annotations for this Code section.

In general. — Witness may be impeached by proving that the statements made by the witness in the witness's testimony are not the truth. Middle Ga. & A. Ry. v. Barnett, 104 Ga. 582, 30 S.E. 771, 1898 Ga. LEXIS 369 (1898) (decided under former Civil Code 1895, § 5291).

Criminal defendant is subject to impeachment, and defendant may be impeached by disproving the facts to which defendant testified. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114, 1981 Ga. App. LEXIS 2722 (1981) (decided under former Code 1933, § 38-1802).

Witness can be impeached as to matters relevant to the witnesses testimony and to the case, and by disproving facts testified to by the witness. Morris v. State Farm Mut. Auto. Ins. Co., 203 Ga. App. 839, 418 S.E.2d 119, 1992 Ga. App. LEXIS 628 (1992) (decided under former O.C.G.A. § 24-9-82).

Defendant's malice murder conviction was upheld because defendant did not identify any error and by testifying that defendant had never actually hurt anyone before, defendant invited state to cross-examine defendant on the matter in an attempt to contradict and discredit defendant's testimony. Wynn v. State, 313 Ga. 827, 874 S.E.2d 42, 2022 Ga. LEXIS 160 (2022).

Former statute applied whenever there was a conflict in testimony. Southern Ry. v. O'Bryan, 119 Ga. 147, 45 S.E. 1000, 1903 Ga. LEXIS 69 (1903) (decided under former Civil Code 1895, § 5291); Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913, 1923 Ga. App. LEXIS 184 (1923) (decided under former Civil Code 1910, § 5880); Wilcox v. Wilcox, 31 Ga. App. 486, 119 S.E. 445, 1923 Ga. App. LEXIS 996 (1923) (decided under former Civil Code 1910, § 5880); Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168, 1957 Ga. App. LEXIS 708 (1957) (decided under former Code 1933, § 38-1802).

Impeachment by unconstitutionally obtained evidence. — Even evidence which violates constitutional standards of due process, such as unlawfully obtained confessions, may be admitted for impeachment purposes. Ensley v. Jordan, 244 Ga. 435, 260 S.E.2d 480, 1979 Ga. LEXIS 1272 (1979) (decided under former Code 1933, § 38-1802).

No foundation is required for impeachment. Deaton v. Swanson, 196 Ga. 833, 28 S.E.2d 126, 1943 Ga. LEXIS 445 (1943) (decided under former Code 1933, § 38-1802); Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168, 1957 Ga. App. LEXIS 708 (1957) (decided under former Code 1933, § 38-1802); Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799, 1980 Ga. App. LEXIS 2547 (1980) (decided under former Code 1933, § 38-1802).

Challenge of witness on cross-examination is not required before the witness's testimony could be impeached by another witness. Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876, 1992 Ga. App. LEXIS 1264 (1992), cert. denied, No. S93C0201, 1993 Ga. LEXIS 47 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-82).

Immaterial matter. — Witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. Daniels v. Luton, 40 Ga. App. 741, 151 S.E. 659, 1930 Ga. App. LEXIS 680 (1930); Gilbert v. State, 159 Ga. App. 326, 283 S.E.2d 361, 1981 Ga. App. LEXIS 2592 (1981) (decided under former Code 1933, § 38-1802).

While a witness may be impeached on a collateral issue which is indirectly material to the issue in the case, a witness may not be impeached because of a discrepancy as to a wholly immaterial matter. Strickland v. State, 166 Ga. App. 702, 305 S.E.2d 434, 1983 Ga. App. LEXIS 2300 (1983) (decided under former O.C.G.A. § 24-9-82).

Witness may not be impeached because of a discrepancy as to a wholly immaterial matter. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881, 1983 Ga. App. LEXIS 2859 (1983) (decided under former O.C.G.A. § 24-9-82).

Although a witness may be impeached by disproving the facts testified to by the witness, a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter. Brown v. State, 260 Ga. 153, 391 S.E.2d 108, 1990 Ga. LEXIS 172 (1990).

Testimony that was properly excluded as irrelevant to the issues of the case was not admissible for impeachment purposes. Goss v. Total Chipping, Inc., 220 Ga. App. 643, 469 S.E.2d 855 (decided under former O.C.G.A. § 24-9-82).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive ineffective assistance of trial counsel merely because counsel failed to impeach the victim's credibility with evidence concerning a 1996 drug arrest as: (1) the evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character. Pierce v. State, 281 Ga. App. 821, 637 S.E.2d 467, 2006 Ga. App. LEXIS 1269 (2006) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err when the court excluded extrinsic evidence to impeach a witness's testimony about a rent dispute that the witness and the victim had with a prior landlord because the prior dispute

General Consideration (Cont'd)

was not germane or material to whether the defendant was justified in shooting the victim. Corley v. State, 308 Ga. 321, 840 S.E.2d 391, 2020 Ga. LEXIS 172 (2020).

In the defendant's murder trial, the trial court erred in allowing the state to introduce an AK-47 rifle and ammunition found in the defendant's home for impeachment purposes under O.C.G.A. § 24-6-621 after the defendant testified that the defendant's spouse had removed the murder weapon from the home because the defendant "never wanted to see a gun in [her] life." The evidence was not unduly prejudicial under O.C.G.A. § 24-4-403 and was not emphasized by the state. Dunbar v. State, 309 Ga. 252, 845 S.E.2d 607, 2020 Ga. LEXIS 461 (2020).

Testimony that facts are true. — State may introduce testimony to the effect that the facts stated by the state's witness, whose character is under attack, are true, even though such corroboration involves information received from the witness. Stevenson v. State, 69 Ga. 68, 1882 Ga. LEXIS 180 (1882) (decided under former Code 1873, § 3871).

Disproving facts only. — When police officer's purported statement to plaintiff's mother that the officer had found plaintiff not to be at fault would have, if at all, served only to rebut that portion of the officer's own testimony wherein the officer tacitly opined the accident was due to plaintiff's fault; such a purported statement did not rebut a fact to which the officer testified and was inadmissible. Campbell v. Cozad, 207 Ga. App. 175, 427 S.E.2d 515, 1993 Ga. App. LEXIS 118, amended, No. A92A1816 (Ga. Ct. App. 1993), cert. denied, No. S93C0713, 1993 Ga. LEXIS 424 (Ga. Apr. 8, 1993) (decided under former O.C.G.A. § 24-9-82).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405, 24-4-413, and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82. Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729, 2004 Ga. App. LEXIS 174 (2004) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err by not disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under former O.C.G.A. § 24-9-82; (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under former O.C.G.A. § 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613); (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under former O.C.G.A. § 24-9-84 (see now O.C.G.A. § 24-6-608). Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898, 2004 Ga. App. LEXIS 563 (2004) (decided under former O.C.G.A. § 24-9-82).

In a criminal case, the trial court properly excluded impeachment testimony about the victim's relationship with the victim's employees; the evidence did not disprove facts to which the victim testified, but was evidence of prior specific acts or bad character. Jones v. State, 283 Ga. App. 631, 642 S.E.2d 331, 2007 Ga. App. LEXIS 149 (2007) (decided under former O.C.G.A. § 24-9-82).

Alibi witnesses. — State was obligated to respond to defendants' notification of their intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under former O.C.G.A. §§ 24-9-82 and 24-9-83 (see now O.C.G.A. §§ 24-6-608,

24-6-613, and 24-6-621) was a substitute for compliance with O.C.G.A. § 17-16-5(b). Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813, 2001 Ga. App. LEXIS 648 (2001), cert. denied, No. S01C1518, 2001 Ga. LEXIS 878 (Ga. Nov. 5, 2001), cert. denied, No. S01C1517, 2001 Ga. LEXIS 879 (Ga. Nov. 5, 2001) (decided under former O.C.G.A. § 24-9-82).

Bias of witness. — Proffered testimony of a witness for the propounder of a will, that bad feeling existed between the testator and one of the witnesses for the caveators, who testified that when the witness saw the testator on the day the will was executed the testator did not recognize the witness and did not speak to the witness, and who denied that the testator was unfriendly towards the witness because the witness had testified against the testator in a case in which the testator was a party, was admissible to explain why the testator did not speak to the caveators' witness, and to impeach the witness as to the feeling existing between the witness and the testator. Orr v. Blalock, 195 Ga. 863, 25 S.E.2d 668, 1943 Ga. LEXIS 294 (1943) (decided under former Code 1933, § 38-1802).

Character evidence. — Witness who is not impeached otherwise than by disproving the truth of the witness's evidence cannot be supported by proof of the witness's general good character. Miller v. Western & Atl. R.R., 93 Ga. 480, 21 S.E. 52, 1893 Ga. LEXIS 461 (1893) (decided under former Code 1882, § 3871); Bell v. State, 100 Ga. 78, 100 Ga. 98, 27 S.E. 669, 1896 Ga. LEXIS 552 (1896) (decided under former Penal Code 1895, § 1025); Surles v. State, 148 Ga. 537, 97 S.E. 538, 1918 Ga. LEXIS 428 (1918) (decided under former Code 1933, § 38-1802).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when it held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-9-82).

Effect of proof of own declaration. — Witness impeached by proof of contradictory statements cannot be sustained by proof of witness's own declarations, consistent with witness's evidence at the trial, made at other times and places, whether prior or subsequent to the time of making the contradictory statements imputed to the witness. Fussell v. State, 93 Ga. 450, 21 S.E. 97, 1893 Ga. LEXIS 457 (1893) (decided under former Code 1882, § 3871).

Province of jury. — When a witness is sought to be impeached by disproving the facts testified to by the witness in such way that there results only a conflict between the witness's testimony and the testimony of other witnesses, it is the province of the jury to determine which of the witnesses has spoken the truth even if in order to do so it is necessary to impute perjury to one or the other. Champion v. State, 84 Ga. App. 163, 65 S.E.2d 280, 1951 Ga. App. LEXIS 653 (1951) (decided under former Code 1933, § 38-1802).

Disbelief of impeached witness. — When a witness has been successfully impeached, the witness ought not to be believed, and it is the duty of the trier of fact to disregard the witness's testimony unless the testimony is corroborated, in which case the testimony may be believed. Pike v. Greyhound Bus Lines, 140 Ga. App. 863, 232 S.E.2d 143, 1977 Ga. App. LEXIS 2112 (1977) (decided under former Code 1933, § 38-1802).

Impeachment as to certain facts does not necessarily exclude the jury from believing the witness as to other facts testified to. Elliot v. State, 138 Ga. 23, 74 S.E. 691, 1912 Ga. LEXIS 178 (1912) (decided under former Penal Code 1910, § 1051).

In a condemnation proceeding, after a city's witness not only directly supported the city's main contention that a landown-

General Consideration (Cont'd)

er's property could not be developed or removed from the flood plain, but the city's appraiser based a valuation on the witness's representations to that effect, the witness's testimony was critical, and the landowner had a right to interview the witness, check the facts to which the witness would testify, and, if indicated, arrange to secure rebuttal evidence or to impeach the witnesses. Shepherd Interiors v. City of Atlanta, 263 Ga. App. 869, 589 S.E.2d 640, 2003 Ga. App. LEXIS 1354 (2003) (decided under former O.C.G.A. § 24-9-82).

Defendant was not unfairly denied impeachment because defendant was prohibited from asking an ambiguous and prolix question of a witness which, in effect, asked for the witness's opinion concerning the witness's own bad reputation for veracity. Sewell v. State, 244 Ga. App. 449, 536 S.E.2d 173, 2000 Ga. App. LEXIS 747 (2000) (decided under former O.C.G.A. § 24-9-82).

Disregarding conflicting testimony. — Since there was a material conflict in the testimony of the plaintiff and that of the agent for the insurance company who procured the application, the jury was authorized under former Code 1933, §§ 38-1802 and 38-1806 (see O.C.G.A. §§ 24-6-620 and 24-6-621) to disregard the testimony of the agent. Gulf Life Ins. Co. v. Moore, 90 Ga. App. 791, 84 S.E.2d 696, 1954 Ga. App. LEXIS 816 (1954) (decided under former Code 1933, § 38-1802).

Trial court erred in disallowing testimony of a defense witness offered to disprove facts testified to by a prosecution witness. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (decided under former O.C.G.A. § 24-9-82).

Ineffective assistance of counsel claims based on impeachment of witnesses. — Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the witness by showing the minor nature of one of the violations, were objectively reasonable; when the state broached the subject of the witness's incarceration just before the night in question, it might have gone on to uncover proof of that fact, which would have been admissible as contradictory of the witness's testimony that the witness was in the car with the defendant on the night before the defendant's arrest. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. Noellien v. State, 298 Ga. App. 47, 679 S.E.2d 75, 2009 Ga. App. LEXIS 582 (2009) (decided under former O.C.G.A. § 24-9-82).

Counsel's errors in opening door to damaging testimony. — Defendant's convictions were reversed because the defendant showed the required prejudice to prevail on an ineffective assistance claim based on trial counsel's errors of opening the door to damaging testimony that introduced evidence into the record that directly contradicted the defendant's trial testimony and allowed the admission of other evidence that further challenged the defendant's credibility, the combined effect of which was to severely undercut the defense's case. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71, 2017 Ga. App. LEXIS 100 (2017).

Erroneous consideration of impeachment evidence harmless error. — Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing modus operandi, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. Howard v. State, 202 Ga. App. 574, 415 S.E.2d 45, 1992 Ga. App. LEXIS 96 (1992) (decided under former O.C.G.A. § 24-9-82).

Application

1. In General

Photographs. — In a prosecution for child molestation, photographs showing defendant naked in defendant's home

were admissible to impeach the defendant's testimony that the defendant never walked around the house nude. Kelley v. State, 233 Ga. App. 244, 503 S.E.2d 881 (decided under former O.C.G.A. § 24-9-82).

2. Alcohol and Drug Offenses

Evidence of prior DUI admissible. — Defendant's testimony that defendant had never taken a breath alcohol test opened the door for the state to impeach defendant with the defendant's previous DUI conviction. Renn v. State, 234 Ga. App. 790, 508 S.E.2d 174 (decided under former O.C.G.A. § 24-9-82).

Introduction of prior alcohol-related accident. — There is no error in allowing the state to produce evidence of a prior alcohol-related motorcycle accident by the defendant for the purpose of impeaching the testimony of the defendant that the defendant did not ride the defendant's motorcycle when the defendant had been drinking. Hammond v. State, 169 Ga. App. 97, 311 S.E.2d 523, 1983 Ga. App. LEXIS 2992 (1983) (decided under former O.C.G.A. § 24-9-82).

Alco-sensor results. — Officer's testimony that the numerical value of defendant's alco-sensor test was .089 was properly admitted to impeach and rebut defendant's testimony that the result was .06. Capps v. State, 273 Ga. App. 696, 615 S.E.2d 821, 2005 Ga. App. LEXIS 601 (2005) (decided under former O.C.G.A. § 24-9-82).

Evidence of prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. Kraus v. State, 169 Ga. App. 54, 311 S.E.2d 493, 1983 Ga. App. LEXIS 2976 (1983) (decided under former O.C.G.A. § 24-9-82).

Prior drug conviction admissible. — Defendant was properly impeached by defendant's former contradictory statement after defendant's statement on the stand that the defendant did not "mess with dope" was construed as a denial by the defendant that the defendant had ever been involved with drugs. Thrasher v. State, 204 Ga. App. 413, 419 S.E.2d 516, 1992 Ga. App. LEXIS 866 (1992) (decided under former O.C.G.A. § 24-9-82).

Admissibility of evidence initially excluded in DUI case. — In a prosecution for driving under the influence of alcohol, results of a breath test which had been excluded because the arresting officer had failed to advise defendant of defendant's right to an additional test were admissible to rebut the testimony of defendant's expert witness. Charlton v. State, 217 Ga. App. 842, 459 S.E.2d 455, 1995 Ga. App. LEXIS 620 (1995) (decided under former O.C.G.A. § 24-9-82).

Evidence on drinking habits admissible. — Once defendant testified that the defendant always stopped after one drink if the defendant was going to drive, the state was properly allowed to impeach this testimony by questioning appellant about defendant's prior DUI convictions. Wyatt v. State, 179 Ga. App. 327, 346 S.E.2d 387, 1986 Ga. App. LEXIS 1891 (1986) (decided under former O.C.G.A. § 24-9-82).

Breath test evidence admissible. — In a prosecution for driving under the influence, evidence offered by the state concerning defendant's breath test was admissible to rebut defendant's testimony on direct examination that defendant had consumed two and one-half beers on the night of defendant's arrest. Goodwin v. State, 222 Ga. App. 285, 474 S.E.2d 84 (decided under former O.C.G.A. § 24-9-82).

Drug evidence admissible. — In a prosecution for rape and kidnapping, the trial court should have permitted defendant to impeach the victim by calling witnesses to show that the victim used crack cocaine on the day of the incident, before encountering defendant, because the victim's consumption of drugs shortly before the incident occurred was not immaterial, inasmuch as it might have affected the victim's recollection of events. Curry v. State, 243 Ga. App. 712, 534 S.E.2d 168, 2000 Ga. App. LEXIS 546

2. Alcohol and Drug Offenses (Cont'd)

(2000) (decided under former O.C.G.A. § 24-9-82).

Impeachment for large quantity of marijuana. — Testimony which showed the defendant had been in possession of a large quantity of marijuana was not admissible as impeachment evidence of the defendant's character in a prosecution for trafficking in cocaine because the fact that defendant at some time in the past possessed a substantial amount of marijuana did not contradict defendant's assertion that the defendant did not deal in cocaine. Seabrooks v. State, 164 Ga. App. 747, 297 S.E.2d 745, 1982 Ga. App. LEXIS 2930 (1982), aff'd, 251 Ga. 564, 308 S.E.2d 160, 1983 Ga. LEXIS 916 (1983) (decided under former O.C.G.A. § 24-9-82).

3. Criminal Matters

Evidence of prior crimes or bad acts can be admitted when such evidence is necessary and relevant to impeach defendant's specific testimony. Lucas v. State, 215 Ga. App. 293, 450 S.E.2d 313, 1994 Ga. App. LEXIS 1216 (1994) (decided under former O.C.G.A. § 24-9-82).

Certified record of a prior conviction allegedly of a witness for obstruction and giving false information was properly excluded because: (1) the witness testified that the signature on the certified record was not the witness's signature; (2) the witness opined that the person named in the record of conviction was the witness's cousin, who had the same name, and explained that the defendant and defendant's cousin were only a few months apart and that the cousin also had a criminal record; (3) the witness testified unequivocally that defendant was never indicted, tried, convicted, or sentenced for the offenses charged in the certified record; and (4) defendant offered no further proof that the person named in the exhibit was in fact the witness. Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564, 2005 Ga. App. LEXIS 544 (2005) (decided under former O.C.G.A. § 24-9-82).

It was proper to admit evidence of driving under the influence and suspended license convictions to impeach the defendant, who had denied having a Georgia driver's license or ever having been convicted of driving with a suspended license. Walsh v. State, 283 Ga. App. 817, 642 S.E.2d 879, 2007 Ga. App. LEXIS 203 (2007) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err by allowing the state to place the defendant's character in issue by introducing evidence of defendant's prior arrest for possession of marijuana through the police sergeant because the defendant opened the door to the sergeant's testimony; since the defendant testified that the defendant's prior marijuana charge only involved "a couple of joints behind the seat" of which the defendant was unaware and that the charge had been dismissed because the defendant was not guilty, it was not error to allow the state to attempt to impeach the defendant through the rebuttal testimony of the sergeant. Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766, 2010 Ga. App. LEXIS 316 (2010) (decided under former O.C.G.A. § 24-9-82).

While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86, 2011 Ga. App. LEXIS 399 (2011) (decided under former O.C.G.A. § 24-9-82).

Person charged with crime remaining silent. — Plaintiff having testified that a third person stated in the hearing of defendant that the defendant committed a crime, to which the defendant made no response, and this third person when examined in behalf of defendant having denied making the statement, it was error not to allow the plaintiff, in reply, to prove by another witness that the defendant was present and heard the defendant's witness make the statement at the time and place mentioned by the plaintiff in plaintiff's testimony. Bray v. Latham, 81 Ga. 640, 8 S.E. 64, 1888 Ga. LEXIS 297 (1888) (decided under former Code 1882, § 3871).

Mere commission, arrest, or confinement for crime insufficient to impeach. — Witness may be impeached by

proof of a crime involving moral turpitude, but not by showing that the witness has committed, been arrested for, confined for, or even indicted for such an offense. Strickland v. State, 166 Ga. App. 702, 305 S.E.2d 434, 1983 Ga. App. LEXIS 2300 (1983) (decided under former O.C.G.A. § 24-9-82).

Showing of mere accusation of offense. — Prosecutor's cross-examination of defendant about recently having been charged with pointing a pistol at someone was an improper line of questioning, although defendant had denied using a gun during the previous year; competent evidence disproving that testimony would have been proper impeachment but merely showing an accusation of the misdemeanor offense was insufficient for that purpose. Williams v. State, 181 Ga. App. 693, 353 S.E.2d 563, 1987 Ga. App. LEXIS 1523 (1987) (decided under former O.C.G.A. § 24-9-82).

Question as to prior arrest. — It is not error to allow a witness to be questioned as to a prior arrest to impeach the witness's testimony that the witness had "never been in a situation dealing with the law." Parker v. State, 169 Ga. App. 557, 313 S.E.2d 751, 1984 Ga. App. LEXIS 2784 (1984) (decided under former O.C.G.A. § 24-9-82).

Prior adjudication of delinquency admissible. — Any error in admitting impeaching evidence of defendant's prior adjudication of delinquency was harmless because, at the time it was admitted pursuant to former O.C.G.A. § 24-9-82, the trial court instructed the jury that the evidence was admitted for the limited purpose of refuting defendant's testimony that defendant was not familiar with criminal cases, and that it could not be considered for any other purpose; it was highly probable that admission of the evidence did not contribute to the jury's finding of guilt. Emberson v. State, 271 Ga. App. 773, 611 S.E.2d 83, 2005 Ga. App. LEXIS 172 (2005) (decided under former O.C.G.A. § 24-9-82).

Criminal defendant. — While a criminal defendant is not subject to impeachment by proof of general bad character or prior convictions until the defendant put defendant's general good character in evidence, the defendant is subject to impeachment the same as any other witness. Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902, 1978 Ga. App. LEXIS 2295 (1978) (decided under former O.C.G.A. § 24-9-82).

Prosecution for rape. — Former Code 1933, § 38-202.1 (see now O.C.G.A. § 24-4-412) provided the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape; the res gestae rule, impeachment techniques, and other traditional means for introducing evidence which is otherwise inadmissible are inapplicable. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363, 1978 Ga. App. LEXIS 2319 (1978) (decided under former Code 1933, § 38-1802).

Trial court did not err in refusing to permit defendant to cross-examine prosecutor. Gresham v. State, 169 Ga. App. 525, 314 S.E.2d 111, 1984 Ga. App. LEXIS 1623 (1984) (decided under former O.C.G.A. § 24-9-82).

Evidence of prior incident of sex with a minor. — In the defendant's child molestation trial, pursuant to O.C.G.A. § 24-6-621, the trial court properly allowed a rebuttal witness to testify that the defendant had sex with her when she was 14, because the defendant opened the door by testifying that the defendant's prior guilty plea to molestation was an isolated incident and that no other incidents had occurred. Harris v. State, 333 Ga. App. 118, 775 S.E.2d 602, 2015 Ga. App. LEXIS 436 (2015).

Evidence of prior killing. — There is no error in allowing the district attorney to present evidence of a prior killing by defendant for the purpose of impeaching the testimony of the defendant that defendant had never killed anyone in defendant's whole life. Lumpkin v. State, 151 Ga. App. 896, 262 S.E.2d 208, 1979 Ga. App. LEXIS 2732 (1979) (decided under former Code 1933, § 38-1802).

Admission of photographs and texts sent to others. — In the murder trial of defendants, husband and wife, for the killing of a 13-month-old girl, the wife's testimony about her relationship with and fear of the husband opened the door for the state to rebut her claims with

3. Criminal Matters (Cont'd)

evidence that she was pursuing other men, pursuant to O.C.G.A. § 24-6-621; admitting the state's evidence that she had sent photographs and texts of herself to other men was not error. Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019).

Evidence found admissible. — In an action for battery, a witness should have been allowed to impeach defendant's statement that defendant had never ordered defendant's bodyguard or anyone else to strike another person. Williams v. Knight, 211 Ga. App. 420, 439 S.E.2d 507, 1993 Ga. App. LEXIS 1510 (1993), cert. denied, No. S94C0503, 1994 Ga. LEXIS 258 (Ga. Jan. 28, 1994) (decided under former O.C.G.A. § 24-9-82).

State was entitled to question defendant as to whether defendant changed defendant's name because the authorities in North Carolina were looking for defendant because defendant had been accused of rape in that state after defendant introduced this area of inquiry by offering another reason for leaving North Carolina to explain having two sets of identification in defendant's possession when the defendant was arrested. Vehaun v. State, 244 Ga. App. 136, 534 S.E.2d 873, 2000 Ga. App. LEXIS 653 (2000) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in denying defendant's motion for a mistrial made as to a testifying officer's rebuttal testimony as that testimony was admissible as impeachment going to defendant's veracity, pursuant to former O.C.G.A. § 24-9-82. Cox v. State, 263 Ga. App. 266, 587 S.E.2d 205, 2003 Ga. App. LEXIS 1083 (2003) (decided under former O.C.G.A. § 24-9-82).

Evidence that defendant knew defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted the testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in allowing the evidence to impeach defendant's testimony. Cooper v. State, 272 Ga. App. 209, 612 S.E.2d 42, 2005 Ga. App. LEXIS 247 (2005) (decided under former O.C.G.A. § 24-9-82).

Since, at trial, the defendant's girlfriend testified that the girlfriend was certain that the defendant's mother had never told the girlfriend about her son's statement of regret about the victim's murder, but, the girlfriend had earlier told detectives that the conversation had, in fact, happened, and since the defendant's mother also took the witness stand and testified both specifically that the defendant had never told the mother that the defendant had any regret about the crime and more generally that the mother never discussed the crime with the defendant at all, the statement the defendant's girlfriend made to police directly contradicted the facts as recounted by both the defendant's mother and the girlfriend; as such, the girlfriend's prior statement was admissible to impeach both. Williams v. State, 280 Ga. 539, 630 S.E.2d 410, 2006 Ga. LEXIS 350 (2006) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in overruling the defendant's objection to an officer's testimony that the officer and another officer recovered a 9 mm handgun from the defendant when the officers arrested the defendant because there was no basis for concluding that either officer committed perjury, but rather, it appeared that the memory of one of the officers could have faded as to that detail during the two years that elapsed between the defendant's arrest and trial; although the discrepancy could have given the defendant the opportunity to impeach the credibility of the officer who testified at trial by disproving a fact to which the officer testified, the fact that the officer's recollection of the events differed from the other officer's pretrial testimony did not render the testimony about the gun inadmissible, but rather, the matter was one of credibility for the jury to resolve. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616, 2011 Ga. App. LEXIS 351 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. Jan. 9, 2012) (decided under former O.C.G.A. § 24-9-82).

Trial court did not abuse the court's discretion in allowing a railroad to cross-examine an employee and in admitting

the testimony of supervisors for purposes of disproving certain facts to which the railroad had testified because the circumstances surrounding the employee's dispute with the supervisors was at least indirectly material to the matters at issue in the case; the employee opened the door to being impeached with evidence that tended to disprove the employee's testimony. CSX Transp., Inc. v. Smith, 289 Ga. 903, 717 S.E.2d 209, 2011 Ga. LEXIS 813 (2011), superseded by statute as stated in Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err when the court allowed the state to cross-examine the defendant about an altercation with the defendant's girlfriend because evidence about the nature of the altercation was admissible for purposes of impeachment inasmuch as the defendant testified dishonestly about the reasons why the defendant had been ejected from the girlfriend's car. Taylor v. State, 302 Ga. 176, 805 S.E.2d 851, 2017 Ga. LEXIS 813 (2017).

Evidence of prior offense admissible. — When defendant implied on direct examination that defendant had only one prior conviction for a weapons offense, defendant's testimony in this regard was subject to rebuttal proof of other weapons offenses defendant had committed. Francis v. State, 266 Ga. 69, 463 S.E.2d 859, 1995 Ga. LEXIS 886 (1995) (decided under former O.C.G.A. § 24-9-82).

Portion of defendant's pre-trial statement to police in which the defendant admitted to another robbery was properly admitted, even though it reflected negatively on the defendant's character, because it rebutted the defendant's prior testimony. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288, 2004 Ga. App. LEXIS 1400 (2004) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in allowing the prosecutor to read defendant's entire criminal history into evidence because the basis for admitting the evidence pursuant to former O.C.G.A. § 24-9-82 was to disprove defendant's lie by omission in response to a question at trial involving the defendant's previous encounters with law enforcement. McNeal v. State, 289 Ga. 711, 715 S.E.2d 95, 2011 Ga. LEXIS 672 (2011) (decided under former O.C.G.A. § 24-9-82).

State was allowed to disprove the fact the defendant testified to, that the defendant had not been in a situation like this before, by impeaching the defendant with a prior charge for aggravated assault, even though that charge resulted in a conviction on a lesser offense. Parker v. State, 339 Ga. App. 285, 793 S.E.2d 173, 2016 Ga. App. LEXIS 613 (2016).

Testimony on the number of times pulled over. — State had no basis for impeaching the testimony of a witness by the witness's driving record after the witness immediately revised the witness's testimony that the witness had been "pulled over" three or four times to state that the witness did not know the exact number of times the witness had been pulled over. Waters v. State, 210 Ga. App. 305, 436 S.E.2d 44, 1993 Ga. App. LEXIS 1185 (1993) (decided under former O.C.G.A. § 24-9-82).

Impeachment on nonviolent character not allowed. — In a prosecution for aggravated assault, carrying a concealed weapon, and possession of cocaine, when defendant's prior conviction was for misdemeanor obstruction of a law enforcement officer, which offense did not involve the element of violence, neither a conviction thereof nor an indictment charging a greater offense was admissible to impeach a defense witness's testimony as to defendant's nonviolent character. Daniel v. State, 211 Ga. App. 455, 439 S.E.2d 720, 1993 Ga. App. LEXIS 1559 (1993), cert. denied, No. S94C0526, 1994 Ga. LEXIS 610 (Ga. Feb. 18, 1994) (decided under former O.C.G.A. § 24-9-82).

Evidence from video sharing channel. — In a case in which the defendant was convicted of incest, rape, aggravated child molestation, child molestation, and reckless conduct, as the connection between the victim's sexual assault allegations and the victim's testimony regarding the victim's purported video sharing channel was extremely attenuated, the trial court did not abuse its discretion in excluding the defendant's extrinsic evidence on that issue as irrelevant and on a mat-

3. Criminal Matters (Cont'd)

ter collateral to the issues at trial. Campbell v. State, 362 Ga. App. 337, 868 S.E.2d 471, 2022 Ga. App. LEXIS 34 (2022).

4. Civil Matters

In action for fraud and breach of warranties, oral testimony concerning other lawsuits would be incompetent for impeachment purposes unless it contradicted the witness's testimony at trial; it cannot be used merely to expose the witness's intelligence, memory, accuracy, judgment, and veracity. Haley v. Oaks Apts., Ltd., 173 Ga. App. 44, 325 S.E.2d 602, 1984 Ga. App. LEXIS 2723 (1984) (decided under former O.C.G.A. § 24-9-82).

Railroad engineer. — If the jury believed that the horse and colt crossed the track in front of the train immediately before the train struck plaintiff's mule, as testified to by two witnesses, the witnesses would be authorized to infer that the engineer was not keeping a proper lookout ahead, although the engineer swore that the engineer was. Atlantic Coast Line R.R. v. Hodges, 90 Ga. App. 870, 84 S.E.2d 711, 1954 Ga. App. LEXIS 838 (1954) (decided under former Code 1933, § 38-1802).

Admission of evidence initially excluded in accident case. In an action for physical injuries allegedly received in a rear-end collision, the defendant was allowed to show that plaintiff had settled a lawsuit arising from an earlier accident in order to impeach plaintiff's testimony that the complaint had been dismissed. Bischoff v. Payne, 239 Ga. App. 824, 522 S.E.2d 257 (decided under former O.C.G.A. § 24-9-82).

Although a trial court granted an employee's motion in limine to exclude evidence that the employee had been taken out of service several hours prior to a workplace accident, once the employee submitted to questioning on the issue without seeking to enforce the limine ruling, the employee opened the door to being impeached by the employee's supervisors' depositions that the employee had been taken out of service due to a safety violation. Smith v. CSX Transp., Inc., 306 Ga. App. 897, 703 S.E.2d 671, 2010 Ga. App. LEXIS 991 (2010), aff'd, 289 Ga. 903, 717 S.E.2d 209, 2011 Ga. LEXIS 813 (2011) (decided under former O.C.G.A. § 24-9-82).

Evidence of assets admissible. — Fact that one brother had considerable assets and another brother had none is admissible to impeach testimony that the two brothers had shared the benefit of real property equally, and it is not error to admit such evidence. Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530, 1978 Ga. LEXIS 1128 (1978) (decided under former Code 1933, § 38-1802).

Medical evidence admissible. — In a personal injury action, since plaintiff specifically denied any prior back, neck, or leg pain at trial, plaintiff's medical records showing otherwise were admissible under former O.C.G.A. § 24-9-82. Barone v. Law, 242 Ga. App. 102, 527 S.E.2d 898, 2000 Ga. App. LEXIS 39 (2000) (decided under former O.C.G.A. § 24-9-82).

In a personal injury action filed by a couple, including an injured wife, against a tractor-trailer's owner and its driver, the trial court did not err in admitting doctors' reports outlining that the wife "passed out" before the collision: (1) as substantive evidence, given that the wife was present at trial and subject to cross-examination; and (2) as prior inconsistent statements to impeach the wife based upon earlier testimony that the wife never lost consciousness. Collins v. Mitchell, 282 Ga. App. 860, 640 S.E.2d 364, 2006 Ga. App. LEXIS 1536 (2006) (decided under former O.C.G.A. § 24-9-82).

Admission of threatening letter. — In a homeowner's suit against a construction company for failing to remedy a defect in the homeowner's house, when the company's representative claimed remorse in the phase of the trial in which the amount of punitive damages was being determined, a letter from the company to the homeowner threatening to sue the homeowner for abusive litigation if the homeowner pursued a claim was properly admitted. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d 668, 2004 Ga. App. LEXIS 2 (2004), cert. denied, No. S04C0965, 2004 Ga. LEXIS 385 (Ga. May 3, 2004) (decided under former O.C.G.A. § 24-9-82).

Employer drug test admissible. — It was error under former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621) not to allow a defendant to introduce witness testimony and evidence of negative employer drug tests to rebut an officer's testimony that the defendant admitted using drugs. Doyal v. State, 287 Ga. App. 667, 653 S.E.2d 52, 2007 Ga. App. LEXIS 894 (2007) (decided under former O.C.G.A. § 24-9-82).

Evidence of medical license admissible. — In a medical malpractice action, the trial court did not abuse the court's discretion by permitting the plaintiff to cross-examine the defendant doctor with regard to the status of the doctor's medical license from another state for impeachment purposes; the limited investigation by the plaintiff into whether the out-of-state license was renewed or not was permissible after the doctor testified that the doctor had allowed the license to expire. Barngrover v. Hins, 289 Ga. App. 410, 657 S.E.2d 14, 2008 Ga. App. LEXIS 28 (2008) (decided under former O.C.G.A. § 24-9-82).

Admission of printouts from medical devices. — Trial court abused the court's discretion in excluding printouts from a medical device like the one used on the patient, which showed that the device had been used on other patients despite the doctor's prior claim to the contrary, to impeach the doctor as the court's ruling authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged. Hand v. S. Ga. Urology Ctr., P.C., 332 Ga. App. 148, 769 S.E.2d 814, 2015 Ga. App. LEXIS 265 (2015), cert. denied, No. S15C1304, 2015 Ga. LEXIS 594 (Ga. Sept. 8, 2015), overruled in part, Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015).

Evidence from medical device should have been admitted. — Trial court abused the court's discretion in excluding printouts from a medical device like the one used on the patient, which showed that the device had been used on other patients despite the doctor's prior claim to the contrary, to impeach the doctor as the court's ruling authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged. Hand v. S. Ga. Urology Ctr., P.C., 2015 Ga. App. LEXIS 121.

Contradictory testimony of physician allowed. — When a physician testified on cross-examination that the physician had never written a history and physical examination in a chart for a patient when the physician had not performed the history and physical examination, the physician's testimony was subject to impeachment by calling the widow of a former patient who testified that the physician had not performed the physical examinations and history on the widow's late husband contrary to the physician's written entry on the medical chart. Weaver v. Ross, 192 Ga. App. 568, 386 S.E.2d 43, 1989 Ga. App. LEXIS 1082 (1989) (decided under former O.C.G.A. § 24-9-82).

Instructions

Instructions generally. — It is not error for the trial court, in the absence of request, to charge on the subject of impeachment of witnesses. Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276, 1954 Ga. App. LEXIS 736 (1954) (decided under former Code 1933, § 38-1802).

Defendant who wishes to have trial judge give limiting instructions for impeachment evidence used in the mode of disproving facts testified to, which incidentally injects character, must request such instructions; the judge is not required to give instructions on the judge's own motion. Byrd v. State, 255 Ga. 665, 341 S.E.2d 455, 1986 Ga. LEXIS 634 (1986) (decided under former O.C.G.A. § 24-9-82).

Conflict in testimony. — When there is a conflict between the testimony of the defendant and a state's witness, a charge on impeachment is not improper. McNeill v. State, 135 Ga. App. 876, 219 S.E.2d 613, 1975 Ga. App. LEXIS 1856 (1975) (decided under former Code 1933, § 38-1802).

Failure to charge all methods of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the

Instructions (Cont'd)

other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, is not reversible error in the absence of a request. Milwaukee Mechanics Ins. Co. v. Davis, 79 Ga. App. 70, 52 S.E.2d 643, 1949 Ga. App. LEXIS 588 (1949) (decided under former Code 1933, § 38-1802).

Charging parts of sections. — Charge of the court was not error when part of the charge contained former Civil Code 1910, § 5880 (see O.C.G.A. § 24-6-621) and a part of former Civil Code 1910, § 5881 (see O.C.G.A. § 24-6-608 and 24-6-613) and the parts of both of those sections charged which were excepted to were applicable to the case. Hall v. Burpee, 176 Ga. 270, 168 S.E. 39, 1933 Ga. LEXIS 59 (1933) (decided under former Civil Code 1910, § 5880).

Contradiction of witness for jury consideration. — When no attempt was made during the trial of a case to impeach a witness by disproving the facts testified to by the witness, except insofar as different witnesses testify in a conflicting manner to their impression of a given state of facts, a charge of the court in the language of former Code 1933, § 38-1806 (see O.C.G.A. §§ 24-6-620 and 24-6-621) that when a witness shall be successfully contradicted as to a material matter the witness's credit as to other matters was for the jury, included the substance of former Code 1933, § 38-1802 (see O.C.G.A. § 24-6-621). Aiken v. Glass, 95 Ga. App. 849, 99 S.E.2d 426, 1957 Ga. App. LEXIS 932 (1957) (decided under former Code 1933, § 38-1802).

Charging on law of impeachment for bad character. — In charging upon the law of impeachment of witnesses, when the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it is not error to omit to charge the law of impeachment by proof of general bad character, when there is no evidence seeking to impeach any witness upon that ground. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28, 1945 Ga. LEXIS 301 (1945), overruled in part, Milton v. State, 245 Ga. 20, 262 S.E.2d 789, 1980 Ga. LEXIS 672 (1980) (decided under former Code 1933, § 38-1802).

Charging on good character. — When it was sought to impeach the sole witness for the defendant charged with murder, and no evidence of the good character of such witness was offered by the defendant, it was reversible error to state in the charge to the jury that when it is sought to impeach a witness, the witness may be sustained by proof of good character. Jones v. State, 193 Ga. 449, 18 S.E.2d 844, 1942 Ga. LEXIS 419 (1942) (decided under former Code 1933, § 38-1802).

Instruction proper. — Charge of court was not subject to exceptions because of verbal inaccuracies. Bart v. Scheider, 39 Ga. App. 467, 147 S.E. 430, 1929 Ga. App. LEXIS 363 (1929) (decided under former Civil Code 1910, § 5880).

Improper instruction not reversible error. — Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the defendant's guilt. Peterson v. State, 212 Ga. App. 147, 441 S.E.2d 481, 1994 Ga. App. LEXIS 191 (1994) (decided under former O.C.G.A. § 24-9-82).

In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518, 2008 Ga. App. LEXIS 1106 (2008) (decided under former O.C.G.A. § 24-9-82).

RESEARCH REFERENCES

ALR.

Admissibility of affidavit to impeach witness, 14 A.L.R.4th 828.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 A.L.R.5th 277.

24-6-622. Witness's feelings towards and relationship to parties provable.

The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.

History.

Code 1981, § 24-6-622, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to prove relationship of a witness to a party, see 21 Mercer L. Rev. 347 (1969).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For annual survey on trial practice and procedure, see 70 Mercer L. Rev. 253 (2018).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Analysis

General Consideration
Feelings
Relationships

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3820, former Code 1873, § 3876, former Code 1882, § 3876, former Civil Code 1895, § 5289, former Penal Code 1895, § 1023, former Civil Code 1910, § 5878, former Penal Code 1910, § 1049, former Code 1933, § 38-1712, and former O.C.G.A. § 24-9-68 are included in the annotations for this Code section.

In general. — Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellishment for fear that there may be those in attendance who could call the testimony into question if not truthful. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72, 1980 Ga. App. LEXIS 3062 (1980) (decided under former Code 1933, § 38-1712).

As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72, 1980 Ga. App. LEXIS 3062 (1980) (decided under former Code 1933, § 38-1712).

History. — Statute was simply declaratory of a general common law principle. Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794, 1896 Ga. LEXIS 424 (1896) (decided under former Civil Code 1895, § 5289).

Credibility. — As a general rule, a party may show any fact or circumstance that may affect the credibility of an opposing witness. Fowler v. Waldrip, 10 Ga. 350, 1851 Ga. LEXIS 109 (1851) (decided under former law); Simpson v. State, 78 Ga.

General Consideration (Cont'd)

91, 1886 Ga. LEXIS 178 (1886) (decided under former Code 1882, § 3876); Daniel v. State, 103 Ga. 202, 29 S.E. 767, 1897 Ga. LEXIS 391 (1897) (decided under former Penal Code 1895, § 1023); Neill v. Hill, 32 Ga. App. 381, 123 S.E. 30, 1924 Ga. App. LEXIS 412 (1924) (decided under former Civil Code 1910, § 5878); Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174, 1929 Ga. App. LEXIS 101 (1929) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75, 1946 Ga. App. LEXIS 455 (1946) (decided under former Code 1933, § 38-1712); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263, 1974 Ga. App. LEXIS 1699 (1974) (decided under former Code 1933, § 38-1712); Southeast Transp. Corp. v. Hogan Livestock Co., 133 Ga. App. 825, 212 S.E.2d 638, 1975 Ga. App. LEXIS 2306 (1975) (decided under former Code 1933, § 38-1712).

Relevancy. — In a criminal prosecution, it was error for the trial court to permit the state, in argument and in testimony, to identify a fingerprint expert who testified for the state as having originally been hired by the defendant; the fact of the expert's original employment by defendant was irrelevant and could be prejudicial. Blige v. State, 264 Ga. 166, 441 S.E.2d 752, 1994 Ga. LEXIS 291 (1994) (decided under former O.C.G.A. § 24-9-68).

Former O.C.G.A. § 24-2-1 and 24-9-68 (see now O.C.G.A. §§ 24-4-401 to 24-4-403 and 24-6-622) should be considered in pari materia; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. Lockett v. State, 217 Ga. App. 328, 457 S.E.2d 579, 1995 Ga. App. LEXIS 445 (1995) (decided under former O.C.G.A. § 24-9-68).

In a personal injury suit filed by a car driver against a truck driver because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new trial was ordered. Laukaitis v. Basadre, 287 Ga. App. 144, 650 S.E.2d 724, 2007 Ga. App. LEXIS 808 (2007) (decided under former O.C.G.A. § 24-9-68).

Criminal record. — It was not error to refuse to admit evidence pertaining to a witness's criminal record since there was nothing to show that the witness's past record would motivate the witness to be untruthful or "shade" the witness's testimony to please the state, there were no outstanding criminal charges against the witness, and the state did not open the door to admission of such evidence. Jenkins v. State, 215 Ga. App. 540, 451 S.E.2d 457, 1994 Ga. App. LEXIS 1298 (1994), cert. denied, No. S95C0571, 1995 Ga. LEXIS 405 (Ga. Mar. 17, 1995) (decided under former O.C.G.A. § 24-9-68).

While it was error under former O.C.G.A. § 24-9-68 not to allow the defendant to cross-examine a witness about pending felony charges against the witness, it was highly probable that the error did not contribute to the verdict, and was therefore harmless error, because the witness was not present at the crime scene and the witness's testimony that the defendant bragged about committing an assault was put in doubt by another witness. Fields v. State, 285 Ga. App. 345, 646 S.E.2d 326, 2007 Ga. App. LEXIS 515 (2007) (decided under former O.C.G.A. § 24-9-68).

In a claim by the first defendant, the trial court did not improperly limit the second defendant's ability to cross-examine one of the state's witnesses about an alleged prior arrest for prostitution because the right to inquire into partiality and bias was not without limits; neither the first defendant nor the co-defendants presented any evidence to show that the witness at issue had any bias in favor of the state based on an alleged prostitution charge; and, while the second defendant asserted at trial that a prostitution charge had been dismissed shortly before trial, there was nothing in the record support-

ing that claim. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399, 2018 Ga. LEXIS 184 (2018).

Officer making threat against defendant. — Although the trial court erred in excluding evidence that a supervising officer subsequently made a threat against the defendant because the evidence was admissible under former O.C.G.A. § 24-9-68, the trial court's exclusion of the evidence provided no ground for reversal since the supervising officer's testimony was corroborated by the testimony of two other witnesses, and the excluded evidence did not challenge the credibility of the other two witnesses; thus, the evidence that the defendant committed obstruction as charged in the accusation was overwhelming, and it was highly probable that the trial court's error did not contribute to the verdict. Edwards v. State, 308 Ga. App. 569, 707 S.E.2d 917, 2011 Ga. App. LEXIS 234 (2011) (decided under former O.C.G.A. § 24-9-68).

Jury charge not appropriate. — In the absence of any evidence regarding the feelings or bias of witnesses toward defendant, or why the witnesses were familiar with defendant's appearance, defendant's requested charge on the language of former O.C.G.A. § 24-9-68 was not authorized. Scruggs v. State, 227 Ga. App. 35, 488 S.E.2d 110 (decided under former O.C.G.A. § 24-9-68).

Jury charge appropriate. — Trial court did not err in refusing to charge the jury regarding former O.C.G.A. § 24-9-68, as it was sufficient that the jury was charged that, in passing upon credibility of witnesses, it could consider their interest or lack of interest in the occurrences about which the witnesses testified. Stinson v. State, 256 Ga. App. 902, 569 S.E.2d 858, 2002 Ga. App. LEXIS 700 (2002), cert. denied, No. S02C1912, 2002 Ga. LEXIS 987 (Ga. Oct. 28, 2002) (decided under former O.C.G.A. § 24-9-68).

Issue not preserved for appellate review. — Because the defendant never argued in the trial court that the testimony the prosecuting attorney elicited by the cross-examination of a defense witness was not probative of any relationship between the defendant and the witness under former O.C.G.A. § 24-9-68, there was nothing for the court of appeals to review on appeal; at trial, defense counsel never argued that the questions the prosecuting attorney proposed to ask, and ultimately did ask, of the witness would not elicit testimony showing some relationship between the two and that the proposed cross-examination, therefore, was not probative of a relationship under former O.C.G.A. § 24-9-68, and although defense counsel objected that the pending charge was not a conviction, that was a different objection than the one the defendant raised on appeal. Luckie v. State, 310 Ga. App. 859, 714 S.E.2d 358, 2011 Ga. App. LEXIS 529 (2011), cert. denied, No. S11C1803, 2011 Ga. LEXIS 965 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-9-68).

Feelings

In general. — State of the witness's feelings to the parties may always be proved for the consideration of the jury. Bishop v. State, 9 Ga. 121, 1850 Ga. LEXIS 125 (1850) (decided under former law); Whitlow v. State, 74 Ga. 819, 1885 Ga. LEXIS 415 (1885) (decided under former law); Durham v. State, 45 Ga. 516, 1872 Ga. LEXIS 273 (1872) (role of accused unpopular with witness) (decided under former Code 1868, § 3820); Skipper v. State, 59 Ga. 63, 1877 Ga. LEXIS 202 (1877); Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794, 1896 Ga. LEXIS 424 (1896) (decided under former Code 1873, § 3876); Shaw v. State, 102 Ga. 660, 29 S.E. 477, 1897 Ga. LEXIS 667 (1897) (personal conduct) (decided under former Code 1873, § 3876); Patman v. State, 61 Ga. 379, 1878 Ga. LEXIS 130 (1878) (witness subject to similar acts of injury as done by accused) (decided under former Code 1882, § 3876); Daniel v. State, 103 Ga. 202, 29 S.E. 767, 1897 Ga. LEXIS 391 (1897); Purdee v. State, 118 Ga. 798, 45 S.E. 606, 1903 Ga. LEXIS 712 (1903) (decided under former Penal Code 1895, § 1023); McDuffie v. State, 121 Ga. 580, 49 S.E. 708, 1905 Ga. LEXIS 7 (1905) (decided under former Penal Code 1895, § 1023); Sasser v. State, 129 Ga. 541, 59 S.E. 255, 1907 Ga. LEXIS 507 (1907) (decided under former Penal Code 1895, § 1023); Parker v. State, 11 Ga. App. 251,

Feelings (Cont'd)

75 S.E. 437, 1912 Ga. App. LEXIS 355 (1912) (subordination of another witness) (decided under former Penal Code 1895, § 1023); Smith v. State, 12 Ga. App. 13, 76 S.E. 647, 1912 Ga. App. LEXIS 5 (1912); Sisk v. Landers, 67 Ga. App. 538, 21 S.E.2d 449, 1942 Ga. App. LEXIS 464 (1942) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75, 1946 Ga. App. LEXIS 455 (1946) (decided under former Code 1933, § 38-1712); Miller v. Smith, 302 F. Supp. 385, 1968 U.S. Dist. LEXIS 9634 (N.D. Ga. 1968); (decided under former Code 1933, § 38-1712); Harrell v. State, 139 Ga. App. 556, 228 S.E.2d 723, 1976 Ga. App. LEXIS 1884 (1976), overruled in part, Spence v. State, 163 Ga. App. 198, 292 S.E.2d 908, 1982 Ga. App. LEXIS 3193 (1982) (decided under former Code 1933, § 38-1712).

Statute relates to the state of the witness's feelings to the parties, and not the state of the feelings of a party toward the witness. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1712).

Trial court did not err in refusing to permit the condemnee to show, by a witness for the condemnee, the bias and prejudice of a witness for the condemnor against the condemnee, where the questions asked the witness related to the feelings of the condemnor's witness at a time before the trial and did not attempt to show the feelings of the condemnor's witness at the time of the trial. Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1712).

Interest. — Cross-examination of an adverse witness as to interest, attitude, and feelings is admissible. Jeter & Forbes v. Haviland, Keese & Co., 24 Ga. 252, 1858 Ga. LEXIS 191 (1858) (decided under former law); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 688 (1954) (decided under former Code 1933, § 38-1712); Miller v. Smith, 302 F. Supp. 385, 1968 U.S. Dist. LEXIS 9634 (N.D. Ga. 1968); (decided under former Code 1933, § 38-1712); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263, 1974 Ga. App. LEXIS 1699 (1974) (decided under former Code 1933, § 38-1712); Harrell v. State, 139 Ga. App. 556, 228 S.E.2d 723, 1976 Ga. App. LEXIS 1884 (1976), overruled in part, Spence v. State, 163 Ga. App. 198, 292 S.E.2d 908, 1982 Ga. App. LEXIS 3193 (1982) (decided under former Code 1933, § 38-1712).

Jury may not arbitrarily disregard the testimony of a witness by reason of interest in the result. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954) (decided under former Code 1933, § 38-1712).

After a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries; the defendant was entitled to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. Boggs v. State, 195 Ga. App. 605, 394 S.E.2d 401, 1990 Ga. App. LEXIS 600 (1990) (decided under former O.C.G.A. § 24-9-68).

Bias and prejudice. — Jury is authorized to consider the bias or prejudices of the witnesses in a criminal case, if any exist. Wall v. State, 153 Ga. 309, 112 S.E. 142, 1922 Ga. LEXIS 75 (1922) (decided under former Penal Code 1910, § 1049); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (decided under former Code 1933, § 38-1712); Dennis v. State, 216 Ga. 206, 115 S.E.2d 527, 1960 Ga. LEXIS 428 (1960) (decided under former Code 1933, § 38-1712).

Fact that, in the investigating officer's previous experience, most of the sexual abuse victims' mothers had sided with their defendant-husbands was not relevant to explain either the conduct or the testimony of the victim's mother in the instant case, insofar as the testimony did not relate to the state of specifically her feelings towards the parties and specifically her relationship to the parties. Lott

v. State, 206 Ga. App. 886, 426 S.E.2d 667, 1992 Ga. App. LEXIS 1821 (1992) (decided under former O.C.G.A. § 24-9-68).

In a prosecution for aggravated assault, when defendant was allowed to testify that the victim was a drug dealer who had furnished drugs to defendant's nephew, which had prompted the confrontation between them, the exclusion of additional evidence of the victim's drug dealing was not a curtailment of defendant's right to show the bias of the victim. Hayes v. State, 211 Ga. App. 801, 440 S.E.2d 539, 1994 Ga. App. LEXIS 38 (1994) (decided under former O.C.G.A. § 24-9-68).

In a criminal prosecution, when the state's eyewitness was never asked what the witness's personal feelings were toward defendant, further inquiry into the basis for any bias or prejudice that the witness might have against African-Americans would not have been relevant. Farley v. State, 225 Ga. App. 687, 484 S.E.2d 711 (decided under former O.C.G.A. § 24-9-68).

Trial counsel was not ineffective for failing to insist that the victim's entire diary go out with the jury in order to show the victim's animosity toward the defendant, the victim's father, as the diary showed only that the victim had negative feelings toward the victim's mother, not the defendant. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753, 2014 Ga. App. LEXIS 662 (2014).

Trial court did not err in allowing the state to impeach the defendant's girlfriend using the girlfriend's first-offender plea because the state did not use the girlfriend's guilty plea to impeach the girlfriend's general credibility, but instead used the plea to show bias through evidence that the defendant had previously attempted to accept responsibility for the girlfriend's criminal conduct in a different matter, and the trial court acted well within the court's discretion in allowing the state to explore whether the defendant's previous attempt to accept responsibility for the girlfriend's criminal conduct might have influenced the girlfriend's trial testimony. Hall v. State, 335 Ga. App. 895, 783 S.E.2d 400, 2016 Ga. App. LEXIS 106 (2016) (decided under former O.C.G.A. § 24-9-68).

Trial court did not abuse the court's discretion by excluding evidence of cultural bias by the victim's family against the defendant, who was not a gypsy, because the defense counsel did not question the victim's sister about potential cultural biases the sister held and proffered no other evidence relating to biases held against the defendant. Merritt v. State, 311 Ga. 875, 860 S.E.2d 455, 2021 Ga. LEXIS 489 (2021).

Racial bias of officer. — Trial court did not abuse the court's discretion in restricting the defendant's examination of an officer regarding the officer's alleged racial bias because the defendant had an opportunity to develop testimony regarding the officer's alleged racial bias but failed to do so, and, to the extent that the defendant's enumeration was premised upon evidence reflected in the officer's personnel file, the defendant failed to perfect the record with a sufficient proffer of the excluded evidence; although the officer's personnel file was presented to the trial court for consideration, such evidence was not introduced and included in the record for appellate review, and in the absence of the evidence, the court of appeals could not reach the merits of the claim. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820, 2010 Ga. App. LEXIS 321 (2010) (decided under former O.C.G.A. § 24-9-68).

Child molestation victim's feelings regarding parents. — In a child molestation case, trial counsel was not ineffective in failing to insist that the victim's entire diary go out with the jury because the evidence of the feelings of the victim, the defendant's daughter, toward the victim's parents showed that the victim had animosity toward the mother, rather than the defendant; and the diary entries which referenced the allegations that the defendant had fathered a child out of wedlock and failed to satisfy the financial obligations regarding the defendant's children would likely have undermined the defendant's good character defense. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753, 2014 Ga. App. LEXIS 835 (2014), cert. denied, No. S15C0681, 2015 Ga. LEXIS 263 (Ga. Apr. 20, 2015).

Motive. — Intent or motive of a witness is a legitimate subject of inquiry, and the

Feelings (Cont'd)

fact that a witness is influenced by financial considerations may affect a witness's credit and diminish the weight of a witness's testimony. Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174, 1929 Ga. App. LEXIS 101 (1929) (decided under former Penal Code 1910, § 1049).

If an attempt be made to discredit a witness on the ground that the witness's testimony is given under the influence of some motive prompting the witness to make a false or colored statement, the witness may be allowed to show in reply that the witness made similar declarations at a time when the motive imputed to the witness did not exist. Fuller v. State, 197 Ga. 714, 30 S.E.2d 608, 1944 Ga. LEXIS 332 (1944); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263, 1974 Ga. App. LEXIS 1699 (1974) (decided under former Code 1933, § 38-1712).

Relationships

In general. — Relationship of a witness to a party is a relevant consideration for the jury. Fowler v. Waldrip, 10 Ga. 350, 1851 Ga. LEXIS 109 (1851) (decided under former law); Simpson v. State, 78 Ga. 91, 1886 Ga. LEXIS 178 (1886) (decided under former Code 1882, § 3876); Futch v. State, 90 Ga. 472, 16 S.E. 102, 1892 Ga. LEXIS 205 (1892), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); (decided under former Code 1882, § 3876); Myers v. State, 97 Ga. 76, 25 S.E. 252, 1895 Ga. LEXIS 298 (1895) (decided under former Code 1882, § 3876); Shaw v. State, 102 Ga. 660, 29 S.E. 477, 1897 Ga. LEXIS 667 (1897) (decided under former Penal Code 1895, § 1023); Daniel v. State, 103 Ga. 202, 29 S.E. 767, 1897 Ga. LEXIS 391 (1897) (decided under former Penal Code 1895, § 1023); Brown v. State, 119 Ga. 572, 46 S.E. 833, 1904 Ga. LEXIS 291 (1904) (decided under former Penal Code 1895, § 1023); Perdue v. State, 126 Ga. 112, 54 S.E. 820, 1906 Ga. LEXIS 341 (1906) (decided under former Penal Code 1895, § 1023); Bates v. State, 4 Ga. App. 486, 61 S.E. 888, 1908 Ga. App. LEXIS 453 (1908) (bailor and bailee); Clark v. State, 5 Ga. App. 605, 63 S.E. 606, 1909 Ga. App. LEXIS 79 (1909); Union v. State, 7 Ga. App. 27, 66 S.E. 24, 1909 Ga. App. LEXIS 519 (1909) (decided under former Penal Code 1895, § 1023); Billings v. State, 8 Ga. App. 672, 70 S.E. 36, 1911 Ga. App. LEXIS 96 (1911) (decided under former Penal Code 1895, § 1023); Watts v. State, 9 Ga. App. 500, 71 S.E. 766, 1911 Ga. App. LEXIS 206 (1911) (decided under former Penal Code 1910, § 1049); Smith v. State, 15 Ga. App. 713, 84 S.E. 159, 1915 Ga. App. LEXIS 46 (1915) (police work); Berry v. City of Jackson, 16 Ga. App. 479, 85 S.E. 683, 1915 Ga. App. LEXIS 92 (1915); Lundy v. State, 144 Ga. 833, 88 S.E. 209, 1916 Ga. LEXIS 135 (1916) (decided under former Penal Code 1910, § 1049); Neill v. Hill, 32 Ga. App. 381, 123 S.E. 30, 1924 Ga. App. LEXIS 412 (1924) (decided under former Civil Code 1910, § 5878); Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174, 1929 Ga. App. LEXIS 101 (1929) (decided under former Civil Code 1910, § 5878); Georgia Hwy. Express, Inc. v. Sturkie, 62 Ga. App. 741, 9 S.E.2d 683, 1940 Ga. App. LEXIS 426 (1940) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75, 1946 Ga. App. LEXIS 455 (1946) (decided under former Code 1933, § 38-1712); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954) (decided under former Code 1933, § 38-1712); Dennis v. State, 216 Ga. 206, 115 S.E.2d 527, 1960 Ga. LEXIS 428 (1960) (lover); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263, 1974 Ga. App. LEXIS 1699 (1974) (prosecutor); Southeast Transp. Corp. v. Hogan Livestock Co., 133 Ga. App. 825, 212 S.E.2d 638, 1975 Ga. App. LEXIS 2306 (1975) (employer and employee); Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530, 1978 Ga. LEXIS 1128 (1978).

Expert's relationship to party and to attorney. — In a personal injury action, it was not error to allow evidence showing the close relationship between the medical witness and the plaintiff, a long-time patient, and between the witness and plaintiff's counsel. Canada v. Shropshire, 232 Ga. App. 341, 501 S.E.2d 860 (decided under former O.C.G.A. § 24-9-68).

In defendant's trial on charges of malice murder and aggravated assault, the trial

court did not err by allowing the state to ask an expert witness who opined that defendant was insane at the time defendant stabbed two people if the witness had been hired by defendant's counsel to testify in other cases and how much the witness was being paid to testify in defendant's case. Whitner v. State, 276 Ga. 742, 584 S.E.2d 247, 2003 Ga. LEXIS 627 (2003), overruled in part, Ledford v. State, 289 Ga. 70, 709 S.E.2d 239, 2011 Ga. LEXIS 267 (2011) (decided under former O.C.G.A. § 24-9-68).

Expert testimony limited. — In a medical malpractice action, the trial court did not err in limiting a patient's cross-examination of the doctor's expert witness, and hence, the patient's ability to show bias on the expert's part as: (1) the rules of evidence specifically prohibited a party from eliciting evidence that the expert had testified in a previous lawsuit, as such would have shown that the doctor had been sued before and suggested a proclivity for negligent conduct; and (2) the mere fact that a juror with an interest in the doctor's liability insurer would have been stricken for cause did not grant the patient an allowance to cross-examine a witness about that witness's interest in the insurer. Carlisle v. Abend, 288 Ga. App. 150, 653 S.E.2d 388, 2007 Ga. App. LEXIS 1158 (2007) (decided under former O.C.G.A. § 24-9-68).

Sexual. — Trial court did not err in allowing the state to ask a defense witness whether the witness had a sexual relationship with defendant, not to impeach the witness by reason of the immorality, but to show the witness's intimate relations with the accused and the witness's probable bias as a witness. Watkins v. State, 206 Ga. App. 701, 426 S.E.2d 238, 1992 Ga. App. LEXIS 1751 (1992) (decided under former O.C.G.A. § 24-9-68).

Homosexuality. — State was entitled to establish the homosexual relationship between the defendant and the state's key witness pursuant to former O.C.G.A. § 24-9-68 (see now O.C.G.A. 24-6-622), and the state did not attempt to belabor the issue beyond this limited purpose. Moreover, trial counsel sought through voir dire to eliminate jurors who may have held biases against those practicing homosexuality. State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48, 2011 Ga. LEXIS 550 (2011) (decided under former O.C.G.A. § 24-9-68).

Alibi witness. — In a criminal prosecution, proof that the alibi witness had accused the defendant, her boyfriend, of kidnapping and rape but then declined to prosecute her paramour was relevant and admissible to show bias on her part as an alibi witness. Hood v. State, 245 Ga. App. 391, 537 S.E.2d 788, 2000 Ga. App. LEXIS 962 (2000) (decided under former O.C.G.A. § 24-9-68).

Employer and employee. — Jury could consider whether a witness had an interest in providing testimony favorable to the employer that insulated the employer from liability and whether the witness/employee received a promotion and pay increase as a reward for such testimony. McNeely v. Wal-Mart Stores, Inc., 246 Ga. App. 852, 542 S.E.2d 575, 2000 Ga. App. LEXIS 1378 (2000) (decided under former O.C.G.A. § 24-9-68).

In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not err in admitting evidence of the chief executive officer's compensation from the defendant because the chief executive officer was not a party, so the rule that the financial circumstances of a party were generally inadmissible did not apply; a jury could find that the chief executive officer's compensation package made the existence of bias in favor of the defendant more probable; and any concerns regarding prejudice had to yield to the statutory mandate that the state of a witness's feelings towards the parties and the witness's relationship to them could always be proved for the consideration of the jury. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754, 2016 Ga. App. LEXIS 646 (2016), aff'd, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility

Relationships (Cont'd)

and bias relevant. Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Evidence of defendant's gang affiliation shared with an alibi witnesses and a police officer's testimony that the name of the gang meant "I will die for you, you will die for me" was relevant to show the state of the witnesses' feelings toward defendant and the witnesses' relationship to the defendant. Hayes v. State, 265 Ga. 1, 453 S.E.2d 11, 1995 Ga. LEXIS 77 (1995). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (decided under former O.C.G.A. § 24-9-68).

Cross examination of mother of child abuse victim. — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that his cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented him from showing any bias or prejudice against him on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward him pursuant to former O.C.G.A. § 24-9-68 and about his relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141, 2011 Ga. App. LEXIS 154 (2011) (decided under former O.C.G.A. § 24-9-68).

Admission of domestic abuse. — In the defendant's trial for the murder of a former girlfriend's 13-month-old daughter, evidence that the defendant had abused the child's mother was not introduced for one of the purposes listed in O.C.G.A. § 24-4-404(b), but rather to show the mother's bias under O.C.G.A. § 24-6-622, which allowed evidence of a witness's feelings towards the parties and the witness's relationship to the parties. Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019).

RESEARCH REFERENCES

ALR.

Admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 A.L.R. 1110.

Cross-examination of adversary witness regarding compromise or settlement of his claim against the party calling him, for purpose of affecting his credibility, 161 A.L.R. 395.

Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 A.L.R.2d 893.

Right of accused in homicide case to cross-examine prosecution's witness as to latter's pending or contemplated civil action against accused arising out of same transaction, 41 A.L.R.2d 1205.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 A.L.R.2d 610.

Necessity and sufficiency of foundation for discrediting evidence showing bias or prejudice of adverse witness, 87 A.L.R.2d 407.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 A.L.R.3d 1060.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 A.L.R.4th 812.

Adverse presumption or inference based on party's failure to produce or

question examining doctor—modern cases, 77 A.L.R.4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 A.L.R.4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 A.L.R.4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 A.L.R.4th 337.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 A.L.R.4th 939.

24-6-623. Treatment of witness.

It shall be the right of a witness to be examined only as to relevant matters and to be protected from improper questions and from harsh or insulting demeanor.

History.
Code 1981, § 24-6-623, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Analysis

General Consideration
Improper Questions
Harsh or Insulting Demeanor

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5281, former Civil Code 1910, § 5870, former Code 1933, § 38-1704, and former O.C.G.A. § 24-9-62 are included in the annotations for this Code section.

In general. — Right of a witness to be protected from improper questioning must be balanced against the right of parties to a thorough and sifting cross-examination. White v. Knapp, 31 Ga. App. 344, 120 S.E. 796, 1923 Ga. App. LEXIS 941 (1923) (decided under former Civil Code 1910, § 5870); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Civil Code 1910, § 5870); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1704); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131, 1952 Ga. App. LEXIS 845 (1952) (decided under former Code 1933, § 38-1704); Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511, 1971 Ga. App. LEXIS 1281 (1971) (decided under former Code 1933, § 38-1704); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466, 1974 Ga. LEXIS 994 (1974) (decided under former Code 1933, § 38-1704); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492, 1978 Ga. App. LEXIS 1710 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 835, 268 S.E.2d 330, 1980 Ga. LEXIS 955 (1980) (decided under former Code 1933, § 38-1704).

General Consideration (Cont'd)

Witness's rights under former O.C.G.A. § 24-9-62 (see now O.C.G.A. §§ 24-6-611 and 24-6-623) must be balanced with the party's right under former O.C.G.A. § 24-9-64 (see now O.C.G.A. § 24-6-611) to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134, 1990 Ga. App. LEXIS 173 (1990) (decided under former O.C.G.A. § 24-9-62); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486, 1994 Ga. App. LEXIS 1299 (1994), cert. denied, No. S95C0589, 1995 Ga. LEXIS 413 (Ga. Mar. 17, 1995) (decided under former O.C.G.A. § 24-9-62).

Questioning reluctant witnesses. — It is the privilege of counsel and the duty of courts to propound such questions to reluctant witnesses as will strip the witnesses of the subterfuges to which the witnesses resort to evade telling the truth. Kelly v. State, 19 Ga. 425, 1856 Ga. LEXIS 194 (1856) (decided under former law).

Repeated questions. — Trial court properly prevented a defendant from questioning a witness for the fourth time as to whether the witness would tell a lie after the witness had answered the first three times with some variant of the word "no." Butler v. State, 285 Ga. 518, 678 S.E.2d 92, 2009 Ga. LEXIS 296 (2009) (decided under former O.C.G.A. § 24-9-62).

Improper Questions

Protection of witness. — It is the duty of the trial court to protect the witness on cross-examination from being unfairly dealt with. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1704).

Testing intelligence, memory, accuracy, or veracity. — Question propounded by counsel on cross-examination is allowable for the purpose of testing the intelligence of the witness, or memory, accuracy, and veracity, but must not be argumentative. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-1704).

Illegal or immoral conduct. — Until a foundation showing the relevancy of a line of questioning is established so as to come within the "other crime" exception, one may not, under the guise of attacking the witness's credibility, ask questions suggesting illegal or immoral conduct in areas other than that before the court. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405, 1979 Ga. App. LEXIS 2778 (1979) (decided under former Code 1933, § 38-1704).

Accuracy. — When in a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130, 1931 Ga. App. LEXIS 537 (1931) (decided under former Code 1933, § 38-1704).

Veracity. — It is not proper that a question to a witness should assume that the witness has made a statement which, the witness says, the witness has not made. Sanderlin v. Sanderlin, 24 Ga. 583, 1858 Ga. LEXIS 249 (1858) (decided under former law).

When a witness testified that the witness had previously sworn in the case, a question by the counsel asking the witness if the witness had sworn the same then as the witness does now was properly objected to by the court. Andrews v. State, 118 Ga. 1, 43 S.E. 852, 1903 Ga. LEXIS 412 (1903) (decided under former Civil Code 1895, § 5281).

Chastity. — Witnesses cannot be impeached by showing their lack of chastity since this bears no relevance to the case. Smith v. State, 235 Ga. 327, 219 S.E.2d 440, 1975 Ga. LEXIS 868 (1975) (decided under former Code 1933, § 38-1704).

In a prosecution for rape, the trial court properly barred defendant's crossexamination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. Lee v. State, 241 Ga. App. 182, 525 S.E.2d 426 (decided under former O.C.G.A. § 24-9-62).

Life style. — It is improper argument to infer that witnesses are not worthy of belief because the witnesses are living in the same apartment while unmarried. Smith v. State, 235 Ga. 327, 219 S.E.2d 440, 1975 Ga. LEXIS 868 (1975) (decided under former Code 1933, § 38-1704).

Harsh or Insulting Demeanor

Speaking too loudly. — Trial court did not err by admonishing defendant's counsel for speaking too loudly when counsel questioned a 12-year old witness since the trial court did limit the type of questions that defendant could ask or in any way comment on the evidence, but rather, the trial court merely exercised the court's broad discretion to protect a witness from harsh or insulting demeanor. Schneider v. State, 267 Ga. App. 508, 603 S.E.2d 663, 2004 Ga. App. LEXIS 704 (2004) (decided under former O.C.G.A. § 24-9-62).

RESEARCH REFERENCES

ALR.

Abuse of witness by counsel as ground for new trial or reversal, 4 A.L.R. 414.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 A.L.R.3d 537.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 A.L.R.3d 304.

ARTICLE 3

USE OF SIGN LANGUAGE AND INTERMEDIARY INTERPRETER IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Cross references.

Arrest of hearing impaired persons, § 17-4-30.

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-6-650. State policy on hearing impaired persons.

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commissions, departments, and boards of this state and its political subdivisions unless qualified interpreters are available to assist such persons.

History.

Code 1981, § 24-6-650, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-100 are included in the annotations for this Code section.

Failing to object to presence of interpreters. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. Smith v. State, 284 Ga. 599, 669 S.E.2d 98, 2008 Ga. LEXIS 866 (2008) (decided under former O.C.G.A. § 24-9-100).

Adequate accommodation for defendant's hearing loss. — Defendant's claim of a due process violation because the defendant's hearing impairment prevented the defendant from comprehending the witnesses' testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant's conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. Neugent v. State, 294 Ga. App. 284, 668 S.E.2d 888, 2008 Ga. App. LEXIS 1171 (2008) (decided under former O.C.G.A. § 24-9-100).

Trial court did not err by not providing the appellant with adequate hearing assistance during the trial nor was trial counsel ineffective for failing to arrange adequate hearing assistance during the trial because the record reflected that the appellant did not request the assistance of a sign-language interpreter during pretrial proceedings or at trial and, instead, the trial court provided the appellant with headphones that amplified words spoken into microphones in the courtroom. Birdow v. State, 305 Ga. 48, 823 S.E.2d 736, 2019 Ga. LEXIS 64 (2019).

Defendant's pornography convictions were upheld because defendant did not establish a reasonable probability that the result of his trial would have been different had he been offered or provided with different or additional services for deaf and hard-of-hearing individuals. Hardy v. State, 363 Ga. App. 734, 872 S.E.2d 511, 2022 Ga. App. LEXIS 213 (2022).

24-6-651. Definitions.

As used in this article, the term:

(1) "Agency" means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of this state or any political subdivision thereof.

(2) "Court qualified interpreter" means any person licensed as an interpreter for the hearing impaired pursuant to Code Section 15-1-14.

(3) "Hearing impaired person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(4) "Intermediary interpreter" means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(5) "Proceeding" means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(6) "Qualified interpreter" means any person certified as an interpreter for hearing impaired persons by the Registry of Interpreters for the Deaf or a court qualified interpreter.

History.
Code 1981, § 24-6-651, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Adequate accommodation for defendant's hearing loss. — Trial court did not err by not providing appellant with adequate hearing assistance during trial nor was trial counsel ineffective for failing to arrange adequate hearing assistance during trial because the record reflected the appellant did not request assistance of a sign-language interpreter during pre-trial proceedings or at trial and, instead, the trial court provided the appellant with headphones that amplified words spoken into microphones in the courtroom. Birdow v. State, 305 Ga. 48, 823 S.E.2d 736, 2019 Ga. LEXIS 64 (2019).

Failure to provide accommodation to hearing impaired criminal defendant. — Defendant's pornography convictions were upheld because defendant did not establish a reasonable probability that the result of his trial would have been different had he been offered or provided with different or additional services for deaf and hard-of-hearing individuals. Hardy v. State, 363 Ga. App. 734, 872 S.E.2d 511, 2022 Ga. App. LEXIS 213 (2022).

24-6-652. Qualified interpreters at agency proceedings.

(a) The agency conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person who is below the age of 18 years is a party to the proceeding or a witness before the proceeding conducted by an agency whose parents are hearing impaired persons or whose guardian is a hearing impaired person.

(b) A hearing impaired person shall notify the agency not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person received notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, such person

shall notify the agency as soon as practicable after receiving such notice.

History.
Code 1981, § 24-6-652, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-102 are included in the annotations for this Code section.

Hearing impaired juror. — Subsection (a) of former O.C.G.A. § 24-9-102 did not require that a court provide an interpreter for a hearing impaired prospective juror. 1987 Op. Att'y Gen. No. U87-11 (decided under former O.C.G.A. § 24-9-102).

24-6-653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws.

(a) An arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever a hearing impaired person is arrested for allegedly violating any criminal law or ordinance of this state or any political subdivision thereof.

(b)(1) Except as provided in paragraph (2) of this subsection, no interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken upon a hearing impaired person unless a qualified interpreter has been provided or the law enforcement agency has taken such other steps as may be reasonable to accommodate such person's disability. No answer, statement, admission, or other evidence acquired through the interrogation of a hearing impaired person shall be admissible in any criminal or quasi-criminal proceedings unless such was knowingly and voluntarily given. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available, an arresting officer may interrogate or take a statement from such person, provided that if the hearing impaired person cannot hear spoken words with a hearing aid or other sound amplification device, such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

History.
Code 1981, § 24-6-653, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.
For casenote, "Rodriguez v. State: Addressing Georgia's Implied Consent Re-

quirements for Non-English-Speaking Drivers," see 54 Mercer L. Rev. 1253 (2003).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-103 are included in the annotations for this Code section.

Hearing impaired person arrested for driving under the influence was not entitled to a qualified interpreter before the person's rights under the implied consent law were conveyed to the person by the arresting officer. State v. Webb, 212 Ga. App. 872, 443 S.E.2d 630, 1994 Ga. App. LEXIS 427 (1994), cert. denied, No. S94C1221, 1994 Ga. LEXIS 1011 (Ga. Sept. 16, 1994), superseded by statute as stated in State v. Woody, 215 Ga. App. 448, 449 S.E.2d 615, 1994 Ga. App. LEXIS 1270 (1994) (decided under former O.C.G.A. § 24-9-103).

Giving implied consent card inadequate. — Qualified interpreter was required to be present to convey implied consent warnings and rights to an impaired person before any questioning or advice was given and an officer's giving the person an "implied consent card" to read and writing an explanation were not sufficient. Allen v. State, 218 Ga. App. 844, 463 S.E.2d 522, 1995 Ga. App. LEXIS 902 (1995) (decided under former O.C.G.A. § 24-9-103).

Impact of one-hour waiting period. — When police have made a request for an interpreter and one has been provided, after the one-hour waiting period elapses, the police may proceed with their investigation under the implied consent laws. If, however, the impaired person intelligently waives the one-hour requirement, the police may proceed with written interrogatories and the person should answer in writing, and then the police may proceed under the implied consent law. Allen v. State, 218 Ga. App. 844, 463 S.E.2d 522, 1995 Ga. App. LEXIS 902 (1995) (decided under former O.C.G.A. § 24-9-103).

Arresting officer failed to comply with statutory procedures. — DUI conviction was reversed when the arresting officer failed to comply with the statutory procedures for communicating with a hearing impaired detainee because the requirements in the statute were mandatory, and if not met, the evidence acquired was not admissible under former O.C.G.A. § 24-9-103. Yates v. State, 248 Ga. App. 35, 545 S.E.2d 169, 2001 Ga. App. LEXIS 165 (2001) (decided under former O.C.G.A. § 24-9-103).

Non hearing impaired defendant's equal protection argument failed when the defendant could not meet the defendant's burden to show that former O.C.G.A. § 24-9-103 was arbitrary or otherwise not rationally related to a legitimate state interest. Sisson v. State, 232 Ga. App. 61, 499 S.E.2d 422, 1998 Ga. App. LEXIS 574 (1998), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-9-103).

Failing to object to presence of interpreters. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. Smith v. State, 284 Ga. 599, 669 S.E.2d 98, 2008 Ga. LEXIS 866 (2008) (decided under former O.C.G.A. § 24-9-103).

Impact of failure to comply with procedure. — When the arresting officer failed to comply with the procedure in former O.C.G.A. § 24-9-103, such failure

rendered blood test results inadmissible. State v. Woody, 215 Ga. App. 448, 449 S.E.2d 615, 1994 Ga. App. LEXIS 1270 (1994), cert. denied, No. S95C0487, 1995 Ga. LEXIS 480 (Ga. Feb. 24, 1995) (decided under former O.C.G.A. § 24-9-103).

Application to Spanish speaking people. — Defendant's constitutional claims to the implied consent statutes were without merit since defendant, a Spanish speaking person, was not similarly situated to a hearing impaired person and, although similarly situated to an English-speaking person, there was a rational basis for requiring the implied consent warnings to be read in English. Rodriguez v. State, 275 Ga. 283, 565 S.E.2d 458, 2002 Ga. LEXIS 526, cert. denied, Rodriguez v. Georgia, 537 U.S. 1046, 123 S. Ct. 624, 154 L. Ed. 2d 519, 2002 U.S. LEXIS 8717 (2002) (decided under former O.C.G.A. § 24-9-103).

Waiver. — Trial court did not err by admitting into evidence a statement defendant gave after the defendant had been arrested and was in custody because the interpreter's involvement in the interview was harmless as the defendant waived the requirements of O.C.G.A. § 24-6-653 when the defendant and counsel required the follow-up meeting, the written statement the defendant gave was not translated by the interpreter, both the defendant and counsel clearly stated that the defendant wanted to give the statement, and it was plain from the video recording that the statement was freely and voluntarily made. Harris v. State, 307 Ga. 657, 837 S.E.2d 777, 2020 Ga. LEXIS 4 (2020).

24-6-654. Indigent hearing impaired defendants to be provided with interpreters.

(a) A court shall provide a court qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a public defender or court appointed legal counsel.

(b) The court qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel.

History.
Code 1981, § 24-6-654, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Adequate accommodation for defendant's hearing loss. — Trial court did not err by not providing the appellant with adequate hearing assistance during the trial nor was trial counsel ineffective for failing to arrange adequate hearing assistance during the trial because the record reflected that the appellant did not request the assistance of a sign-language interpreter during pre-trial proceedings or at trial and, instead, the trial court provided the appellant with headphones that amplified words spoken into microphones in the courtroom. Birdow v. State, 305 Ga. 48, 823 S.E.2d 736, 2019 Ga. LEXIS 64 (2019).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-108 are included in the annotations for this Code section.

Expenditure for interpreter for in-

digent criminal defendant. — When the superior court exercises the court's discretion to appoint an interpreter for an indigent criminal defendant who neither speaks nor understands English, the court has inherent power to assess the cost of the interpreter against the county. 1989 Op. Att'y Gen. No. U89-24 (decided under former O.C.G.A. § 24-9-108).

24-6-655. Waiver of right to interpreter.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be approved by the agency or law enforcement agency before which the hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver of the hearing impaired person's right to a qualified interpreter.

History.
Code 1981, § 24-6-655, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-6-656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, the agency or law enforcement agency shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency or law enforcement agency shall obtain the services of another qualified interpreter or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person.

History.
Code 1981, § 24-6-656, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Waiver. — Trial court did not err by admitting into evidence a statement defendant gave after the defendant had been arrested and was in custody because the interpreter's involvement in the interview was harmless as the defendant waived the requirements of O.C.G.A. § 24-6-656 when the defendant and counsel required the follow-up meeting, the written statement defendant gave was not translated by the interpreter, both the defendant and counsel clearly stated that the defendant wanted to give the statement, and it was plain from the video recording that the statement was freely and voluntarily made. Harris v. State, 307 Ga. 657, 837 S.E.2d 777, 2020 Ga. LEXIS 4 (2020).

24-6-657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons' testimony.

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he or she will interpret all communications in an accurate manner to the best of his or her skill and knowledge. The Supreme Court of Georgia may by rule of court prescribe the form of the oath for interpreters and intermediary interpreters for use in court and other judicial proceedings.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged or otherwise confidential, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever a qualified interpreter is required by this article, the agency or law enforcement agency shall not begin the proceeding or take any action until such interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency or law enforcement agency may, upon its own motion or upon motion of any party, witness, or participant, order that the testimony of the hearing impaired person be electronically and visually recorded. Any such recording may be used to verify the testimony given by the hearing impaired person.

History.
Code 1981, § 24-6-657, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-6-658. Compensation of interpreters.

Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency or law enforcement agency requesting such service.

History.
Code 1981, § 24-6-658, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-108 are included in the annotations for this Code section.

Expenditure for interpreter for in-

digent criminal defendant. — When the superior court exercises the court's discretion to appoint an interpreter for an indigent criminal defendant who neither speaks nor understands English, the court has inherent power to assess the cost of the interpreter against the county. 1989 Op. Att'y Gen. No. U89-24 (decided under former O.C.G.A. § 24-9-108).

CHAPTER 7

OPINIONS AND EXPERT TESTIMONY

Sec.		Sec.	
24-7-701.	Lay witness opinion testimony.	24-7-705.	Disclosure of facts or data underlying expert opinion.
24-7-702.	Expert opinion testimony; medical experts.	24-7-706.	Court appointed experts.
24-7-703.	Bases of expert opinion testimony.	24-7-707.	[Repealed] Expert opinion testimony in criminal proceedings.
24-7-704.	Ultimate issue opinion.		

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Garbage In, Garbage Out: Revising Strickland as Applied to Forensic Science Evidence," see 34 Ga. St. U.L. Rev. 893 (2018).

For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: A Discouraging Omen: A Critical Evaluation of the Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline," see 34 Ga. St. U.L. Rev. 1103 (2018).

For annual survey on evidence, see 71 Mercer L. Rev. 1021 (2020).

RESEARCH REFERENCES

ALR.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of prescription drugs generally, 38 A.L.R.7th Art. 7.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to prescription drug user concerning particular witnesses, 39 A.L.R.7th Art. 1.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to prescription drug user concerning particular drugs, 39 A.L.R.7th Art. 2.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of medical devices generally, 39 A.L.R.7th Art. 5.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to medical device user concerning particular witnesses, 39 A.L.R.7th Art. 8.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to medical device user concerning particular devices, 40 A.L.R.7th Art. 4.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of automobiles and other motor vehicles generally, 42 A.L.R.7th Art. 4.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to automobile and other motor vehicle user concerning particular witnesses, 43 A.L.R.7th Art. 2.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to automobile and other motor vehicle user concerning particular vehicles, 43 A.L.R.7th Art. 7.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of household items, 44 A.L.R.7th Art. 5.

Products liability: necessity and admissibility of expert or opinion evidence as to

causation of injury to user of electronic devices, 45 A.L.R.7th Art. 4.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of industrial equipment and chemicals, 46 A.L.R.7th Art. 8.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of agricultural equipment, chemicals, and feed, 48 A.L.R.7th Art. 4.

Products liability: necessity and admissibility of expert or opinion evidence as to causation of injury to user of sporting equipment, 49 A.L.R.7th Art. 1.

Low Copy Number DNA Testing, 52 A.L.R.7th 2.

Products Liability: Necessity and Admissibility of Expert or Opinion Evidence as to Causation of Injury to User of Food Products and Equipment, 52 A.L.R.7th 4.

Necessity of Expert Testimony on Grooming Behavior Involving Sexual Conduct with Child, 53 A.L.R.7th 3.

Products Liability: Necessity and Admissibility of Expert or Opinion Evidence as to Causation of Injury to User of Construction Products and Equipment, 53 A.L.R.7th 8.

Sufficiency of DNA Evidence for Weapons Possession Under State Law, 58 A.L.R.7th Art. 5.

Right of Indigent Defendant in State Criminal Case to Mitigation Expert, 58 A.L.R.7th Art. 6.

24-7-701. Lay witness opinion testimony.

(a) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness;

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

(3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

(b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion.

History.

Code 1981, § 24-7-701, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-9-66, which contained comparable provisions to subsection (b) of this Code section, as effective January 1, 2013, was derived from the decision in Central R.R. & Banking Co. v. Skellie, 86 Ga. 686, 12 S.E. 1017 (1891).

Cross references.

Opinion testimony by lay witnessess, Fed. R. Evid. 701.

Law reviews.

For comment on Caldwell v. State, 82 Ga. App. 480, 61 S.E.2d 543 (1950), see 14 Ga. B.J. 241 (1951).

For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953).

For comment on Corley v. Russell, 92 Ga. App. 417, 88 S.E.2d 470 (1955), holding that the opinion of an expert is inadmissible in a negligence action, as that is the very issue the jury is impaneled to try, see 18 Ga. B.J. 338 (1956).

For comment on Northwestern Univ. v. Crisp, 211 Ga. 636, 88 S.E.2d 26 (1955), concerning the admissibility of lay opinions regarding the sanity of a testator, see 19 Ga. B.J. 82 (1956).

For comment discussing the use of hypothetical questions to avoid the requirements of first-hand knowledge, see 19 Ga. B.J. 346 (1957).

For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12-year-old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958).

For comment on Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967).

For comment on Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967).

For note on admissibility of expert psychological testimony in Georgia, see 4 Ga. St. U.L. Rev. 117 (1988).

For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004); 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006).

For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005); and 57 Mercer L. Rev. 1083 (2006).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3811, former Code 1873, § 3867, former Code 1882, § 3867, former Civil Code 1895, § 5285, former Penal Code 1895, § 1021, former Penal Code 1910, § 1047, former Civil Code 1910, §§ 5874, 5875, former Code 1933, §§ 38-1708, 38-1709, and former O.C.G.A. §§ 24-9-65 and 24-9-66 are included in the annotations for this Code section.

In general. — Class of questions here referred to must be such as lie within the range of common opinion, that is, an opinion which is supposed to be within the common knowledge, experience, and education of men. Cone v. Davis, 66 Ga. App. 229, 17 S.E.2d 849, 1941 Ga. App. LEXIS 187 (1941) (decided under former Code 1933, § 38-1708).

Former Code 1933, § 38-1710 (see former O.C.G.A. § 24-9-67) dealt with science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1703 (see O.C.G.A. now § 24-7-701) dealt with opinions of lay witnesses. Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1708).

Former statute plainly referred to two separate and distinct situations, and declares different rules in reference thereto: (1) when the question under examination and to be decided by the jury shall be one of opinion; and (2) when the issue shall be as to the existence of a fact. Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945) (decided under former Code 1933, § 38-1708).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase

is within the sound discretion of the trial court. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1708).

History. — Former statute was but a compendium of the common law. Central R.R. & Banking Co. v. Kelly, 58 Ga. 107, 1877 Ga. LEXIS 18 (1877) (decided under former Code 1873, § 3867).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court. DOT v. McLaughlin, 163 Ga. App. 1, 292 S.E.2d 435, 1982 Ga. App. LEXIS 3179, cert. denied, 250 Ga. 10, 297 S.E.2d 217, 1982 Ga. LEXIS 970 (1982) (decided under former O.C.G.A. § 24-9-65).

Witness's opinion must be witness's own and the witness cannot act as a mere conduit for the opinions of others. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981) (decided under former O.C.G.A. § 24-9-65).

Qualifying words. — An answer of a witness is not to be struck out because the witness qualified the witness's statement of fact by such statements as "I would judge," and "I think," nor because the witness used the word "opinion," since, from the context, the witness was merely qualifying the witness's statement of fact. Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808, 1944 Ga. App. LEXIS 355 (1944) (decided under former Code 1933, § 38-1708).

Plaintiff may not establish variance from standard of care in medical or legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. Savannah Valley Prod. Credit Ass'n v. Cheek, 248 Ga. 745, 285 S.E.2d 689, 1982 Ga. LEXIS 650 (1982) (decided under former O.C.G.A. § 24-9-65).

Status of witness as lay or expert goes not to admissibility, but credibility. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, 1992 Ga. App. LEXIS 397 (1992), cert. denied, No. S92C0727, 1992 Ga. LEXIS 376 (Ga. Apr. 30, 1992) (decided under former O.C.G.A. § 24-9-65).

Weight of opinion evidence is matter for jury. — Probative value and weight to be given the evidence and the credibility of the witness are matters to be determined by the jury. Blackman v. State, 80 Ga. 785, 7 S.E. 626, 1888 Ga. LEXIS 254 (1888), overruled in part, Corbin v. State, 211 Ga. 400, 86 S.E.2d 221, 1955 Ga. LEXIS 336 (1955) (decided under former Code 1882, § 3867); Caswell v. State, 5 Ga. App. 583, 63 S.E. 566 (1909) (decided under former Penal Code 1895, § 1021); Glover v. State, 15 Ga. App. 44, 82 S.E. 602, 1914 Ga. App. LEXIS 12 (1914) (decided under former Penal Code 1910, § 1047); Hayes v. State, 16 Ga. App. 20, 84 S.E. 497, 1915 Ga. App. LEXIS 485 (1915) (decided under former Penal Code 1910, § 1047); Bugg v. State, 17 Ga. App. 211, 86 S.E. 405, 1915 Ga. App. LEXIS 310 (1915) (decided under former Code 1933, § 38-1708); Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796, 1935 Ga. App. LEXIS 489 (1935) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399, 1942 Ga. LEXIS 642 (1942) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945) (decided under former Code 1933, § 38-1708); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364, 1945 Ga. App. LEXIS 717 (1945) (decided under former Code 1933, § 38-1708); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454, 1973 Ga. App. LEXIS 1468 (1973) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127, 1976 Ga. App. LEXIS 1931 (1976) (decided under former Code 1933, § 38-1708); Tam v. Newsome, 141 Ga. App. 76, 232 S.E.2d 613, 1977 Ga. App. LEXIS 1771 (1977) (decided under former Code 1933, § 38-1708).

Jury instructions. — In the absence of a timely written request, the mere fact that opinion evidence was introduced does not require an instruction as to the weight of such evidence. Fountain v. Smith, 103

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Ga. App. 192, 118 S.E.2d 852, 1961 Ga. App. LEXIS 906 (1961) (decided under former Code 1933, § 38-1708); Vandable v. State, 127 Ga. App. 306, 193 S.E.2d 197, 1972 Ga. App. LEXIS 865 (1972) (decided under former Code 1933, § 38-1708).

Harmless error. — Expression of the opinion of a witness amounting to conclusion is harmless since there is ample evidence to support the inference. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1708).

Assuming that the lead investigator's testimony about the direction in which one of the bullets that struck the victim traveled was erroneously admitted, the error was harmless as the jury reasonably rejected the defendant's claims of self-defense and voluntary manslaughter because the evidence of the defendant's guilt showed that the defendant, who was jealous of the victim and had threatened to make the victim disappear, approached the victim, pulled out a gun, and fired four shots at the victim, who turned to run and pulled out a gun only after the victim had been shot; and the defendant did not contend that the prosecutor emphasized that testimony during closing argument. Saxton v. State, 313 Ga. 48, 867 S.E.2d 130, 2021 Ga. LEXIS 732 (2021), cert. denied, 142 S. Ct. 1461, 212 L. Ed. 2d 548, 2022 U.S. LEXIS 1805 (2022).

Statement not an opinion. — Building contractor was not asked to give contractor's opinion but was asked for the contractor's impression, i.e., the contractor's understanding, of what a bid was to be based upon. This evidence was properly admitted to explain the contractor's future conduct and show contractor's understanding of the parties' oral agreement. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134, 1990 Ga. App. LEXIS 173 (1990) (decided under former O.C.G.A. § 24-9-65).

Investigator's testimony that early in the interrogation the defendant was playing games and did not want to give the police the full truth was admissible as the challenged evidence was not inadmissible opinion evidence under former O.C.G.A. § 24-9-65, but was relevant as to why the interview lasted several hours in response to a defense implication that the defendant was subjected to an overly burdensome interrogation. Jordan v. State, 293 Ga. 619, 748 S.E.2d 876, 2013 Ga. LEXIS 719 (2013) (decided under former O.C.G.A. § 24-9-65).

Question not eliciting opinion. — State's question to victim's mother as to whether she believed victim's earlier allegation that she was molested by her natural father did not elicit inadmissible opinion evidence, and did not constitute impermissible bolstering of victim's credibility. Yebra v. State, 206 Ga. App. 12, 424 S.E.2d 318, 1992 Ga. App. LEXIS 1555 (1992), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-9-65).

Opinion Testimony Admissible

1. In General

Admissibility generally. — Opinion testimony is admissible when the question under examination is one of opinion. Alexander v. State, 118 Ga. 26, 44 S.E. 851, 1903 Ga. LEXIS 421 (1903) (decided under former Civil Code 1895, § 5285); Klein v. State, 104 Ga. App. 126, 121 S.E.2d 253, 1961 Ga. App. LEXIS 622 (1961) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1708).

Opinions, even expert opinions, are allowed by way of exception to the general rule that a witness is to give facts observed, but not the expert's conclusions from those facts, and opinions are to be allowed only when there is real helpfulness or necessity to resort to the opinions. Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364, 1945 Ga. App. LEXIS 717 (1945) (decided under former Code 1933, § 38-1708).

Testimony which in the main is a mere statement of fact may be admitted, even though it rests to a certain extent on the application of legal principles. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS

1951 (1980) (decided under former Code 1933, § 38-1708).

Defendant failed to show that defense counsel rendered ineffective assistance, in violation of U.S. Const., amend. 6, on the basis that counsel did not object when one of the victims testified that defendant stabbed the victim on purpose and not by accident, as there was no support for the proposition that such a statement was inadmissible opinion testimony under former O.C.G.A. § 24-9-65; even if it were deemed inadmissible, no prejudice was shown to defendant. Brown v. State, 275 Ga. App. 99, 619 S.E.2d 789, 2005 Ga. App. LEXIS 899 (2005), cert. denied, No. S06C0003, 2006 Ga. LEXIS 53 (Ga. Jan. 17, 2006) (decided under former O.C.G.A. § 24-9-65).

State of mind or mental condition generally. — Person's state of mind or mental condition is properly the subject of opinion testimony, and after narrating the facts and circumstances upon which the person's conclusion is based, a nonexpert witness may express the witness's opinion as to the state of mind or mental condition of another. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838, 1985 Ga. App. LEXIS 2818 (1985) (decided under former O.C.G.A. § 24-9-65).

Evidence not challenged. — An opinionative statement of a witness, even though it was a conclusion unsupported by such facts as were necessary to show its correctness, when no objection was urged thereto upon the trial, cannot be challenged for the first time upon review as incompetent and insufficient. Bailey v. Newberry, 52 Ga. App. 693, 184 S.E. 357, 1935 Ga. App. LEXIS 5 (1935) (decided under former Code 1933, § 38-1708); Johnson v. Woodward Lumber Co., 76 Ga. App. 152, 45 S.E.2d 294, 1947 Ga. App. LEXIS 395 (1947) (decided under former Code 1933, § 38-1708); Gazaway v. Secured Ins. Co., 109 Ga. App. 428, 136 S.E.2d 531, 1964 Ga. App. LEXIS 887 (1964) (decided under former Code 1933, § 38-1708).

After providing supporting facts. — Witness may give witness's belief or opinion when it is in connection with, and a mental deduction from, the facts which come within the witness's knowledge and to which the witness has testified. McGinnis v. State, 31 Ga. 236, 1860 Ga. LEXIS 321 (1860) (decided under former law); Executors of Riggins v. Brown, 12 Ga. 271, 1852 Ga. LEXIS 126 (1852) (decided under former law); Macon & W.R.R. v. Johnson, 38 Ga. 409, 1868 Ga. LEXIS 106 (1868), superseded by statute as stated in Garrett v. NationsBank, N.A. (South), 228 Ga. App. 114, 491 S.E.2d 158, 1997 Ga. App. LEXIS 1046 (1997) (decided under former Code 1868, § 3811); Ryder v. State, 100 Ga. 528, 28 S.E. 246, 1897 Ga. LEXIS 94 (1897) (decided under former Penal Code 1895, § 1021); Yates v. State, 127 Ga. 813, 56 S.E. 1017, 1907 Ga. LEXIS 483 (1907) (decided under former Penal Code 1895, § 1021); Cranshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S.E. 222, 1907 Ga. App. LEXIS 245 (1907) (decided under former Civil Code 1895, § 5285); Glover v. State, 129 Ga. 717, 59 S.E. 816, 1907 Ga. LEXIS 564 (1907) (decided under former Penal Code 1895, § 1021); Ray v. State, 142 Ga. 655, 83 S.E. 518, 1914 Ga. LEXIS 490 (1914) (decided under former Penal Code 1910, § 1047); Bennett v. American Bank & Trust Co., 162 Ga. 718, 134 S.E. 781, 1926 Ga. LEXIS 268 (1926) (decided under former Civil Code 1910, § 5847); Hill v. State, 50 Ga. App. 154, 177 S.E. 270, 1934 Ga. App. LEXIS 671 (1934) (decided under former Code 1933, § 38-1708); Roberts v. Hardin, 180 Ga. 757, 180 S.E. 634, 180 S.E. 757, 1935 Ga. LEXIS 553 (1935) (decided under former Code 1933, § 38-1708); Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597, 1936 Ga. App. LEXIS 427 (1936) (decided under former Code 1933, § 38-1708); Pollard v. Page, 56 Ga. App. 503, 193 S.E. 117, 1937 Ga. App. LEXIS 147 (1937) (decided under former Code 1933, § 38-1708); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808, 1944 Ga. App. LEXIS 355 (1944) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945) (decided under former

In General (Cont'd)

Code 1933, § 38-1708); Beasley v. Burt, 201 Ga. 144, 39 S.E.2d 51, 1946 Ga. LEXIS 435 (1946) (decided under former Code 1933, § 38-1708); Sellers v. Johnson, 207 Ga. 166, 60 S.E.2d 352, 1950 Ga. LEXIS 409 (1950) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19, 1954 Ga. LEXIS 483 (1954) (decided under former Code 1933, § 38-1708); Atlantic Coast Line R.R. v. Godard, 211 Ga. 373, 86 S.E.2d 311, 1955 Ga. LEXIS 329 (1955); Adams v. Adams, 213 Ga. 875, 102 S.E.2d 566, 1958 Ga. LEXIS 311 (1958) (decided under former Code 1933, § 38-1708); Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576, 1960 Ga. App. LEXIS 1027 (1960) (decided under former Code 1933, § 38-1708); Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351, 1962 Ga. App. LEXIS 602 (1962) (decided under former Code 1933, § 38-1708); English v. Shivers, 220 Ga. 737, 141 S.E.2d 443, 1965 Ga. LEXIS 620 (1965) (decided under former Code 1933, § 38-1708); Atlanta Stove Works, Inc. v. Hollon, 112 Ga. App. 862, 146 S.E.2d 358, 1965 Ga. App. LEXIS 854 (1965) (decided under former Code 1933, § 38-1708); Sasser v. Coastal States Life Ins. Co., 113 Ga. App. 17, 147 S.E.2d 5, 1966 Ga. App. LEXIS 948 (1966) (decided under former Code 1933, § 38-1708); Southern Ry. v. Grogan, 113 Ga. App. 451, 148 S.E.2d 439, 1966 Ga. App. LEXIS 1091 (1966) (decided under former Code 1933, § 38-1708); Griffin v. State, 123 Ga. App. 820, 182 S.E.2d 498, 1971 Ga. App. LEXIS 1400 (1971) (decided under former Code 1933, § 38-1708); Lashley v. Ford Motor Co., 359 F. Supp. 363, 1972 U.S. Dist. LEXIS 12178 (M.D. Ga. 1972), aff'd, 480 F.2d 158, 1973 U.S. App. LEXIS 9695 (5th Cir. 1973); State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96, 1973 Ga. App. LEXIS 906 (1973) (decided under former Code 1933, § 38-1708); Spencer v. State, 236 Ga. 697, 224 S.E.2d 910, 1976 Ga. LEXIS 996, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 302, 1976 U.S. LEXIS 3422 (1976); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127, 1976 Ga. App. LEXIS 1931 (1976) (decided under former Code 1933, § 38-1708); Gaines v. DOT, 140 Ga. App. 741, 231 S.E.2d 829, 1976 Ga. App. LEXIS 1617 (1976) (decided under former Code 1933, § 38-1708); Allen v. State, 152 Ga. App. 481, 263 S.E.2d 259, 1979 Ga. App. LEXIS 2970 (1979) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1708); Classic Restorations, Inc. v. Bean, 155 Ga. App. 694, 272 S.E.2d 557, 1980 Ga. App. LEXIS 2746 (1980) (decided under former Code 1933, § 38-1708); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94, 1981 Ga. App. LEXIS 1688 (1981) (decided under former O.C.G.A. § 24-9-65); Peterson v. RTM Mid-America, Inc., 209 Ga. App. 691, 434 S.E.2d 521, 1993 Ga. App. LEXIS 966 (1993), cert. denied, No. S93C1771, 1993 Ga. LEXIS 1064 (Ga. Nov. 5, 1993) (decided under former O.C.G.A. § 24-9-65).

When facts cannot be demonstrated. — Opinion of a nonexpert witness may be received in evidence if the witness observed the matter in issue and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them to equally well draw the inference. Pride v. State, 133 Ga. 438, 66 S.E. 259 (1909) (decided under former Penal Code 1895, § 1021); Taylor v. State, 135 Ga. 622, 70 S.E. 237, 1911 Ga. LEXIS 24 (1911) (decided under former Civil Code 1910, § 5874); Jackson v. State, 148 Ga. 519, 97 S.E. 525, 1918 Ga. LEXIS 418 (1918) (decided under former Civil Code 1910, § 5874); Jefferson v. State, 56 Ga. App. 383, 192 S.E. 644, 1937 Ga. App. LEXIS 368 (1937) (decided under former Code 1933, § 38-1708); Harris v. State, 188 Ga. 745, 4 S.E.2d 651, 1939 Ga. LEXIS 609 (1939) (decided under former Code 1933, § 38-1708); Tillman v. State, 61 Ga. App. 724, 7 S.E.2d 285, 1940 Ga. App. LEXIS 241 (1940) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945) (decided under former Code 1933, § 38-1708);

McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19, 1954 Ga. LEXIS 483 (1954) (decided under former Code 1933, § 38-1708); Wilson v. Garrett, 92 Ga. App. 820, 90 S.E.2d 74, 1955 Ga. App. LEXIS 720 (1955) (decided under former Code 1933, § 38-1708); Atlantic Coast Line R.R. v. Blount, 116 Ga. App. 86, 156 S.E.2d 409, 1967 Ga. App. LEXIS 710 (1967) (decided under former Code 1933, § 38-1708).

Opinions from lay witnesses. — Lay witnesses may relate their opinions as to the existence of a fact so long as the opinions are based upon the witnesses' own observations, provided that the witnesses cannot adequately relate those observations without also relating a personal opinion formed through such observations. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (decided under former O.C.G.A. § 24-9-65).

2. Specific Examples

Appearance and conduct. — See Perdue v. State, 135 Ga. 277, 69 S.E. 184, 1910 Ga. LEXIS 508 (1910) (decided under former Penal Code 1910, § 1047); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94, 1981 Ga. App. LEXIS 1688 (1981) (decided under former O.C.G.A. § 24-9-65); Roberts v. State, 232 Ga. App. 745, 503 S.E.2d 614 (decided under former O.C.G.A. § 24-9-65); Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (decided under former O.C.G.A. § 24-9-65).

Trial court properly admitted a witness's testimony about the witness's observations of defendant's appearance and behavior and the assumptions that the witness made based upon such observations; the witness was not asked to, nor did the witness, express an opinion about whether defendant shot either or both of the victims or whether defendant possessed a firearm during the commission of any felony. Harris v. State, 279 Ga. 304, 612 S.E.2d 789, 2005 Ga. LEXIS 345 (2005) (decided under former O.C.G.A. § 24-9-65).

Cause of collision. — See Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7, 1981 Ga. App. LEXIS 2547 (1981) (decided under former Code 1933, § 38-1708).

Cause of death. — See Everett v. State, 62 Ga. 65, 1878 Ga. LEXIS 300 (1878) (decided under former Code 1873, § 3867); McLain v. State, 71 Ga. 279, 1883 Ga. LEXIS 179 (1883) (decided under former Code 1882, § 3867); Lanier v. State, 141 Ga. 17, 80 S.E. 5, 1913 Ga. LEXIS 290 (1913) (decided under former Penal Code 1910, § 1047); Bullard v. Metropolitan Life Ins. Co., 31 Ga. App. 641, 122 S.E. 75, 1924 Ga. App. LEXIS 113 (1924) (decided under former Civil Code 1910, § 5874).

Jail nurse's testimony. — Jail nurse's testimony regarding the defendant's alleged mental deficiencies and seizure disorder was not improper and therefore the prosecutor did not commit misconduct by eliciting the testimony because the testimony was rationally based on the nurse's personal observations of the defendant and the nurse's experience with other patients and did not require scientific, technical, or other specialized knowledge. The nurse's testimony was also relevant to two issues in the case: what defendant's mental condition was and whether the defendant suffered from a seizure disorder. Moody v. State, No. S23P0046, 2023 Ga. LEXIS 98 (Ga. May 16, 2023).

Jail officer's testimony. — Jail officer's testimony that the defendant "liked to plan his seizures" was not improper and therefore the prosecutor did not commit misconduct by eliciting the testimony because the testimony was based on the officer's personal observations of and experiences with the defendant and did not require scientific, technical, or other specialized knowledge, and it was relevant to an issue in the case — whether defendant was malingering. Moody v. State, No. S23P0046, 2023 Ga. LEXIS 98 (Ga. May 16, 2023).

Correctional officer's testimony. — With regard to a defendant's habeas corpus challenge to a finding that the defendant was not mentally retarded, a trial court did not err in the admission of the testimony of a correctional officer, who was called by the state to testify regarding the defendant's behavior while incarcerated with regard to testimony that the defendant was not housed in the area of the institution with those inmates the officer had been told were mentally retarded, as the officer's testimony was relevant to the issue of the defendant's adap-

Specific Examples (Cont'd)

tive skills and was not unduly prejudicial because the officer clarified that the officer was not diagnosing anyone. The testimony also did not constitute an impermissible lay opinion because the officer was never asked for, nor did the officer ever give, an opinion as to the ultimate issue, namely whether the defendant was or was not mentally retarded. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31, 2007 Ga. LEXIS 838 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, 2008 U.S. LEXIS 3194 (2008), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-65).

Identification of defendant by confidential informant and detective via video and photographs. — Trial court did not abuse the court's discretion, nor commit plain error, in allowing the confidential informant (CI) and the detective to identify the defendant in videos and photographs because in addition to interacting with the defendant over the course of several drug transactions, the CI and the detective testified to knowing the defendant for a long time, thus, there was some basis for concluding that they were in a better position to correctly identify the defendant than the jurors. Goforth v. State, 360 Ga. App. 832, 861 S.E.2d 800, 2021 Ga. App. LEXIS 400 (2021).

Officer's identification of defendant in social media photographs. — Trial court did not abuse the court's discretion in allowing an officer to identify the defendant in the social media photographs presented at trial because the officer established years of familiarity with the defendant, and that the officer became familiar with the defendant in the officer's capacity as a law enforcement officer, or even in the officer's capacity as a gang expert, did not prevent the officer from providing identification testimony as a lay witness. Bullard v. State, 307 Ga. 482, 837 S.E.2d 348, 2019 Ga. LEXIS 843 (2019).

Detective's testimony. — Defendant failed to show that trial counsel was ineffective for failing to object when the detectives testified about what the detectives observed in surveillance videos because the defendant failed to show that the statements would have been excluded as the trial court would not have erred by determining that the detectives' statements were rationally based on inferences the detectives formed by reviewing the videos and other evidence and that the detectives' testimony would have been helpful to determine who could be seen in the videos and thus who committed the crimes. Anderson v. State, 313 Ga. 178, 869 S.E.2d 401, 2022 Ga. LEXIS 33 (2022).

Damages. — See Atlanta S.R.R. v. Walker, 93 Ga. 462, 21 S.E. 48, 1893 Ga. LEXIS 459 (1893) (decided under former Code 1882, § 3867); City Elec. Ry. v. Smith, 121 Ga. 663, 49 S.E. 724, 1905 Ga. LEXIS 35 (1905) (decided under former Civil Code 1895, § 5285).

Owners failed to present competent evidence of damages under O.C.G.A. § 11-2-714(2) because an owner's affidavit lacked a proper foundation as the owner failed to testify that any of the owner's past purchases included the purchase of a vehicle with the defects at issue, the owner did not have any specialized knowledge, and the owner's testimony was not supported by objective information on vehicles found in published valuation guides, such as the "Blue Book"; the value of the defective vehicle could not be established by the repair invoices as few, if any, of the repairs reflected costs incurred by the owners. Hill v. Mercedes-Benz USA, LLC, 274 Ga. App. 826, 619 S.E.2d 353, 2005 Ga. App. LEXIS 853 (2005) (decided under former O.C.G.A. § 24-9-65).

Dangerousness. — Testimony of a golf course architect as to the dangerousness of a golf cart path was the architect's opinion and was admissible as such. American Golf Corp. v. Manley, 222 Ga. App. 7, 473 S.E.2d 161 (decided under former O.C.G.A. § 24-9-65).

Defendant's actions not accidental. — Any error in allowing a police officer to testify to the officer's opinion that defendant did not accidentally accelerate and hit another officer's car was harmless as the officer could properly testify that defendant could have escaped without driving straight at the other officer and the

officer's car, and there was ample evidence to support the officer's opinion as two officers testified that defendant accelerated straight toward the officer and the officer's car, even though there was room for defendant to drive away without hitting the officer's car, a videotape was played for the jury, and there was testimony that the videotape showed that when defendant accelerated, defendant aimed defendant's car straight toward the officer and the officer's car. Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898, 2004 Ga. App. LEXIS 563 (2004) (decided under former O.C.G.A. § 24-9-65).

Distance. — See Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796, 1935 Ga. App. LEXIS 489 (1935) (decided under former Code 1933, § 38-1708).

Divorce. — See West v. West, 199 Ga. 378, 34 S.E.2d 545, 1945 Ga. LEXIS 322 (1945) (decided under former Code 1933, § 38-1708).

Driving too fast for conditions testimony from expert. — In a personal injury case brought against a driver, a police officer, testifying as an expert on automobile collisions, stated in response to a hypothetical question that the driver was driving too fast for conditions if the driver was driving 55 miles per hour. As the officer did not offer an ultimate opinion as to whether the driver was at fault in the accident or was negligent, the officer's testimony was admissible. Kennebeck v. Glover, 294 Ga. App. 822, 670 S.E.2d 459, 2008 Ga. App. LEXIS 1252 (2008), cert. denied, No. S09C0499, 2009 Ga. LEXIS 127 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-9-65).

Deputy's testimony on steering of vehicle. — Despite the deputy's testimony concerning the deputy's general training, the deputy simply made layperson observations concerning the codefendant's inability to maneuver the vehicle while protruding from the driver's window and shooting at the deputy. That testimony was based upon the deputy's personal observations during the pursuit, was helpful to determine whether the defendant participated in the codefendant's crimes, and was not necessarily based on any particular specialized knowledge. Best v. State, 355 Ga. App. 881, 846 S.E.2d 157, 2020 Ga. App. LEXIS 400 (2020).

Embarrassment. — See Glover v. State, 15 Ga. App. 44, 82 S.E. 602, 1914 Ga. App. LEXIS 12 (1914) (decided under former Civil Code 1910, § 5874).

Excitement and alarm. — See Roberts v. State, 123 Ga. 146, 51 S.E. 374, 1905 Ga. LEXIS 402 (1905) (decided under former Penal Code 1895, § 1021).

Defense requiring expert testimony. — While the defendant was correct that in 2013 there was no pre-trial notice requirement when an insanity-type defense, such as involuntary intoxication, was to be pursued exclusively through lay witnesses, the defense depended on more than lay-witness testimony as the defendant intended to call an emergency-department physician who treated the defendant on the night of the defendant's arrest; and the anticipated purpose of the physician's testimony was in exploring what testing the physician ordered, what substances the physician did not test for, and whether the defendant could have been on those substances, which required scientific or specialized knowledge, and veered into the realm of expert-witness testimony. McKelvin v. State, 305 Ga. 39, 823 S.E.2d 729, 2019 Ga. LEXIS 61 (2019).

Expert witnesses. — See Hook v. Stovall, Dunn & Co., 30 Ga. 418, 1860 Ga. LEXIS 110 (1860) (decided under former law); Allison v. Wall, 121 Ga. 822, 49 S.E. 831, 1905 Ga. LEXIS 85 (1905) (decided under former Civil Code 1895, § 5285); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Parker, 114 Ga. App. 270, 150 S.E.2d 875, 1966 Ga. App. LEXIS 713 (1966) (decided under former Code 1933, § 38-1708); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, 1968 Ga. LEXIS 763, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455, 1968 U.S. LEXIS 200 (1968) (decided under former Code 1933, § 38-1708); Smith v. State, 247 Ga. 612, 277 S.E.2d 678, 1981 Ga. LEXIS 781 (1981), superseded by statute as stated in Gibbs v. State, 340 Ga. App. 723, 798 S.E.2d 308, 2017 Ga. App. LEXIS 126 (2017) (decided under former O.C.G.A. § 24-9-65).

Expert on similarly situated driver. — In a spouse's wrongful death suit

Specific Examples (Cont'd)

against the Georgia Department of Transportation, the trial court did not err by allowing the spouse's expert to testify as to whether a driver in the victim's position could discern that the victim was approaching a more major road and would therefore be required to yield. In light of the witness's familiarity with the intersection gained during a site visit, as well as the photographs presented, it could not be said that the trial court abused the court's discretion in allowing the witness to testify as to a similarly-situated driver's opportunity to discern the nature of the upcoming intersection. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898, 2008 Ga. App. LEXIS 874 (2008) (decided under former O.C.G.A. § 24-9-65).

Failure to object to expert testimony. — Even if trial counsel provided ineffective assistance of counsel by failing to object to alleged improper opinion testimony by the district attorney's investigator, the defendant could not demonstrate prejudice as the only check-related charge for which the jury found the defendant guilty was the check issued to the victim by a third-party, not a check drawn on the victim's account and completed by another. Bell v. State, 362 Ga. App. 631, 869 S.E.2d 576, 2022 Ga. App. LEXIS 72 (2022).

Fair trial issue. — See Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576, 1960 Ga. App. LEXIS 1027 (1960) (decided under former Code 1933, § 38-1708).

Gunshot wounds. — See Nunn v. State, 143 Ga. 451, 85 S.E. 346, 1915 Ga. LEXIS 480 (1915) (decided under former Penal Code 1910, § 1047); Harris v. State, 74 Ga. App. 614, 40 S.E.2d 664, 1946 Ga. App. LEXIS 597 (1946) (decided under former Code 1933, § 38-1708).

Trial counsel was not ineffective for failing to object that the investigating detective improperly opined that the defendant had shot the defendant's self in the leg while fleeing the crime scene as the detective's lay opinion was rationally based on inferences the detective formed from a review of the evidence and the detective's prior observations of gunshot wounds, which did not require scientific, technical, or other specialized knowledge; and the detective's testimony was helpful in determining how the defendant was injured on the night of the crime. Harris v. State, 309 Ga. 599, 847 S.E.2d 563, 2020 Ga. LEXIS 582 (2020).

Health of witness. — See Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E.2d 339, 1943 Ga. App. LEXIS 226 (1943) (decided under former Code 1933, § 38-1708).

Hearsay. — See Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22, 1974 Ga. App. LEXIS 981 (1974) (decided under former Code 1933, § 38-1708).

Hypothetical questions. — See Taylor v. Warren, 175 Ga. 800, 166 S.E. 225, 1932 Ga. LEXIS 337 (1932) (decided under former Civil Code 1910, § 5874); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, 1968 Ga. LEXIS 763, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455, 1968 U.S. LEXIS 200 (1968) (decided under former Code 1933, § 38-1708); Lashley v. Ford Motor Co., 359 F. Supp. 363, 1972 U.S. Dist. LEXIS 12178 (M.D. Ga. 1972), aff'd, 480 F.2d 158, 1973 U.S. App. LEXIS 9695 (5th Cir. 1973) (decided under former Code 1933, § 38-1708); Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309, 1980 Ga. App. LEXIS 2024 (1980) (decided under former Code 1933, § 38-1708); Xiong v. Landford, 226 Ga. App. 126, 485 S.E.2d 534 (decided under former O.C.G.A. § 24-9-65).

Identity. — Under former O.C.G.A. § 24-9-65, a lay witness who had been a friend of the defendant's for 22 years could give an opinion as to whether the defendant was the person pictured in a videotape. The quality of the videotape and still photos taken from the videotape was such that it was not within the ability of average jurors to decide the issue for themselves; the witness testified that the defendant's appearance had changed in the four years between the recording and the trial; and the witness's testimony was based on the witness's personal observations of the defendant over the years. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755, 2008 Ga. LEXIS 257, cert. denied, 555 U.S. 871, 129 S. Ct. 169, 172 L. Ed. 2d 122, 2008 U.S. LEXIS 6812 (2008) (decided under former O.C.G.A. § 24-9-65).

Trial court did not abuse its discretion in admitting a deputy's lay opinion testimony identifying the defendant on a surveillance videotape because the deputy's testimony was sufficient to identify the defendant as the perpetrator of the crime pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), and the testimony was probative of a fact in issue and based on the deputy's observations of the defendant at the time the surveillance photograph was taken; because the deputy testified to having previously worked at the police department and had met the defendant on several occasions, the deputy was in a unique position to recognize the defendant, given the deputy's familiarity with the defendant's personal appearance before and at the time of the offense. Strickland v. State, 302 Ga. App. 44, 690 S.E.2d 638, 2010 Ga. App. LEXIS 30 (2010) (decided under former O.C.G.A. § 24-9-65).

In a malice murder case, the trial court did not err in denying the defendant's motion in limine to exclude testimony by lay witnesses identifying the defendant as one of the perpetrators in the video surveillance from the motel parking lot and photographs because the video recording was of such poor quality that the average juror would not be able to distinguish the faces by themselves; the witnesses, who had known the defendant prior to the crime, were in a better position to correctly identify the defendant in the video than the jurors; and the identification testimony of the defendant's ex-girlfriend was required to identify the defendant in the video as the defendant's appearance had changed since the time of the crime. Glenn v. State, 302 Ga. 276, 806 S.E.2d 564, 2017 Ga. LEXIS 874 (2017).

Trial court did not abuse the court's discretion in denying the defendant's motion in limine and allowing a lay witness statement identifying the defendant in a video because of the poor quality of the recording and the fact that the lay witness had known the defendant prior to the crimes and was familiar with the defendant's appearance. Glenn v. State, 306 Ga. 550, 832 S.E.2d 433, 2019 Ga. LEXIS 520 (2019).

Identification by victim through use of videotape. — In the defendant's trial for the armed robbery of three taxi drivers, the trial court did not err in allowing one victim to identify the defendant from videos from other taxis under O.C.G.A. § 24-7-701 because the defendant had grown a beard at the time of trial, and the driver testified that the driver recognized and memorized voices as a result of the driver's job and that the driver recognized the man in the videos as the man who robbed the driver. Rice v. State, 351 Ga. App. 96, 830 S.E.2d 429, 2019 Ga. App. LEXIS 388 (2019), cert. denied, No. S19C1434, 2020 Ga. LEXIS 66 (Ga. Jan. 27, 2020).

Identity of material. — See Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808, 1944 Ga. App. LEXIS 355 (1944) (decided under former Code 1933, § 38-1708); Wortham v. State, 158 Ga. App. 19, 279 S.E.2d 287, 1981 Ga. App. LEXIS 2053 (1981) (decided under former O.C.G.A. § 24-9-65); Wright v. State, 220 Ga. App. 233, 469 S.E.2d 381 (decided under former O.C.G.A. § 24-9-65).

Intoxication. — See Pierce v. State, 53 Ga. 365, 1874 Ga. LEXIS 487 (1874) (decided under former Code 1873, § 3867); Suggs v. State, 9 Ga. App. 830, 72 S.E. 287, 1911 Ga. App. LEXIS 362 (1911) (decided under former Penal Code 1910, § 1047); Grier v. State, 72 Ga. App. 633, 34 S.E.2d 642, 1945 Ga. App. LEXIS 658 (1945) (decided under former Code 1933, § 38-1708); Fountain v. Smith, 103 Ga. App. 192, 118 S.E.2d 852, 1961 Ga. App. LEXIS 906 (1961) (decided under former Code 1933, § 38-1708).

When the plaintiff sued the defendant for expenses and damages that the plaintiff and the plaintiff's daughter incurred as a result of an accident, the trial court did not abuse the court's discretion in allowing a witness's opinion testimony because the witness's opinion that the defendant was impaired was helpful to understand the witness's testimony that the witness recommended to the responding officer that the officer perform a toxicology screen on the defendant; and because the witness's opinion was based on the witness's personal observations that the defendant was driving erratically prior to the accident. Dagne v. Schroeder, 336 Ga. App. 36, 783 S.E.2d 426, 2016 Ga. App. LEXIS 107 (2016).

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Mental condition. — See Dennis v. Weekes, 51 Ga. 24, 1874 Ga. LEXIS 48 (1874) (decided under former Code 1873, § 3867); Strickland v. State, 137 Ga. 115, 72 S.E. 922, 1911 Ga. LEXIS 321 (1911) (decided under former Penal Code 1910, § 1047); Goss v. State, 14 Ga. App. 402, 81 S.E. 247, 1914 Ga. App. LEXIS 268 (1914) (decided under former Penal Code 1910, § 1047); Dyar v. Dyar, 161 Ga. 615, 131 S.E. 535, 1926 Ga. LEXIS 311 (1926) (decided under former Civil Code 1910, § 5874); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225, 1932 Ga. LEXIS 337 (1932) (decided under former Civil Code 1910, § 5874); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Espy v. Preston, 199 Ga. 608, 34 S.E.2d 705, 1945 Ga. LEXIS 407 (1945) (decided under former Code 1933, § 38-1708); Jarrard v. State, 206 Ga. 112, 55 S.E.2d 706, 1949 Ga. LEXIS 416 (1949) (decided under former Code 1933, § 38-1708); English v. Shivers, 220 Ga. 737, 141 S.E.2d 443, 1965 Ga. LEXIS 620 (1965) (decided under former Code 1933, § 38-1708); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, 1968 Ga. LEXIS 763, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455, 1968 U.S. LEXIS 200 (1968) (decided under former Code 1933, § 38-1708); Dix v. State, 238 Ga. 209, 232 S.E.2d 47, 1977 Ga. LEXIS 965 (1977), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781, 1980 U.S. LEXIS 1291 (1980) (decided under former Code 1933, § 38-1708); Currelley v. State, 145 Ga. App. 29, 243 S.E.2d 307, 1978 Ga. App. LEXIS 1849 (1978) (decided under former Code 1933, § 38-1708); Moses v. State, 245 Ga. 180, 263 S.E.2d 916, 1980 Ga. LEXIS 732 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60, 1980 U.S. LEXIS 2962 (1980), overruled in part, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490, 1993 Ga. LEXIS 326 (1993) (decided under former Code 1933, § 38-1708); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94, 1981 Ga. App. LEXIS 1688 (1981) (decided under former O.C.G.A. § 24-9-65).

In a transfer hearing, a child's mental condition may be established by the testimony of a nonexpert witness, such as a court services worker, provided the witness gives sufficient facts and circumstances to establish the basis for the witness's opinion. L.K.F. v. State, 173 Ga. App. 770, 328 S.E.2d 394, 1985 Ga. App. LEXIS 1686 (1985) (decided under former O.C.G.A. § 24-9-65).

Odor identification. — See Green v. State, 125 Ga. 742, 54 S.E. 724, 1906 Ga. LEXIS 254 (1906) (decided under former Penal Code 1895, § 1021).

Personal injury damages. — See Black & White Cab Co. v. Clark, 67 Ga. App. 170, 19 S.E.2d 570, 1942 Ga. App. LEXIS 350 (1942) (decided under former Code 1933, § 38-1708); Moore v. Graham, 221 Ga. App. 616, 472 S.E.2d 152 (decided under former O.C.G.A. § 24-9-65).

Quality of product. — See Wilcox v. State, 8 Ga. App. 536, 69 S.E. 1086, 1911 Ga. App. LEXIS 25 (1911) (decided under former Penal Code 1910, § 1047).

Rape. — See Epps v. State, 216 Ga. 606, 118 S.E.2d 574, 1961 Ga. LEXIS 294, cert. denied, 368 U.S. 849, 82 S. Ct. 81, 7 L. Ed. 2d 47, 1961 U.S. LEXIS 629 (1961) (decided under former Code 1933, § 38-1708).

Sanity. — See Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164, 1981 Ga. App. LEXIS 1939 (1981) (decided under former O.C.G.A. § 24-9-65).

Shovel expert. — Defendant failed to show that trial counsel was ineffective for failing to object to testimony by a GBI agent that, based on soil patterns, the victim's grave had been dug with a flat shovel because such an objection would have been meritless as the agent's visual observations and conclusions drawn from those observations did not depend on scientific, technical, or other specialized knowledge. Anglin v. State, 312 Ga. 503, 863 S.E.2d 148, 2021 Ga. LEXIS 628 (2021).

Size. — See Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 1947 Ga. LEXIS 534 (1947) (decided under former O.C.G.A. § 24-9-65).

Shoe size is matter within the common knowledge, experience, and education of mankind. Buchanan v. State, 168 Ga. App. 365, 308 S.E.2d 860, 1983 Ga. App. LEXIS 2773 (1983) (decided under former O.C.G.A. § 24-9-65).

Solvency or insolvency. — See Crawford v. Andress, 6 Ga. 244, 1849 Ga. LEXIS 34 (1849) (decided under former law); Cabaniss v. State, 8 Ga. App. 129, 68 S.E. 849, 1910 Ga. App. LEXIS 76 (1910) (decided under former Penal Code 1910, § 1047); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, 1917 Ga. App. LEXIS 712 (1917); Lamb v. Sewell, 20 Ga. App. 250, 92 S.E. 1011, 1917 Ga. App. LEXIS 843 (1917) (decided under former Penal Code 1910, § 1047); Gay v. Smith, 51 Ga. App. 615, 181 S.E. 129, 1935 Ga. App. LEXIS 422 (1935) (decided under former Code 1933, § 38-1708); Bell v. State, 52 Ga. App. 249, 183 S.E. 93, 1935 Ga. App. LEXIS 125 (1935) (decided under former Code 1933, § 38-1708); Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785, 1948 Ga. App. LEXIS 735 (1948) (decided under former Code 1933, § 38-1708); Western & Atl. R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302, 1957 Ga. App. LEXIS 925 (1957) (decided under former Code 1933, § 38-1708); Hatcher v. State, 175 Ga. App. 768, 334 S.E.2d 709, 1985 Ga. App. LEXIS 2830 (1985) (decided under former O.C.G.A. § 24-9-65).

Speed. — Layman's opinion of speed is admissible when the layman has testified to the facts upon which the opinion is based. Wright v. State, 205 Ga. App. 149, 421 S.E.2d 331, 1992 Ga. App. LEXIS 1092 (1992), cert. denied, No. S92C1414, 1992 Ga. LEXIS 789 (Ga. Oct. 1, 1992) (decided under former O.C.G.A § 24-9-65).

In a wrongful death and negligence action, in which the decedent was riding a motorcycle when the decedent collided with an automobile occupied by the defendants, the trial court did not err in allowing witnesses to testify about their estimates of the motorcycle's speed because their opinions were based on their experience riding motorcycles, their experience hearing and seeing motorcycles being ridden at high rates of speed, and the manner in which the decedent's motorcycle passed the witnesses' vehicles and crested hills. Clack v. Hasnat, 354 Ga. App. 502, 841 S.E.2d 210, 2020 Ga. App. LEXIS 186 (2020).

Stopping distance of vehicle. — See Fouts v. Builders Transp., Inc., 222 Ga. App. 568, 474 S.E.2d 746 (decided under former O.C.G.A § 24-9-65).

Trial court did not err in admitting the testimony of the retired police officer as to the police officer's opinion about the most reliable means of suspect identification as that testimony, which was lay opinion testimony, was based on the police officer's own experience and observations, and referred to a matter within the scope of the average juror's knowledge. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777, 2002 Ga. LEXIS 954 (2002) (decided under former O.C.G.A. § 24-9-65).

Testimony from school counselor in sexual offense case. — In an action for child molestation, aggravated child molestation, and aggravated sexual battery, the trial court did not err in finding that the school counselor's testimony was admissible as lay opinion evidence because the school counselor offered opinions based on first-hand knowledge and observations as a member of the Latino community and a counselor for at-risk Latino youths and the testimony would be helpful to the jury in judging the victim's credibility and was not based on scientific, technical, or specialized knowledge. Martinez-Arias v. State, 356 Ga. App. 423, 846 S.E.2d 448, 2020 Ga. App. LEXIS 426 (2020), aff'd, 313 Ga. 276, 869 S.E.2d 501, 2022 Ga. LEXIS 26 (2022).

Time. — See Allison v. Wall, 121 Ga. 822, 49 S.E. 831, 1905 Ga. LEXIS 85 (1905) (decided under former Civil Code 1895, § 5285); Georgia Ry. & Power Co. v. Belote, 20 Ga. App. 454, 93 S.E. 62, 1917 Ga. App. LEXIS 932 (1917), superseded by statute as stated in Decatur's Best Taxi Serv., Inc. v. Smith, 282 Ga. App. 731, 639 S.E.2d 482, 2006 Ga. App. LEXIS 1399 (2006) (decided under former Civil Code 1910, § 5874).

Ultimate issue. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Weather Bros. Transf. Co. v. Jarrell, 72 Ga. App. 317, 33 S.E.2d 805, 1945 Ga. App. LEXIS 575 (1945) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127, 1976 Ga. App. LEXIS 1931 (1976) (decided under former Code 1933, § 38-1708); Secu-

Specific Examples (Cont'd)

rity Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1708).

Trial court did not err in allowing the witnesses in defendant's trial for possession of illegal gambling machines to testify that the machines were "gambling devices," as the jury had to determine whether defendant sold a machine that detectives testified was set up for gambling to a witness, who then sold it to the detectives, and whether that machine was illegal under O.C.G.A. § 16-12-20(2); describing the machines the detectives seized as "gambling machines" did not answer those questions. Jones v. State, 276 Ga. App. 810, 625 S.E.2d 4, 2005 Ga. App. LEXIS 1236 (2005), cert. denied, No. S06C0809, 2006 Ga. LEXIS 327 (Ga. Apr. 25, 2006) (decided under former O.C.G.A § 24-9-65).

At the defendant's murder trial, the witnesses' opinion testimony that the defendant had killed the victims was rationally based on the witnesses' perception and helpful to understanding the witnesses' testimony, and therefore was admissible under O.C.G.A. § 24-7-701; even if the witnesses' opinion addressed an ultimate issue, the testimony was not objectionable under O.C.G.A. § 24-7-704(a). One witness saw the defendant with the victims shortly before the victims were killed, and the defendant told the other that the defendant had "offed them boys." Grier v. State, 305 Ga. 882, 828 S.E.2d 304, 2019 Ga. LEXIS 324 (2019).

Undue influence. — See Howell v. Howell, 59 Ga. 145, 1877 Ga. LEXIS 218 (1877) (decided under former Code 1873, § 3867).

Unusual or special situation. — See Allison v. Wall, 121 Ga. 822, 49 S.E. 831, 1905 Ga. LEXIS 85 (1905) (decided under former Civil Code 1895, § 5285).

Value. — See Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399, 1942 Ga. LEXIS 642 (1942) (decided under former Code 1933, § 38-1708); Firemen's Ins. Co. v. Allmond, 105 Ga. App. 763, 125 S.E.2d 545, 1962 Ga. App. LEXIS 1032 (1962) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Parker, 114 Ga. App. 270, 150 S.E.2d 875, 1966 Ga. App. LEXIS 713 (1966) (decided under former Code 1933, § 38-1708); Edwards v. State, 116 Ga. App. 80, 156 S.E.2d 518, 1967 Ga. App. LEXIS 704 (1967) (decided under former Code 1933, § 38-1708); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527, 1967 Ga. App. LEXIS 830 (1967) (decided under former Code 1933, § 38-1708); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456, 1970 Ga. App. LEXIS 1280 (1970) (decided under former Code 1933, § 38-1708); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504, 1972 Ga. App. LEXIS 767 (1972) (decided under former Code 1933, § 38-1708); Hasty v. Meaders, 130 Ga. App. 62, 202 S.E.2d 263, 1973 Ga. App. LEXIS 1226 (1973) (decided under former Code 1933, § 38-1708); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22, 1974 Ga. App. LEXIS 981 (1974) (decided under former Code 1933, § 38-1708); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687, 1975 Ga. App. LEXIS 2201 (1975) (decided under former Code 1933, § 38-1708); Gaines v. DOT, 140 Ga. App. 741, 231 S.E.2d 829, 1976 Ga. App. LEXIS 1617 (1976) (decided under former Code 1933, § 38-1708); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720, 1978 Ga. App. LEXIS 2689 (1978) (decided under former Code 1933, § 38-1708); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289, 1978 Ga. App. LEXIS 2623 (1978) (decided under former Code 1933, § 38-1708); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876, 1980 Ga. App. LEXIS 2707 (1980) (decided under former Code 1933, § 38-1708); Four Oaks Properties, Inc. v. Carusi, 156 Ga. App. 422, 274 S.E.2d 783, 1980 Ga. App. LEXIS 3053 (1980) (decided under former Code 1933, § 38-1708); Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480, 1981 Ga. App. LEXIS 1974 (1981) (decided under former O.C.G.A § 24-9-65).

In a condemnation proceeding, in which the land owner maintained that the land's highest and best use was as a wetlands mitigation bank, while the land owner's

president had no specific expertise in wetlands mitigation, the owner's 30 years experience in real estate development and the owner's familiarity with the land's topography and hydrology qualified the owner to give an opinion as to its value as a mitigation bank. DOT v. Southeast Timberlands, Inc., 263 Ga. App. 805, 589 S.E.2d 575, 2003 Ga. App. LEXIS 1265 (2003), cert. denied, No. S04C0450, 2004 Ga. LEXIS 231 (Ga. Mar. 1, 2004) (decided under former O.C.G.A § 24-9-65).

Value of trust assets. — Probate court did not err in allowing a co-executor's husband to testify to an opinion about the value of real property contributed to the trust investments at issue because one need not be an expert or dealer in the article in question to testify to its value if an opportunity for forming a correct opinion has been had, and the husband had testified that to the familiarity with the properties at issue and with comparable properties, which were considered in reaching the opinion. In re Estate of Hubert, 325 Ga. App. 276, 750 S.E.2d 511, 2013 Ga. App. LEXIS 986 (2013), cert. denied, No. S14C0579, 2014 Ga. LEXIS 523 (Ga. June 16, 2014).

Visibility. — See Carnes v. Woodall, 233 Ga. App. 797, 505 S.E.2d 537 (decided under former O.C.G.A § 24-9-65).

Opinion Testimony Not Admissible

1. In General

Intent or purpose contrary to statute. — Witness may not state a purpose or an intended result of a levy, seizure, and notice which purpose or intended result is contrary to the provisions of a plain statute, or constructions thereof which have been made by the courts. Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177, 1972 Ga. App. LEXIS 838 (1972) (decided under former Code 1933, § 38-1708).

Existence of a fact. — When the issue shall be to the existence of a fact, opinions generally are inadmissible. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576, 1960 Ga. App. LEXIS 1027 (1960) (decided under former Code 1933, § 38-1708).

Conclusion cannot be based on hearsay statements. — Police officer who investigates an accident cannot base the officer's opinion as to the manner in which the accident occurred upon hearsay statements which the officer receives during an investigation unless the statements are a part of the res gestae. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7, 1981 Ga. App. LEXIS 2547 (1981) (decided under former O.C.G.A § 24-9-65).

Conclusions. — It is error to permit a witness over timely objection to testify to a conclusion. Hammock v. McBride, 6 Ga. 178, 1849 Ga. LEXIS 22 (1849) (decided under former law); Franklin v. Mayor of Macon, 12 Ga. 257, 1852 Ga. LEXIS 121 (1852) (decided under former law); Parker v. Chambers, 24 Ga. 518, 1858 Ga. LEXIS 244 (1858) (decided under former law); Howell v. Howell, 59 Ga. 145, 1877 Ga. LEXIS 218 (1877) (decided under former Code 1873, § 3867); Atlanta Masonic Temple Co. v. City of Atlanta, 162 Ga. 244, 133 S.E. 864, 1926 Ga. LEXIS 156 (1926) (decided under former Civil Code 1910, § 5874); Central of Ga. Ry. v. Evans, 35 Ga. App. 438, 134 S.E. 122, 1926 Ga. App. LEXIS 423 (1926) (decided under former Civil Code 1910, § 5874); Granger v. National Convoy & Trucking Co., 62 Ga. App. 294, 7 S.E.2d 915, 1940 Ga. App. LEXIS 643 (1940) (decided under former Code 1933, § 38-1708); Cooper v. State, 197 Ga. 611, 30 S.E.2d 177, 1944 Ga. LEXIS 306 (1944) (decided under former Code 1933, § 38-1708); Sanders v. Chandler, 71 Ga. App. 337, 30 S.E.2d 813, 1944 Ga. App. LEXIS 359 (1944) (decided under former Code 1933, § 38-1708); Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1708); Brown-Rogers-Dixson Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702, 1949 Ga. App. LEXIS 669 (1949) (decided under former Code 1933, § 38-1708); Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, 1962 Ga. App. LEXIS 704, rev'd in part, 218 Ga. 525, 128 S.E.2d 926, 1962 Ga. LEXIS 552 (1962) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96, 1973 Ga. App. LEXIS 906 (1973) (decided under former Code 1933, § 38-1708); Marshall v. State, 154 Ga. App. 327, 268 S.E.2d 383, 1980 Ga. App.

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LEXIS 2147 (1980) (decided under former Code 1933, § 38-1708).

Witness cannot state witness's mere conclusion that others than the witness know a fact. Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177, 1972 Ga. App. LEXIS 838 (1972) (decided under former Code 1933, § 38-1708).

Witness cannot state a mere conclusion that others than the witness knew a particular fact since it is not established that the witness was qualified to testify as to the knowledge of others. Marshall v. State, 154 Ga. App. 327, 268 S.E.2d 383, 1980 Ga. App. LEXIS 2147 (1980) (decided under former Code 1933, § 38-1708).

Witness invading province of jury. — Witness cannot state an opinion or conclusion where the data or facts are such that a jury can make the jury's own calculation or conclusions. Blackman v. State, 80 Ga. 785, 7 S.E. 626, 1888 Ga. LEXIS 254 (1888), overruled in part, Corbin v. State, 211 Ga. 400, 86 S.E.2d 221, 1955 Ga. LEXIS 336 (1955) (decided under former Code 1882, § 3867); Robinson v. State, 128 Ga. 254, 57 S.E. 315, 1907 Ga. LEXIS 78 (1907) (decided under former Penal Code 1895, § 1021); Caswell v. State, 5 Ga. App. 483, 63 S.E. 566, 1909 Ga. App. LEXIS 33 (1909) (decided under former Penal Code 1895, § 1021); Glover v. State, 15 Ga. App. 44, 82 S.E. 602, 1914 Ga. App. LEXIS 12 (1914) (decided under former Penal Code 1910, § 1047); Hayes v. State, 16 Ga. App. 20, 84 S.E. 497, 1915 Ga. App. LEXIS 485 (1915) (decided under former Penal Code 1910, § 1047); Bugg v. State, 17 Ga. App. 211, 86 S.E. 405, 1915 Ga. App. LEXIS 310 (1915) (decided under former Penal Code 1910, § 1047); Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796, 1935 Ga. App. LEXIS 489 (1935) (decided under former Code 1933, § 38-1708); Harris v. State, 188 Ga. 245, 4 S.E.2d 651 (1939) (decided under former Code 1933, § 38-1708); Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214, 1941 Ga. App. LEXIS 367 (1941) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399, 1942 Ga. LEXIS 642 (1942) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945) (decided under former Code 1933, § 38-1708); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364, 1945 Ga. App. LEXIS 717 (1945) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19, 1954 Ga. LEXIS 483 (1954) (decided under former Code 1933, § 38-1708); Klein v. State, 104 Ga. App. 126, 121 S.E.2d 253, 1961 Ga. App. LEXIS 622 (1961) (decided under former Code 1933, § 38-1708); Gazaway v. Secured Ins. Co., 109 Ga. App. 428, 136 S.E.2d 531, 1964 Ga. App. LEXIS 887 (1964) (decided under former Code 1933, § 38-1708); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454, 1973 Ga. App. LEXIS 1468 (1973) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127, 1976 Ga. App. LEXIS 1931 (1976) (decided under former Code 1933, § 38-1708); Tam v. Newsome, 141 Ga. App. 76, 232 S.E.2d 613, 1977 Ga. App. LEXIS 1771 (1977) (decided under former Code 1933, § 38-1708).

2. Specific Examples

Accident victims. — In an action against the Georgia Department of Transportation alleging negligent placement of safety devices at an intersection, the trial court properly excluded the testimony of a judge who was injured in an accident at an intersection located in the same road construction project where the plaintiffs' family members died, because the judge's accident occurred at a different intersection and the judge was not familiar with the intersection where the plaintiffs' family members died. McCorkle v. DOT, 257 Ga. App. 397, 571 S.E.2d 160, 2002 Ga. App. LEXIS 1078 (2002) (decided under former O.C.G.A. § 24-9-65).

Conclusion of law. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374, 1979 Ga. App. LEXIS 2553 (1979), overruled in part, Copeland v. State, 160 Ga. App. 786,

287 S.E.2d 120, 1982 Ga. App. LEXIS 1687 (1982) (decided under former Code 1933, § 38-1708); Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1708).

While a sheriff deputy's opinion that the defendant's string of harassing phone messages amounted to aggravated stalking in violation of a protective order was inadmissible testimony on an ultimate issue, the error was harmless given the defendant's own testimony establishing the elements of the offense without dispute. Shafer v. State, 285 Ga. App. 748, 647 S.E.2d 274, 2007 Ga. App. LEXIS 498 (2007), cert. denied, No. S07C1498, 2007 Ga. LEXIS 642 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-9-65).

Plaintiff was incompetent to answer the question of what conduct of the defendant, in her opinion, constituted conspiracy to defraud. See Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475, 1983 Ga. App. LEXIS 2078 (1983) (decided under former O.C.G.A. § 24-9-65).

Contents of bottles. — See Gales v. State, 14 Ga. App. 450, 81 S.E. 364, 1914 Ga. App. LEXIS 290 (1914) (decided under former Penal Code 1910, § 1047).

Damages. — See Central R.R. & Banking Co. v. Kelly, 58 Ga. 107, 1877 Ga. LEXIS 18 (1877) (decided under former Code 1873, § 3867); Carter v. Carter Elec. Co., 156 Ga. 297, 119 S.E. 737, 1923 Ga. LEXIS 241 (1923) (decided under former Civil Code 1910, § 5874).

Experts. — Opinion of an expert accident reconstructionist was not admissible as lay testimony since the expert testified that it was based upon the expert's study of photographs of damaged cars; since the same photographs were before the jury, it was not necessary for the witness to relate the witness's personal opinion in order to adequately relate that information. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (decided under former O.C.G.A. § 24-9-65).

Expert opinion inadmissible as supporting facts not yet in record. — Trial court correctly ruled that a psychologist could not testify that at the time the defendant committed several crimes the defendant did not know right from wrong because the defendant was under the influence of the drug GHB because at the time the defendant sought to present that testimony, there was no evidence that the defendant had actually ingested the drug or was under the drug's influence. Kirkland v. State, 292 Ga. App. 73, 663 S.E.2d 408, 2008 Ga. App. LEXIS 690 (2008) (decided under former O.C.G.A. § 24-9-65).

Hair analysis results cannot be used to make positive identification of an individual. Hudson v. State, 166 Ga. App. 660, 305 S.E.2d 409, 1983 Ga. App. LEXIS 2288 (1983) (decided under former O.C.G.A. § 24-9-65).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. Nichols v. State, 221 Ga. App. 600, 473 S.E.2d 491, 1996 Ga. App. LEXIS 497 (1996), cert. denied, No. S96C1548, 1996 Ga. LEXIS 1030 (Ga. Sept. 20, 1996) (decided under former O.C.G.A. § 24-9-65).

Inference from facts in testimony of others. — See Hook v. Stovall, Dunn & Co., 30 Ga. 418, 1860 Ga. LEXIS 110 (1860) (decided under former law); Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S.E. 964, 1901 Ga. LEXIS 284 (1901) (decided under former Civil Code 1895, § 5285); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225, 1932 Ga. LEXIS 337 (1932) (decided under former Civil Code 1910, § 5874); Murray v. State, 201 Ga. 201, 39 S.E.2d 842, 1946 Ga. LEXIS 478 (1946) (decided under former Code 1933, § 38-1708); Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174, 1947 Ga. App. LEXIS 593 (1947) (decided under former Code 1933, § 38-1708).

Inference requiring mixture of law and fact. — See Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1708).

Intent of deceased. — See Hudgins v. State, 2 Ga. 173, 1847 Ga. LEXIS 25

Specific Examples (Cont'd)

(1847) (decided under former law); Hawkins v. State, 25 Ga. 207, 1858 Ga. LEXIS 47 (1858) (decided under former law).

Intent or purpose of another. — See Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177, 1972 Ga. App. LEXIS 838 (1972) (decided under former Code 1933, § 38-1708).

Lay opinions. — Trial court did not err when the court did not permit a defense witness to give opinion testimony regarding an experiment the witness conducted at the scene of the crime because the issue of the visibility of the bulge produced by an object placed under carpeting since the defendant allegedly hid a murder weapon at the scene of the crime was not one of opinion. Jones v. State, 277 Ga. 36, 586 S.E.2d 224, 2003 Ga. LEXIS 722 (2003) (decided under former O.C.G.A. § 24-9-65).

Because the personal opinions of three potential witnesses were based on the defendant's work, and the limited interactions attendant thereto, and the witnesses could not offer any opinion and had no personal knowledge of the defendant's general reputation in the community, the failure to call the witnesses at trial for that purpose did not prejudice defendant's case. Thomas v. State, 282 Ga. 894, 655 S.E.2d 599, 2008 Ga. LEXIS 11 (2008) (decided under former O.C.G.A. § 24-9-65).

Measurement of missing article. — See Williams v. State, 145 Ga. 177, 88 S.E. 958, 1916 Ga. LEXIS 227 (1916) (decided under former Penal Code 1910, § 1047).

Mental condition. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385, 1942 Ga. LEXIS 445 (1942) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19, 1954 Ga. LEXIS 483 (1954) (decided under former Code 1933, § 38-1708).

Paranoia. — Since paranoia is a medical term relating to a mental disorder, only a qualified expert such as a psychiatrist, psychologist, or medical doctor would be competent to diagnose and define such a mental disorder. Ellis v. State, 168 Ga. App. 757, 309 S.E.2d 924, 1983 Ga. App. LEXIS 3438 (1983) (decided under former O.C.G.A. § 24-9-65).

Proving opinions of others. — See Wynes v. State, 182 Ga. 434, 185 S.E. 711, 1936 Ga. LEXIS 378 (1936) (decided under former Code 1933, § 38-1708).

School counselor's opinion not admissible. — Supreme Court of Georgia did not see how a jury reasonably could infer from the school counselor's testimony that the victim's decision about the timing of the outcry, including suffering nearly three years of abuse before revealing it, was affected (let alone motivated) by the cultural attitudes the school counselor testified to having observed and studied. Martinez-Arias v. State, 313 Ga. 276, 869 S.E.2d 501, 2022 Ga. LEXIS 26 (2022).

Self-defense. — On a trial for murder, as to the defendant's theory of self-defense, apprehensions or opinions of third parties, that the accused is in imminent danger, are not relevant. But facts from which apprehension might reasonably be inferred, as distinct from opinions, are relevant when stated or shown by third parties. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882, 1983 Ga. LEXIS 674 (1983) (decided under former O.C.G.A. § 24-9-65).

Suicide. — See Trammell v. State, 18 Ga. App. 487, 89 S.E. 606, 1916 Ga. App. LEXIS 1037 (1916) (decided under former Civil Code 1910, § 5874).

"Understanding" of ownership. — See Brooks v. State, 19 Ga. App. 3, 90 S.E. 989, 1916 Ga. App. LEXIS 3 (1916) (decided under former Penal Code 1910, § 1047).

Ultimate issue. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897, 1939 Ga. LEXIS 711 (1939) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1708).

Witness's medical condition. — Any statement of "opinion" made by or attributed to a nonexpert workers' compensation claimant which was to the effect that

the claimant's CT scan of October 1983 (which was not in evidence) may have showed a second herniated disc at L4 was nonprobative hearsay as to that purported fact. Under former O.C.G.A. § 24-9-65, lay opinions must be based upon facts, not hearsay. Fidelity & Cas. Ins. Co. v. Cigna/Pacific Employers Ins. Co., 180 Ga. App. 159, 348 S.E.2d 702, 1986 Ga. App. LEXIS 2095 (1986) (decided under former O.C.G.A. § 24-9-65).

Market Value Evidence

"Market value" defined. — What is meant by market value of property is what it will bring when sold for cash by a person ready and willing to sell, but under no obligation to sell, and when bought by a person ready and willing to buy, but under no obligation to buy. Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80, 1954 Ga. App. LEXIS 862 (1954) (decided under former Code 1933, § 38-1709).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court. DOT v. McLaughlin, 163 Ga. App. 1, 292 S.E.2d 435, 1982 Ga. App. LEXIS 3179, cert. denied, 250 Ga. 10, 297 S.E.2d 217, 1982 Ga. LEXIS 970 (1982) (decided under former O.C.G.A. § 24-9-66).

1. Determination of Market Value

In general. — Opinion evidence is admissible when it is necessary for the jury to determine the reasonable value of services or property. Allison v. Wall, 121 Ga. 822, 49 S.E. 831, 1905 Ga. LEXIS 85 (1905) (decided under former Civil Code 1895, § 5285).

Market value may be established by either direct or circumstantial evidence. Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1708); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289, 1978 Ga. App. LEXIS 2623 (1978) (decided under former Code 1933, § 38-1708).

Question of value is a matter of opinion under former O.C.G.A. § 24-9-66, and as to questions of opinion, the witness may swear to the witness's opinion or belief, giving the witness's reasons therefor. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480, 1981 Ga. App. LEXIS 1974 (1981) (decided under former O.C.G.A. § 24-9-66).

Hearsay evidence. — See Garner v. Gwinnett County, 105 Ga. App. 714, 125 S.E.2d 563, 1962 Ga. App. LEXIS 1014 (1962) (decided under former Code 1933, § 38-1709); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22, 1974 Ga. App. LEXIS 981 (1974) (decided under former Code 1933, § 38-1709); Gibbs v. Clay, 137 Ga. App. 381, 224 S.E.2d 46, 1976 Ga. App. LEXIS 2454 (1976) (decided under former Code 1933, § 38-1709); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468, 1976 Ga. App. LEXIS 2530 (1976) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35, 1979 Ga. App. LEXIS 2308 (1979) (decided under former Code 1933, § 38-1709); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298, 1980 Ga. App. LEXIS 2018 (1980) (decided under former Code 1933, § 38-1709); Apostle v. Prince, 158 Ga. App. 56, 279 S.E.2d 304, 1981 Ga. App. LEXIS 2070 (1981) (decided under former O.C.G.A. § 24-9-66).

Market value may rest wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion. B & L Serv. Co. v. Gerson, 167 Ga. App. 679, 307 S.E.2d 262, 1983 Ga. App. LEXIS 2575 (1983) (decided under former O.C.G.A. § 24-9-66).

Debtor's testimony, standing alone, was insufficient under former O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market

Determination of Market Value (Cont'd)

for such cars, or other relevant factors to be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878, 2011 Ga. App. LEXIS 32 (2011) (decided under former O.C.G.A. § 24-9-66).

It is peculiarly within the province of the jury to determine market value. National Ben Franklin Fire Ins. Co. v. Purvis, 61 Ga. App. 674, 7 S.E.2d 296, 1940 Ga. App. LEXIS 220 (1940) (decided under former Code 1933, § 38-1709); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399, 1942 Ga. LEXIS 642 (1942) (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1709); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956) (decided under former Code 1933, § 38-1709); Youngblood v. Ruis, 96 Ga. App. 290, 99 S.E.2d 714, 1957 Ga. App. LEXIS 562 (1957) (decided under former Code 1933, § 38-1709); Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377, 1960 Ga. App. LEXIS 1020 (1960) (decided under former Code 1933, § 38-1709); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43, 1979 Ga. App. LEXIS 2005 (1979) (decided under former Code 1933, § 38-1709); Varnedoe v. Singleton, 154 Ga. App. 332, 268 S.E.2d 387, 1980 Ga. App. LEXIS 2150 (1980) (decided under former Code 1933, § 38-1709); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905, 1980 Ga. App. LEXIS 2405 (1980) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876, 1980 Ga. App. LEXIS 2707 (1980) (decided under former Code 1933, § 38-1709).

Jury question as to weight of value evidence. — When defendants contended that plaintiff's testimony as to the value of plaintiff's motor vehicle was without the proper foundation and had no probative value, but plaintiff had related plaintiff's knowledge and familiarity with classic type vehicles, described the condition of the vehicle, and introduced photographs of the damage to the vehicle, it was held that after the plaintiff gave the basis for plaintiff's opinion, the weight and credibility of the testimony was for the jury, and since the witness had an opportunity for forming a correct opinion, the evidence was sufficient for the jury's consideration. Long v. Marion, 182 Ga. App. 361, 355 S.E.2d 711, 1987 Ga. App. LEXIS 1690, aff'd, 257 Ga. 431, 360 S.E.2d 255, 1987 Ga. LEXIS 901 (1987) (decided under former O.C.G.A. § 24-9-66).

Qualification of witnesses. — Competency of a witness to testify an opinion of market value is a matter for the discretion of the trial court. Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1912 Ga. LEXIS 500 (1912) (decided under former Civil Code 1910, § 5874); Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897, 1924 Ga. App. LEXIS 823 (1924) (decided under former Civil Code 1910, § 5874); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363, 1934 Ga. App. LEXIS 696 (1934) (decided under former Code 1933, § 38-1708); United States ex rel. TVA v. Phillips, 50 F. Supp. 454, 1943 U.S. Dist. LEXIS 2669 (D. Ga. 1943); (decided under former Code 1933, § 38-1708); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468, 1976 Ga. App. LEXIS 2530 (1976) (decided under former Code 1933, § 38-1708); DOT v. Great S. Enters., Inc., 137 Ga. App. 710, 225 S.E.2d 80, 1976 Ga. App. LEXIS 2581 (1976) (decided under former Code 1933, § 38-1708).

It is not a ground for objection to testimony that a witness, after testifying to a fact, testifies on cross-examination to facts that tend to show that the witness knows little or nothing about the facts as to which the witness previously testified on direct examination. Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298, 1980 Ga. App. LEXIS 2018 (1980) (decided under former Code 1933, § 38-1709).

Some evidence of market value mandatory. — There must be in evidence sufficient facts on which the jury may exercise the jury's own knowledge and ideas and draw a legitimate conclusion of market value. Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App.

LEXIS 745 (1953) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773, 1965 Ga. App. LEXIS 982 (1965) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771, 1967 Ga. App. LEXIS 872 (1967) (decided under former Code 1933, § 38-1709); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289, 1978 Ga. App. LEXIS 2623 (1978) (decided under former Code 1933, § 38-1709).

As to items of a common nature, such as automobiles, a plaintiff need not offer any opinion evidence as to value, and so long as the evidence contains facts upon which the jury may legitimately exercise their own knowledge and ideas, the question of value is properly left to the jury. White v. Miller, 194 Ga. App. 816, 392 S.E.2d 30, 1990 Ga. App. LEXIS 345 (1990) (decided under former O.C.G.A. § 24-9-66).

Jurors are not absolutely bound by opinion testimony as to market value, even though it is not contradicted, as jurors may exercise their own judgment based on their own experience and knowledge and the evidence as a whole. Widincamp v. McCall, 25 Ga. App. 733, 104 S.E. 642, 1920 Ga. App. LEXIS 180 (1920) (decided under former Civil Code 1910, § 5875); Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S.E. 543, 1926 Ga. App. LEXIS 529 (1926) (decided under former Civil Code 1910, § 5875); Bitting v. State, 165 Ga. 55, 139 S.E. 877, 1927 Ga. LEXIS 307 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213, 1928 Ga. App. LEXIS 264 (1928) (decided under former Civil Code 1910, § 5875); Watson v. Tompkins Chevrolet Co., 83 Ga. App. 440, 63 S.E.2d 681, 1951 Ga. App. LEXIS 883 (1951) (decided under former Code 1933, § 38-1708); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1708); Hayes v. Carter, 91 Ga. App. 540, 86 S.E.2d 532, 1955 Ga. App. LEXIS 801 (1955) (decided under former Code 1933, § 38-1708); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956) (decided under former Code 1933, § 38-1708); Youngblood v. Ruis, 96 Ga. App. 290, 99 S.E.2d 714, 1957 Ga. App. LEXIS 562 (1957) (decided under former Code 1933, § 38-1708); Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377, 1960 Ga. App. LEXIS 1020 (1960) (decided under former Code 1933, § 38-1708); J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr., 332 F. Supp. 1336, 1971 U.S. Dist. LEXIS 14645 (N.D. Ga. 1971), aff'd, 461 F.2d 1269, 1972 U.S. App. LEXIS 8461 (5th Cir. 1972) (decided under former Code 1933, § 38-1708); DOT v. Driggers, 150 Ga. App. 270, 257 S.E.2d 294, 1979 Ga. App. LEXIS 2145 (1979) (decided under former Code 1933, § 38-1708); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43, 1979 Ga. App. LEXIS 2005 (1979) (decided under former Code 1933, § 38-1708); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905, 1980 Ga. App. LEXIS 2405 (1980) (decided under former Code 1933, § 38-1708).

Credibility of a witness is a matter to be weighed by the jury. Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1912 Ga. LEXIS 500 (1912) (decided under former Civil Code 1910, § 5874); Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897, 1924 Ga. App. LEXIS 823 (1924) (decided under former Civil Code 1910, § 5874); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363, 1934 Ga. App. LEXIS 696 (1934) (decided under former Code 1933, § 38-1708); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468, 1976 Ga. App. LEXIS 2530 (1976) (decided under former Code 1933, § 38-1708).

Weight to be given opinion evidence of market value is a matter for the jury. Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1912 Ga. LEXIS 500 (1912) (decided under former Civil Code 1910, § 5875); Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, 1921 Ga. App. LEXIS 239 (1921) (decided under former Civil Code 1910, § 5874); Bitting v. State, 165 Ga. 55, 139 S.E. 877, 1927 Ga. LEXIS 307 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213, 1928 Ga. App. LEXIS 264 (1928) (decided under former Civil Code 1910, § 5875); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d

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285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1708); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282, 1973 Ga. App. LEXIS 1369 (1973) (decided under former Code 1933, § 38-1708); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22, 1974 Ga. App. LEXIS 981 (1974) (decided under former Code 1933, § 38-1708); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687, 1975 Ga. App. LEXIS 2201 (1975) (decided under former Code 1933, § 38-1708); Gibbs v. Clay, 137 Ga. App. 381, 224 S.E.2d 46, 1976 Ga. App. LEXIS 2454 (1976) (decided under former Code 1933, § 38-1708); Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305, 2000 Ga. App. LEXIS 1227 (2000), cert. denied, No. S01C0355, 2001 Ga. LEXIS 289 (Ga. Mar. 19, 2001) (decided under former O.C.G.A. § 24-9-66).

Expert witnesses. — Witness must be an expert, or must state a sufficient basis for testifying as to market value. Southern Cotton Oil Co. v. Overby, 136 Ga. 69, 70 S.E. 664, 1911 Ga. LEXIS 419 (1911) (decided under former Civil Code 1910, § 5875); Crump v. Knox, 18 Ga. App. 437, 89 S.E. 586, 1916 Ga. App. LEXIS 398 (1916) (decided under former Civil Code 1910, § 5875); Fowler v. National City Bank, 49 Ga. App. 435, 176 S.E. 113, 1934 Ga. App. LEXIS 432 (1934) (decided under former Code 1933, § 38-1709).

Expert's opinion as to what expert would pay for condemned land was probative of the land's fair market value and improperly excluded by the trial court. Jotin Realty Co. v. Department of Transp., 174 Ga. App. 809, 331 S.E.2d 605, 1985 Ga. App. LEXIS 1965 (1985) (decided under former O.C.G.A. § 24-9-66).

Nonexpert witnesses. — There was no requirement that officer be an expert in order to express the officer's opinion as to amount of damages inflicted to the officer's vehicle by defendant, provided the officer had had an opportunity for forming a correct opinion. Mallory v. State, 164 Ga. App. 569, 298 S.E.2d 290, 1982 Ga. App. LEXIS 3326 (1982) (decided under former O.C.G.A. § 24-9-66).

To give an opinion on value, the nonexpert witness must supply reasons by showing knowledge, experience, or familiarity as to value. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277, 1986 Ga. App. LEXIS 2160 (1986) (decided under former O.C.G.A. § 24-9-66).

Because an opinion rendered by a debtor's guarantor lacked probative value as to the valuation of the debtor-dry cleaner's equipment, as the guarantor was not in the business of owning and operating a dry cleaning business, such opinion was inadmissible as it amounted to nothing more than an unsupported conclusion or guess; thus, the debtor and its guarantors failed to rebut the bank's prima facie showing that the sale was commercially reasonable, and the trial court properly granted summary judgment on this ground. AKA Mgmt. v. Branch Banking & Trust Co., 275 Ga. App. 615, 621 S.E.2d 576, 2005 Ga. App. LEXIS 1060 (2005), cert. denied, No. S06C0381, 2006 Ga. LEXIS 194 (Ga. Feb. 27, 2006) (decided under former O.C.G.A. § 24-9-66).

Given that both parties to a property dispute involving a house testified as to the home's value, including the appraisals, probative and non-hearsay evidence as to the value existed to support the jury's damages award such that the trial court erred in concluding otherwise and awarding a new trial on this basis. Perry v. Perry, 285 Ga. App. 892, 648 S.E.2d 193, 2007 Ga. App. LEXIS 669 (2007) (decided under former O.C.G.A. § 24-9-66).

Owner of property is considered to be qualified to state owner's opinion as to value. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480, 1981 Ga. App. LEXIS 1974 (1981) (decided under former O.C.G.A. § 24-9-66); Dixon v. Williams, 177 Ga. App. 702, 340 S.E.2d 286, 1986 Ga. App. LEXIS 1502 (1986) (decided under former O.C.G.A. § 24-9-66).

Property owner need not be an expert to state an opinion as to the value of the owner's property, provided the owner can establish that the owner has had an opportunity for forming a correct opinion. Iffland v. Lancaster, 176 Ga. App. 449, 336 S.E.2d 350, 1985 Ga. App. LEXIS 2334 (1985) (decided under former O.C.G.A. § 24-9-66).

There was no error by the trial court in admitting property owner's opinion testimony as to the fair market value of the damaged property before the fire where the owner had adequate opportunity to form a correct opinion as to the value of the items lost and the values to which the owner testified were those prior to the fire. Georgia Power Co. v. Hinson, 179 Ga. App. 263, 346 S.E.2d 73, 1986 Ga. App. LEXIS 1894 (1986) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in allowing the sellers to testify as to the fair market value of their property in a promissory estoppel action because the owner was competent to form a correct opinion of the property's fair market value based on the financial records put into evidence. Rental Equip. Group, LLC v. Maci, LLC, 263 Ga. App. 155, 587 S.E.2d 364, 2003 Ga. App. LEXIS 1045 (2003), cert. denied, No. S04C0188, 2004 Ga. LEXIS 84 (Ga. Jan. 20, 2004) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to former O.C.G.A. § 24-9-66. Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717, 2011 Ga. App. LEXIS 35 (2011) (decided under former O.C.G.A. § 24-9-66).

Manager's authority and breach of responsibility created issues of fact. — Trial court did not err in denying a manager's motion for summary judgment as to the joint venturers' counterclaims for breach of contract and breach of the duty of good faith and fair dealing regarding its management of certain real estate because genuine issues of material fact existed as to whether the manager failed to meet the manager's contractual obligations to manage and control the business including acquiring, holding, maintaining, leasing, exchanging, and disposing of the properties owned. Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899, 2014 Ga. App. LEXIS 672 (2014), cert. denied, No. S15C0250, 2015 Ga. LEXIS 29 (Ga. Jan. 12, 2015), cert. denied, No. S15C0361, 2015 Ga. LEXIS 49 (Ga. Jan. 12, 2015), overruled in part, SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729, 2020 Ga. LEXIS 235 (2020).

Foundation for opinion evidence required. — Opinion evidence as to market value must be based upon a foundation that the witness has some experience or familiarity with, or knowledge other than mere general knowledge of, the value of the property or similar property, must have had an opportunity to form a correct opinion, and must give reasons for the value assessed. Southern Cotton Oil Co. v. Overby, 136 Ga. 69, 70 S.E. 664, 1911 Ga. LEXIS 419 (1911) (decided under former Civil Code 1910, § 5875); Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387 (1912) (decided under former Civil Code 1910, § 5875); Crump v. Knox, 18 Ga. App. 437, 89 S.E. 586, 1916 Ga. App. LEXIS 398 (1916) (decided under former Civil Code 1910, § 5875); Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, 1921 Ga. App. LEXIS 239 (1921); Bitting v. State, 165 Ga. 55, 139 S.E. 877, 1927 Ga. LEXIS 307 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213, 1928 Ga. App. LEXIS 264 (1928) (decided under former Civil Code 1910, § 5875); Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422, 1929 Ga. App. LEXIS 140 (1929) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902, 1932 Ga. App. LEXIS 141 (1932) (decided under former Code 1933, § 38-1709); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933); Fowler v. National City Bank, 49 Ga. App. 435, 176 S.E. 113, 1934 Ga. App.

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LEXIS 432 (1934) (decided under former Code 1933, § 38-1709); Southern Ry. v. Thacker, 50 Ga. App. 706, 179 S.E. 225, 1935 Ga. App. LEXIS 272 (1935) (decided under former Code 1933, § 38-1709); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (decided under former Code 1933, § 38-1709); United States ex rel. TVA v. Phillips, 50 F. Supp. 454, 1943 U.S. Dist. LEXIS 2669 (D. Ga. 1943); (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80, 1954 Ga. App. LEXIS 862 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330, 1956 Ga. App. LEXIS 785 (1956) (decided under former Code 1933, § 38-1709); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956) (decided under former Code 1933, § 38-1709); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285, 1961 Ga. App. LEXIS 846 (1961) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773, 1965 Ga. App. LEXIS 982 (1965) (decided under former Code 1933, § 38-1709); Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782, 1966 Ga. App. LEXIS 1057 (1966) (decided under former Code 1933, § 38-1709); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527, 1967 Ga. App. LEXIS 830 (1967) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771, 1967 Ga. App. LEXIS 872 (1967) (decided under former Code 1933, § 38-1709); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456, 1970 Ga. App. LEXIS 1280 (1970) (decided under former Code 1933, § 38-1709); Lary v. Gilmer, 125 Ga. App. 604, 188 S.E.2d 432, 1972 Ga. App. LEXIS 1423 (1972) (decided under former Code 1933, § 38-1709); Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915, 1972 Ga. App. LEXIS 1064 (1972) (decided under former Code 1933, § 38-1709); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504, 1972 Ga. App. LEXIS 767 (1972) (decided under former Code 1933, § 38-1709); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282, 1973 Ga. App. LEXIS 1369 (1973) (decided under former Code 1933, § 38-1709); Abbott v. State, 130 Ga. App. 891, 205 S.E.2d 14, 1974 Ga. App. LEXIS 1297 (1974) (decided under former Code 1933, § 38-1709); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22, 1974 Ga. App. LEXIS 981 (1974) (decided under former Code 1933, § 38-1709); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687, 1975 Ga. App. LEXIS 2201 (1975) (decided under former Code 1933, § 38-1709); DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624, 1975 Ga. App. LEXIS 1657 (1975) (decided under former Code 1933, § 38-1709); Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780, 1976 Ga. App. LEXIS 1445 (1976) (decided under former Code 1933, § 38-1709); Canal Ins. Co. v. P & J Truck Lines, 145 Ga. App. 545, 244 S.E.2d 81, 1978 Ga. App. LEXIS 2197 (1978); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720, 1978 Ga. App. LEXIS 2689 (1978) (decided under former Code 1933, § 38-1709); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289, 1978 Ga. App. LEXIS 2623 (1978) (decided under former Code 1933, § 38-1709); DOT v. Brand, 149 Ga. App. 547, 254 S.E.2d 873, 1979 Ga. App. LEXIS 1926 (1979) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35, 1979 Ga. App. LEXIS 2308 (1979) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631, 1979 Ga. App. LEXIS 2390 (1979) (decided under former Code 1933, § 38-1709); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298, 1980 Ga. App. LEXIS 2018 (1980) (decided under former Code 1933, § 38-1709); Varnedoe v. Singleton, 154 Ga. App. 332, 268 S.E.2d 387, 1980 Ga. App. LEXIS 2150 (1980) (decided under former Code 1933, § 38-1709); Orkin Exterminating Co. v. Thrift, 154 Ga. App. 545, 269 S.E.2d 53, 1980 Ga. App. LEXIS 2275 (1980) (decided under former Code 1933, § 38-1709); Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224, 1980 Ga. App.

LEXIS 2509 (1980) (decided under former Code 1933, § 38-1709); Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480, 1981 Ga. App. LEXIS 1974 (1981) (decided under former O.C.G.A. § 24-9-66); Apostle v. Prince, 158 Ga. App. 56, 279 S.E.2d 304, 1981 Ga. App. LEXIS 2070 (1981) (decided under former O.C.G.A. § 24-9-66); Loethen v. State, 158 Ga. App. 469, 280 S.E.2d 878, 1981 Ga. App. LEXIS 2258 (1981) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in refusing to allow the plaintiff to testify as to plaintiff's opinion of the value of an automobile destroyed in a collision since the plaintiff did not demonstrate any foundation of knowledge, experience, or familiarity on which an opinion of value could properly be based. White v. Miller, 194 Ga. App. 816, 392 S.E.2d 30, 1990 Ga. App. LEXIS 345 (1990) (decided under former O.C.G.A. § 24-9-66); GMAC v. Newton, 207 Ga. App. 700, 429 S.E.2d 120, 1993 Ga. App. LEXIS 328 (1993) (decided under former O.C.G.A. § 24-9-66).

Testimony that the witness is familiar with the value of the item in question is sufficient foundation. — It is no ground for objection if thereafter on cross-examination the witness testifies as to facts which tend to show a lack of knowledge about the facts to which the witness previously testified on direct. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277, 1986 Ga. App. LEXIS 2160 (1986) (decided under former O.C.G.A. § 24-9-66).

In an action by homeowners for negligent construction of their house, since the homeowners demonstrated no basis for the homeowners opinion as to value except that the homeowners doubted the house could be sold and to them they had not received what they bargained for and thus the house had no value to them, and later homeowners admitted they were not familiar with building costs or procedures, there was no rational basis for their value opinions, and the opinions could furnish no basis for the jury's consideration of value. Hutto v. Shedd, 181 Ga. App. 654, 353 S.E.2d 596, 1987 Ga. App. LEXIS 1519 (1987) (decided under former O.C.G.A. § 24-9-66).

Pursuant to former O.C.G.A. § 24-9-66, direct testimony as to market value is in the nature of opinion evidence, and one need not be an expert or dealer but may testify as to the value of property if one has had an opportunity for forming a correct opinion; a creditor's testimony at a confirmation proceeding about the creditor's experience with the property at issue in a foreclosure sale, how much the creditor had invested in the property, how much the creditor borrowed against the property, the property's condition at the time of the foreclosure sale, and the creditor's opinion that the creditor bid the fair market value for the property, along with the testimony of one of the buyers and the tax appraisal, was sufficient to show the fair market value of the property at the time of the sale. McCain v. Galloway, 267 Ga. App. 505, 600 S.E.2d 449, 2004 Ga. App. LEXIS 706 (2004) (decided under former O.C.G.A. § 24-9-66).

Testimony of shareholder. — Trial court did not err in refusing to allow a witness to testify as to the value of a riverboat after counsel argued that the witness was a shareholder in the company selling the vessel but no foundation was laid by counsel to elicit the witness's knowledge, experience, or familiarity with the value of the riverboat. North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc., 181 Ga. App. 718, 353 S.E.2d 578, 1987 Ga. App. LEXIS 1557 (1987) (decided under former O.C.G.A. § 24-9-66).

Prior jury verdict not admissible. — Trial court abused the court's discretion in ruling that the prior jury verdict is admissible evidence since to give an opinion on value the witness must supply reasons by showing knowledge, experience, or familiarity as to value and there was no procedure by which the parties could question the jury in the prior case about the reasons for its opinion of the property's earlier value and the prior jury could not relate its opinion to the later value of the property. Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687, 1993 Ga. App. LEXIS 277 (1993), overruled in part, General Motors, LLC v. Buchanan, 313 Ga. 811, 874 S.E.2d 52, 2022 Ga. LEXIS 163 (2022) (decided under former O.C.G.A. § 24-9-66).

2. Application in Specific Cases

Automobile franchise. — Although franchisee was not an expert or dealer, as a person experienced in this field with the opportunity to form a correct opinion, the franchisee was authorized to state the franchisee's opinion of the value of the various equipment and inventory as well as the profit or loss incurred on the sales of certain automobiles. Moore v. American Suzuki Motor Corp., 203 Ga. App. 189, 416 S.E.2d 807, 1992 Ga. App. LEXIS 467 (1992) (decided under former O.C.G.A. § 24-9-66).

Bridge. — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to former O.C.G.A. § 24-9-66 a basis upon which the witness could have formed the witnesses own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness received. Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915, 2010 Ga. App. LEXIS 1065 (2010) (decided under former O.C.G.A. § 24-9-66).

Confiscated drugs. — When a crime laboratory chemist testified as to the basis for the chemist's estimate involving confiscated drugs, it was not necessary that the chemist be qualified as an expert. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, 1992 Ga. App. LEXIS 618 (1992), cert. denied, No. S92C0913, 1992 Ga. LEXIS 460 (Ga. June 4, 1992) (decided under former O.C.G.A. § 24-9-66).

Assessment of property. — See Hirsch v. Joint City County Bd. of Tax Assessors, 218 Ga. App. 881, 463 S.E.2d 703, 1995 Ga. App. LEXIS 926 (1995), cert. denied, No. S96C0343, 1996 Ga. LEXIS 330 (Ga. Feb. 2, 1996) (decided under former O.C.G.A. § 24-9-66); Hall County v. Merritt, 233 Ga. App. 526, 504 S.E.2d 754 (decided under former O.C.G.A. § 24-9-66).

In rendering expert opinions as to the market value of property subject to a condemnation proceeding, experts could properly consider hearsay statements made by a prior planning director for the local government to the effect that the government would work with the property's owner regarding rezoning the property. Unified Gov't v. Watson, 255 Ga. App. 1, 564 S.E.2d 453, 2002 Ga. App. LEXIS 330 (2002), aff'd, 276 Ga. 276, 577 S.E.2d 769, 2003 Ga. LEXIS 167 (2003) (decided under former O.C.G.A. § 24-9-66).

Defendant was properly sentenced for felony theft of aluminum tire rims based on lay testimony of the victim regarding their value because the victim had experience in buying and selling such rims, which gave the victim an opportunity to form a correct opinion as to the fair cash market value at the time and place of the theft. Perdue v. State, 300 Ga. App. 588, 685 S.E.2d 489, 2009 Ga. App. LEXIS 1230 (2009) (decided under former O.C.G.A. § 24-9-66).

Houses. — See Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687, 1975 Ga. App. LEXIS 2201 (1975) (decided under former Code 1933, § 38-1709); DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624, 1975 Ga. App. LEXIS 1657 (1975) (decided under former Code 1933, § 38-1709).

Land. — See Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1912 Ga. LEXIS 500 (1912) (decided under former Civil Code 1910, § 5875); Birmingham Paper Co. v. Holder, 24 Ga. App. 630, 101 S.E. 692, 1919 Ga. App. LEXIS 977 (1919) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902, 1932 Ga. App. LEXIS 141 (1932) (decided under former Code 1933, § 38-1709); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363, 1934 Ga. App. LEXIS 696 (1934) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80, 1954 Ga. App. LEXIS 862 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330, 1956 Ga. App. LEXIS

785 (1956) (decided under former Code 1933, § 38-1709); Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915, 1972 Ga. App. LEXIS 1064 (1972) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876, 1980 Ga. App. LEXIS 2707 (1980) (decided under former Code 1933, § 38-1709).

Mobile homes. — See First Fed. Sav. & Loan Ass'n v. Jones, 173 Ga. App. 356, 326 S.E.2d 554, 1985 Ga. App. LEXIS 1541 (1985) (decided under former O.C.G.A. § 24-9-66).

Motor vehicles. — See Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1708); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771, 1967 Ga. App. LEXIS 872 (1967) (decided under former Code 1933, § 38-1708); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720, 1978 Ga. App. LEXIS 2689 (1978) (decided under former Code 1933, § 38-1708); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35, 1979 Ga. App. LEXIS 2308 (1979) (decided under former Code 1933, § 38-1708); Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc., 167 Ga. App. 532, 307 S.E.2d 13, 1983 Ga. App. LEXIS 2537 (1983) (decided under former O.C.G.A. § 24-9-66).

While the purchase price of a motor vehicle is relevant and admissible to establish the vehicle's value at the time of purchase, it is obviously not, standing alone, sufficient to establish the value of the vehicle at some later point in time. Similarly, the value of a motor vehicle cannot be established merely by adding to the vehicle's purchase price the cost of maintaining and repairing the vehicle. Builders Transp., Inc. v. Hall, 183 Ga. App. 812, 360 S.E.2d 60, 1987 Ga. App. LEXIS 2089 (1987) (decided under former O.C.G.A. § 24-9-66).

When an affidavit as to the value of a truck contained no information regarding the affiant's knowledge, experience, or familiarity with the value of the vehicle, the affidavit lacked probative value as a nonexpert opinion. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750, 2007 Ga. App. LEXIS 722 (2007) (decided under former O.C.G.A. § 24-9-66).

Owner of property. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422, 1929 Ga. App. LEXIS 140 (1929) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902, 1932 Ga. App. LEXIS 141 (1932) (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119, 1953 Ga. App. LEXIS 745 (1953) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80, 1954 Ga. App. LEXIS 862 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330, 1956 Ga. App. LEXIS 785 (1956) (decided under former Code 1933, § 38-1709); Isen & Co. v. Wise, 94 Ga. App. 220, 94 S.E.2d 98, 1956 Ga. App. LEXIS 511 (1956) (decided under former Code 1933, § 38-1709); Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782, 1966 Ga. App. LEXIS 1057 (1966) (decided under former Code 1933, § 38-1709); Edwards v. State, 116 Ga. App. 80, 156 S.E.2d 518, 1967 Ga. App. LEXIS 704 (1967) (decided under former Code 1933, § 38-1709); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527, 1967 Ga. App. LEXIS 830 (1967) (decided under former Code 1933, § 38-1709); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504, 1972 Ga. App. LEXIS 767 (1972) (decided under former Code 1933, § 38-1709); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687, 1975 Ga. App. LEXIS 2201 (1975) (decided under former Code 1933, § 38-1709); Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780, 1976 Ga. App. LEXIS 1445 (1976) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631, 1979 Ga. App. LEXIS 2390 (1979) (decided under former Code 1933, § 38-1709); Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224, 1980 Ga. App. LEXIS 2509 (1980) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876, 1980 Ga. App. LEXIS 2707 (1980) (decided under former Code 1933, § 38-1709).

Trial court did not err in concluding that the victim's testimony was sufficient

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to allow a felony theft charge to go to the jury because the victim testified as to the market value for each of the items stolen from him, and the total value exceeded $500; the victim established that the victim had an opportunity to form a correct opinion because the victim based the opinion as to the market value of the stolen tools on the age of the tools and his experience using and purchasing them. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295, 2009 Ga. App. LEXIS 1235 (2009) (decided under former O.C.G.A. § 24-9-66).

Testimony from child of property owner. — Property owner's son's testimony in a condemnation proceeding as to the value of residential property was admissible, when the son testified to the son's comparable sales analysis and to the son's familiarity with the neighborhood. Appraiser could testify as to the possible rezoned value of the property, because the rezoning was sufficiently likely as to have an appreciable influence on the property's present market value, approximately $600. DOT v. Jordan, 300 Ga. App. 104, 684 S.E.2d 141, 2009 Ga. App. LEXIS 1011 (2009), cert. denied, No. S10C0207, 2010 Ga. LEXIS 311 (Ga. Mar. 29, 2010) (decided under former O.C.G.A. § 24-9-66).

Personal property. — See Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780, 1976 Ga. App. LEXIS 1445 (1976) (decided under former Code 1933, § 24-9-66).

Purchase price. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422, 1929 Ga. App. LEXIS 140 (1929) (decided under former Civil Code 1910, § 5875); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773, 1965 Ga. App. LEXIS 982 (1965) (decided under former Code 1933, § 38-1709); Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782, 1966 Ga. App. LEXIS 1057 (1966) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771, 1967 Ga. App. LEXIS 872 (1967) (decided under former Code 1933, § 38-1709); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456, 1970 Ga. App. LEXIS 1280 (1970) (decided under former Code 1933, § 38-1709); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282, 1973 Ga. App. LEXIS 1369 (1973) (decided under former Code 1933, § 38-1709); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43, 1979 Ga. App. LEXIS 2005 (1979) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631, 1979 Ga. App. LEXIS 2390 (1979) (decided under former Code 1933, § 38-1709); General Fin. Corp. v. Henderson, 160 Ga. App. 242, 286 S.E.2d 454, 1981 Ga. App. LEXIS 2961 (1981) (decided under former O.C.G.A. § 24-9-66).

Purchaser may testify as to termite damage. — In a suit arising out of hidden termite damage, the court erred by refusing to allow the plaintiff-purchaser to provide evidence of damage by giving plaintiff's own non-expert opinion testimony as to the diminished value of the property, based on plaintiff's familiarity with similar property in the area and plaintiff's close personal inspection of the damage in question. Vitello v. Stott, 222 Ga. App. 134, 473 S.E.2d 504 (decided under former O.C.G.A. § 24-9-66).

Rental value. — See Mayor of Gainesville v. Robertson, 25 Ga. App. 632, 103 S.E. 853, 1920 Ga. App. LEXIS 112 (1920) (decided under former Civil Code 1910, § 5875).

Salvage price. — See Isen & Co. v. Wise, 94 Ga. App. 220, 94 S.E.2d 98, 1956 Ga. App. LEXIS 511 (1956) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771, 1967 Ga. App. LEXIS 872 (1967) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35, 1979 Ga. App. LEXIS 2308 (1979) (decided under former Code 1933, § 38-1709).

Services. — See Western & Atl. R.R. v. Townsend, 36 Ga. App. 70, 135 S.E. 439, 1926 Ga. App. LEXIS 768 (1926) (decided under former Civil Code 1910, § 38-1709).

Similar sale. — See Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933) (decided under former Code 1933, § 38-1709); Housing Auth. v.

Spink, 91 Ga. App. 72, 85 S.E.2d 80, 1954 Ga. App. LEXIS 862 (1954) (decided under former Code 1933, § 38-1709).

Stock. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422, 1929 Ga. App. LEXIS 140 (1929) (decided under former Civil Code 1910, § 5875); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933) (decided under former Code 1933, § 38-1709); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (decided under former Code 1933, § 38-1709).

Value of dog. — Trial court did not err in assessing the value of a dog the defendant killed at $3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714, 2012 Ga. App. LEXIS 181 (2012) (decided under former O.C.G.A. § 24-9-66).

Damages recoverable by the owners of a pet dog negligently killed by a kennel included both the dog's fair market value at the time of the loss plus interest and, in addition, any medical and other expenses reasonably incurred in treating the dog; application of an actual value to the owner standard was not the appropriate measure. Barking Hound Vill., LLC v. Monyak, 299 Ga. 144, 787 S.E.2d 191, 2016 Ga. LEXIS 400 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 375 et seq.

C.J.S.

32 C.J.S., Evidence, § 576.

Am. Jur. Proof of Facts.

Proof of Identification of Bite Marks, 75 POF3d 317.

ALR.

Effect of witness qualifying his testimony with "I think," "I believe," or the like, when expressing thereby indistinct observation or recollection, 4 A.L.R. 979.

Newspapers and trade journals as evidence of market prices or quotations, 43 A.L.R. 1192.

Admissibility of witness's conclusion as to care exercised in driving automobile, 66 A.L.R. 1117.

Right of witness to give summary based on inspection of number of documents, 66 A.L.R. 1206.

Testimony by witness as to emotions of fear or other mental state manifested by another, 69 A.L.R. 1168.

Opinion evidence as to speed of automobile or motorcycle, 70 A.L.R. 540; 94 A.L.R. 1190.

Competency of testimony of nonexperts on question of sanity or insanity in criminal cases, 72 A.L.R. 579.

Right of witness to state conclusion as to immoral purpose or intent of another, 73 A.L.R. 868.

Opinion evidence as to condition of automobile or other motor vehicle, 77 A.L.R. 559.

Right of witness to state his opinions or conclusion, based on examination of books and accounts, as to solvency or insolvency, 81 A.L.R. 1431.

Opinion evidence directly as to the ultimate question of the amount of damage to property, 86 A.L.R. 1449.

Opinion of court or counsel or other person learned in law as a factor in determining marketability of title, 90 A.L.R. 609.

Right of witness to testify as a conclusion or as an ultimate fact to existence or nonexistence of agency or relationship of master and servant, 90 A.L.R. 749.

Admissibility and effect of testimony of lay witness as to existence of a particular disease, or as to apparent physical condition of a person, on the issue of existence of particular disease, 93 A.L.R. 482.

Lack of market value as a necessary condition of admissibility of evidence of actual or intrinsic value, 110 A.L.R. 1375.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 A.L.R. 974.

Opinion evidence as to distance within which automobile can be stopped, 135 A.L.R. 1404.

Admissibility of opinion evidence as to cause of death, disease, or injury, 136 A.L.R. 965; 66 A.L.R.2d 1082.

Proper form of question to witness or of testimony of witness, as regards mental condition of person whose capacity to execute a will is in issue, 155 A.L.R. 281.

Competency of witness to give expert or opinion testimony as to value of real property, 159 A.L.R. 7.

Unaccepted offer for purchase or sale of real property as evidence of value, 7 A.L.R.2d 781.

Admissibility on question of damages in action for libel or slander of testimony as to the impression or effect of the matter upon the minds of individuals, 12 A.L.R.2d 1005.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 A.L.R.2d 418.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 A.L.R.2d 1113.

Admissibility of opinion evidence as to whether vehicle involved in collision was standing still or moving, 33 A.L.R.2d 1250.

Admissibility of opinion of nonexpert owner as to value of chattel, 37 A.L.R.2d 967.

Admissibility of opinion evidence as to the cause of an accident or occurrence, 38 A.L.R.2d 13.

Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency, or mental condition, 40 A.L.R.2d 15.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 A.L.R.2d 932.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 A.L.R.2d 1447.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 A.L.R.2d 1048.

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like, 92 A.L.R.2d 1391.

Person performing services as competent to testify as to their value, 5 A.L.R.3d 947.

Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness, 10 A.L.R.3d 258.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 A.L.R.3d 1064.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix, 17 A.L.R.3d 503.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, 29 A.L.R.3d 248.

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, 33 A.L.R.3d 1405.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 A.L.R.3d 575.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 A.L.R.3d 783.

Sale price of real property as evidence in determining value for tax assessment purposes, 89 A.L.R.3d 1126.

Unaccepted offer for purchase of real property as evidence of its value, 25 A.L.R.4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 A.L.R.4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 A.L.R.4th 983.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 A.L.R.4th 456.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 A.L.R.5th 749.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 A.L.R.5th 693.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused, 1 A.L.R.6th 657.

State regulation of naturopaths and naturopathy, 41 A.L.R.7th Art. 10.

Admissibility of "slang," "lingo," "jargon," or "code" lay testimony in state cases, 41 A.L.R.7th Art. 11.

Admissibility of expert or opinion evidence — Supreme court cases, 177 A.L.R. Fed. 77.

24-7-702. Expert opinion testimony; medical experts.

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if:

(1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) The testimony is based upon sufficient facts or data;

(3) The testimony is the product of reliable principles and methods; and

(4) The expert has reliably applied the principles and methods to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. In all civil proceedings, a hearing and any ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) In all civil proceedings, an affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell

Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50.

History.

Code 1981, § 24-7-702, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2022, p. 201, § 1/HB 478.

The 2022 amendment, effective July 1, 2022, deleted "civil" preceding "proceedings" in the first sentence in subsection (a) and in the first sentence in subsection (f); in the introductory language of subsection (b), substituted "A witness who is" for "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness" and deleted "thereto" following "testify", added paragraph (b)(1), redesignated former paragraphs (b)(1) through (b)(3) as present paragraphs (b)(2) through (b)(4), respectively, and rewrote paragraph (b)(4), which read: "The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact."; substituted "In all civil proceedings, a hearing and any ruling" for "Such hearing and ruling" at the beginning of the second sentence in subsection (d); and substituted "In all civil proceedings, an affiant" for "An affiant" at the beginning of subsection (e). See Editor's notes for applicability.

Cross references.

Statute not applicable to valuation of condemned property, § 22-1-14.

Competent expert testimony required in establishing payment standard or reimbursement criteria, § 51-1-52.

Testimony by expert witnesses, Fed. R. Evid. 702.

Editor's notes.

Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provided, with respect to former O.C.G.A. § 24-9-67.1, the predecessor of O.C.G.A. §§ 24-7-702 and 24-7-703, that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2022, p. 201, § 3/HB 478, not codified by the General Assembly, makes this Code section applicable to any motion made or hearing or trial commenced on or after July 1, 2022.

Law reviews.

For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005).

For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005).

For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005).

For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For comment, "Georgia's Codification of

Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?," see 23 Ga. St. U.L. Rev. 481 (2006).

For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006).

For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006).

For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007).

For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008).

For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009).

For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

For annual survey of law on product liability, see 62 Mercer L. Rev. 243 (2010).

For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For article, "Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial," see 47 Ga. L. Rev. 837 (2013).

For annual survey on product liability, see 65 Mercer L. Rev. 221 (2013).

For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014).

For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

For article, "Fisher v. Gala: O.C.G.A. § 9-11-9.1(e) Keeping Malpractice Claims Afloat," see 66 Mercer L. Rev. 817 (2015).

For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016).

For annual survey on product liability, see 69 Mercer L. Rev. 231 (2017).

For article, "Non-Physician vs. Physician: Cross-Disciplinary Expert Testimony in Medical Negligence Litigation - Who Knows the Standard of Care?," see 35 Ga. St. U.L. Rev. 679 (2019).

For annual survey on construction law, see 71 Mercer L. Rev. 57 (2019).

For annual survey on product liability: a two-year survey, see 71 Mercer L. Rev. 223 (2019).

For note, "Faulty Forensics: Bolstering Judicial Gatekeeping in Georgia Courts," see 54 Ga. L. Rev. 1035 (2020).

For annual survey on evidence, see 73 Mercer L. Rev. 111 (2021).

For article, "HB 1405: HB 478: Amendments to Rules of Evidence Regarding Expert Testimony in Criminal Cases," see 39 Ga. St. U.L. Rev. 93 (2022).

For annual survey on criminal law, see 74 Mercer L. Rev. 93 (2022).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3792, former Code 1873, § 3868, former Code 1882, § 3868, former Civil Code 1895, § 5287, former Penal Code 1895, § 1022, former Civil Code 1910, § 5876, former Penal Code 1910, § 1048, former Code 1933, § 38-1710, former O.C.G.A. § 24-7-707, former O.C.G.A. § 24-9-67, and former O.C.G.A. § 24-9-67.1 are included in the annotations for this Code section.

Constitutionality. — Statement of intent in former O.C.G.A. § 24-9-67.1(f) (see now O.C.G.A. §§ 24-7-702, 24-7-703) was not a delegation of legislative power; and, the application of the evidentiary rules established by it, did not violate the constitutional prohibition against retroactive laws. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court erred in declaring former O.C.G.A. § 24-9-67.1(f) (see now O.C.G.A. §§ 24-7-702, 24-7-703) unconstitutional on the ground that the former statute violated the principle of separation of powers as the suggestion in the former statute that Georgia "may" consider the decisions of other courts on a subject did not invade the province of the judiciary because it was not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. Further, the permissive suggestion in former § 24-9-67.1(f), that the courts could consider federal interpretations of the cases on which federal rules and former § 24-9-67.1(f) were based contained no words of command and did not seek to enforce a particular construction of the former statute on the courts. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly found that former O.C.G.A. § 24-9-67.1(a) and (b)(1) (see now O.C.G.A. §§ 24-7-702, 24-7-703)were contradictory in that paragraph (b)(1) limited experts to relying on potentially admissible facts and data, whereas subsection (a) stated that facts and data relied upon need not be admissible. Since the two provisions could not be harmonized and, read together, they rendered the former statute unconstitutionally vague; however, the trial court was not required to strike the former statute in the statute's entirety. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court did not err in rejecting plaintiffs' equal protection challenge since plaintiffs could not establish the necessary element of an equal protection claim that plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases were not similarly situated to those engaged in criminal prosecutions. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

O.C.G.A. § 24-7-702(c)(2)(A), governing expert qualifications in medical malpractice cases, was not unconstitutionally vague, did not violate equal protection or separation of powers, did not make irrevocable grants of special privileges and immunities, and was not a special law; however, the trial court erred in rejecting an expert simply because the expert had not

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performed the specific procedure at issue. The proper consideration was the expert's level of knowledge. Zarate-Martinez v. Echemendia, 299 Ga. 301, 788 S.E.2d 405, 2016 Ga. LEXIS 450 (2016).

Requirements of O.C.G.A. § 24-7-702(c) do not apply to causation testimony. Callaway v. O'Connell, No., 44 F. Supp. 3d 1316, 2014 U.S. Dist. LEXIS 120679 (M.D. Ga. 2014).

Federal interpretation on application of Daubert standard. — Citing the Eleventh Circuit opinion of McDowell v. Brown, 392 F.3d 1283 (11th Cir. 2004), and applying the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), and subsequent cases applying Daubert, the Court of Appeals held that the trial court properly applied the Daubert factors and did not abuse the court's discretion in admitting expert testimony under former O.C.G.A. § 24-9-67.1. Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655, 2006 Ga. App. LEXIS 831 (2006), cert. denied, No. S06C1966, 2007 Ga. LEXIS 112 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Noting that "it is proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing a statute based on those rules", and that since former O.C.G.A. § 24-9-67.1(b) "was based on Fed. R. Evid. Rule 702, which in its present form is based on the holdings in . . . Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 SC 1167 (1999)", it was appropriate to apply the standards of Daubert in determining whether a witness is qualified to render an opinion as an expert. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Application of Daubert standard. — After a trial court found that an expert's testimony failed the first element of Daubert because the expert's theory was essentially untestable and had not been tested, the trial court properly exercised the court's discretion in weighing the fourth Daubert factor—whether the theory had attained general acceptance within the scientific community—less heavily than the other three Daubert factors. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

As the trial court's finding that the plaintiff's expert was a "quintessential expert for hire" was supported by the evidence, it was within the trial court's discretion to apply the Daubert factors with greater rigor in determining the admissibility of the expert's opinion. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Asbestos fiber exposure testimony not allowed. — Expert medical witness could not give an opinion on the cause of death based on lab report which had not yet been admitted into evidence, but error in allowing such opinion was cured when the lab report was later introduced into evidence. Vaughn v. State, 249 Ga. 803, 294 S.E.2d 504, 1982 Ga. LEXIS 1199 (1982) (decided under former O.C.G.A. § 24-9-67).

Trial court did not err in refusing to permit the testimony of two of the manufacturer's expert witnesses in an asbestos exposure case as to the asbestos fiber counts on its packing material that had been determined by an outside laboratory, even though such opinions may be given on the facts as proved by other witnesses, because the experts were not entitled to give an opinion based upon the outside laboratory's report which was prepared by other people and which was not in evidence. John Crane, Inc. v. Jones, 262 Ga. App. 531, 586 S.E.2d 26, 2003 Ga. App. LEXIS 852 (2003), aff'd, 278 Ga. 747, 604 S.E.2d 822, 2004 Ga. LEXIS 996 (2004) (decided under former O.C.G.A. § 24-9-67).

Trial court's denial of Daubert motion presumed correct. — Trial court's evidentiary ruling, denying a property

owner's Daubert motion to exclude a bank's appraiser's expert testimony pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was presumed correct since no transcript from the hearing thereon appeared in the record. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806, 2012 Ga. App. LEXIS 220 (2012) (decided under former O.C.G.A. § 24-9-67.1).

Court determines expert's qualifications. — Qualification of a witness as an expert is addressed to the sound discretion of the court. Clary v. State, 8 Ga. App. 92, 68 S.E. 615, 1910 Ga. App. LEXIS 45 (1910) (decided under former Penal Code 1910, § 1048); Hines v. Hendricks, 25 Ga. App. 682, 104 S.E. 520, 1920 Ga. App. LEXIS 149 (1920) (decided under former Penal Code 1910, § 1048); Western & Atl. R.R. v. Fowler, 77 Ga. App. 206, 47 S.E.2d 874, 1948 Ga. App. LEXIS 521 (1948) (decided under former Code 1933, § 38-1710); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633, 1948 Ga. App. LEXIS 693 (1948) (decided under former Code 1933, § 38-1710); Carroll v. Hayes, 98 Ga. App. 450, 105 S.E.2d 755, 1958 Ga. App. LEXIS 607 (1958) (decided under former Code 1933, § 38-1710); Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654, 1973 Ga. App. LEXIS 1182 (1973) (decided under former Code 1933, § 38-1710); Johnson v. State, 130 Ga. App. 704, 204 S.E.2d 302, 1974 Ga. App. LEXIS 1234 (1974) (decided under former Code 1933, § 38-1710); Barrow v. State, 235 Ga. 635, 221 S.E.2d 416, 1975 Ga. LEXIS 951 (1975) (decided under former Code 1933, § 38-1710); McCoy v. State, 237 Ga. 118, 227 S.E.2d 18, 1976 Ga. LEXIS 1167 (1976) (decided under former Code 1933, § 38-1710); Redd v. State, 240 Ga. 753, 243 S.E.2d 16, 1978 Ga. LEXIS 821 (1978) (decided under former Code 1933, § 38-1710); Kelly v. Floor Bazaar, Inc., 153 Ga. App. 163, 264 S.E.2d 697, 1980 Ga. App. LEXIS 1724 (1980) (decided under former Code 1933, § 38-1710); Wilkie v. State, 153 Ga. App. 609, 266 S.E.2d 289, 1980 Ga. App. LEXIS 1922 (1980) (decided under former Code 1933, § 38-1710); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480, 1980 Ga. App. LEXIS 2317 (1980) (decided under former Code 1933, § 38-1710); Rose Mill Homes, Inc. v. Michel, 155 Ga. App. 808, 273 S.E.2d 211, 1980 Ga. App. LEXIS 2800 (1980) (decided under former Code 1933, § 38-1710); Hicks v. State, 157 Ga. App. 69, 276 S.E.2d 129 (1981) (decided under former Code 1933, § 38-1710); Hicks v. State, 196 Ga. App. 311, 396 S.E.2d 60, 1990 Ga. App. LEXIS 864 (1990) (decided under former O.C.G.A. § 24-9-67).

For definitions of expert, see Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569, 1905 Ga. LEXIS 597 (1905) (decided under former Civil Code 1895, § 5287); see also Doster v. Brown, 25 Ga. 24, 1858 Ga. LEXIS 2 (1858); White v. Clements, 39 Ga. 232, 1869 Ga. LEXIS 207 (1869) (decided under former law); Hines v. Hendricks, 25 Ga. App. 682, 104 S.E. 520, 1920 Ga. App. LEXIS 149 (1920) (decided under former Civil Code 1910, § 5876).

An expert is one who practices a business or profession requiring the person to have technical knowledge in that field. Smith v. State, 127 Ga. 56, 56 S.E. 116, 1906 Ga. LEXIS 735 (1906) (decided under former Penal Code 1895, § 1022); Glover v. State, 129 Ga. 717, 59 S.E. 816, 1907 Ga. LEXIS 564 (1907) (decided under former Penal Code 1895, § 1022).

Expert testimony must relate to scientific or technical knowledge. McLain v. State, 71 Ga. 279, 1883 Ga. LEXIS 179 (1883) (decided under former Code 1882, § 3868); McClendon v. State, 7 Ga. App. 784, 68 S.E. 331, 1910 Ga. App. LEXIS 521 (1910) (decided under former Penal Code 1895, § 1022); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, 1917 Ga. App. LEXIS 712 (1917).

Basic requirements for expert. — Generally, nothing more is required to qualify an expert than that one has been educated in a particular trade or profession. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438, 1964 Ga. App. LEXIS 888 (1964) (decided under former Code 1933, § 38-1710); Bowden v. State, 239 Ga. 821, 238 S.E.2d 905, 1977 Ga. LEXIS 1343 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533, 1978 U.S.

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LEXIS 1234 (1978) (decided under former Code 1933, § 38-1710); Brown v. State, 245 Ga. 588, 266 S.E.2d 198, 1980 Ga. LEXIS 867 (1980) (decided under former Code 1933, § 38-1710); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103, 1981 Ga. App. LEXIS 2717 (1981) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61, 1981 Ga. App. LEXIS 2887 (1981) (decided under former Code 1933, § 38-1710).

An expert witness need only be competent as an expert in the witness's own field, and the witness need not have legal expertise. Watkins v. State, 259 Ga. 648, 386 S.E.2d 132, 1989 Ga. LEXIS 525 (1989) (decided under former O.C.G.A. § 24-9-67).

Formal training is not a prerequisite for expert status. Brown v. State, 245 Ga. 588, 266 S.E.2d 198, 1980 Ga. LEXIS 867 (1980) (decided under former Code 1933, § 38-1710).

Special knowledge necessary to be an expert may be derived from experience as well as study. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438, 1964 Ga. App. LEXIS 888 (1964) (decided under former Code 1933, § 38-1710); Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31, 1973 Ga. App. LEXIS 1130 (1973) (decided under former Code 1933, § 38-1710); Bowden v. State, 239 Ga. 821, 238 S.E.2d 905, 1977 Ga. LEXIS 1343 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533, 1978 U.S. LEXIS 1234 (1978) (decided under former Code 1933, § 38-1710); Brown v. State, 245 Ga. 588, 266 S.E.2d 198, 1980 Ga. LEXIS 867 (1980) (decided under former Code 1933, § 38-1710); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103, 1981 Ga. App. LEXIS 2717 (1981) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61, 1981 Ga. App. LEXIS 2887 (1981) (decided under former Code 1933, § 38-1710).

Failure to object constitutes waiver. — In rate increase request hearings, when the power company failed to object to an expert witness's qualifications either before or during the witness's testimony, any objection it might have had was waived. Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 196 Ga. App. 572, 396 S.E.2d 562, 1990 Ga. App. LEXIS 960 (1990), cert. denied, No. S90C1546, 1990 Ga. LEXIS 483 (Ga. Oct. 23, 1990) (decided under former O.C.G.A. § 24-9-67).

Expert can express an opinion on a matter which lies within the domain of the profession or calling which the witness pursues. Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31, 1973 Ga. App. LEXIS 1130 (1973) (decided under former Code 1933, § 38-1710).

Application of knowledge to specific problem not necessary. — When one has been formally educated in a particular trade or profession, additional experience by application of that knowledge to a specific problem is not necessary in order to sustain one as an expert. Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61, 1981 Ga. App. LEXIS 2887 (1981) (decided under former Code 1933, § 38-1710).

Standard for admissibility of expert testimony was governed by former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702), which provided if scientific, technical, or other specialized knowledge would assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise, if: (1) the testimony was based upon sufficient facts or data which were or will be admitted into evidence at the hearing or trial; (2) the testimony was the product of reliable principles and methods; and (3) the witness had applied the principles and methods reliably to the facts of the case. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672, 2013 Ga. App. LEXIS 344 (2013), cert. denied, No. S13C1255, 2013 Ga. LEXIS 774 (Ga. Sept. 23, 2013) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as an expert not satisfied. — Trial court did not err in refusing

to qualify the employees' witness as an expert because the witness's testimony provided no evidence, let alone expert testimony, that would preclude summary judgment in favor of the Georgia Department of Human Services, and under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court had discretion in determining whether expert testimony was necessary; any use of the witness as an expert in the case was wholly unnecessary because the areas of the expert's specialized knowledge were not issues beyond the ken of lay persons. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 708 S.E.2d 660, 2011 Ga. App. LEXIS 270 (2011), cert. denied, No. S11C1146, 2011 Ga. LEXIS 622 (Ga. Sept. 6, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries and the death of an elderly patient because the witness was completely lacking in recent experience working with the type of patient at issue in the case since the witness never worked in a mental health unit or at any type of extended-stay facility housing elderly patients, and over the prior nine years, the witness had worked in neonatal or pediatric facilities, except for one year when the witness was working in intensive care units. Sanders v. United States, No. CV 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

In a deceased patient's family's action against a hospital arising out of an alleged failure to properly treat decubitus ulcers (pressure sores), the expert affidavit failed to comply with O.C.G.A. §§ 9-11-9.1(a) and 24-7-702(c)(2); the expert was a coroner with a specialty in forensic pathology and not engaged in the treatment of decubitus ulcers. Hendrix v. Fulton DeKalb Hosp. Auth., 330 Ga. App. 833, 769 S.E.2d 575, 2015 Ga. App. LEXIS 69 (2015).

After the pre-trial detainee died in an isolation cell, and the plaintiffs filed a civil action alleging that the medical defendants committed malpractice, because the trial court did not abuse the court's discretion in finding that the affidavit of the plaintiffs' expert witness was insufficient to satisfy the statutory qualifications for an expert witness, the plaintiffs failed to meet the threshold requirement of filing an affidavit of an expert competent to testify and their medical malpractice claims failed as a matter of law; thus, the trial court properly granted summary judgment in favor of the medical defendants. McKuhen v. TransformHealthRX, Inc., 338 Ga. App. 354, 790 S.E.2d 122, 2016 Ga. App. LEXIS 458 (2016), cert. denied, No. S17C0102, 2017 Ga. LEXIS 278 (Ga. Apr. 17, 2017), cert. denied, No. S17C0103, 2017 Ga. LEXIS 264 (Ga. Apr. 17, 2017).

Plaintiffs' expert witness was not sufficiently qualified to render an expert opinion in support of their medical malpractice claims because, in contradiction to the expert's affidavits, the expert admitted in the expert's deposition that during the five years prior to the pre-trial detainee's death, the expert did not teach anyone how to monitor or treat inmates going through alcohol withdrawal; that, in Massachusetts, the expert did not provide daily or even regular patient care, and the expert could not estimate the amount of time the expert spent actually caring for patients; and that, in Nevada, the expert admitted the expert did not directly supervise any nurse in a correctional healthcare setting. McKuhen v. TransformHealthRX, Inc., 338 Ga. App. 354, 790 S.E.2d 122, 2016 Ga. App. LEXIS 458 (2016), cert. denied, No. S17C0102, 2017 Ga. LEXIS 278 (Ga. Apr. 17, 2017), cert. denied, No. S17C0103, 2017 Ga. LEXIS 264 (Ga. Apr. 17, 2017).

Appellate court vacated the trial court's orders admitting the worker's other expert's testimony as the trial court did not evaluate that expert's qualifications to give certain opinions, including whether the power company was legally responsible to the worker or failed to warn. Ga. Power Co. v. Campbell, 360 Ga. App. 422, 861 S.E.2d 255, 2021 Ga. App. LEXIS 369 (2021).

Applicability of former law. — Because former O.C.G.A. § 24-9-67.1(a) (see now O.C.G.A. §§ 24-7-702, 24-7-703), which governed expert witness testimony in civil actions, did not apply to probation revocation hearings, the trial court's ruling to permit the expert's testimony re-

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garding the presence of marijuana in a joint seized from the probationer was not erroneous as the state was not required to comply with Daubert to prove the expert's qualifications. Carlson v. State, 280 Ga. App. 595, 634 S.E.2d 410, 2006 Ga. App. LEXIS 682 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703) was a procedural, not substantive statute because the former statute did not change the standard of care to be applied in a medical malpractice action or the measure of a plaintiff's recovery; thus, the requirements of the statute were properly applied retroactively in a medical malpractice action in which a patient suffered injuries prior to the effective date of the former statute but filed suit after former § 24-9-67.1(c) became effective. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121, 2007 Ga. LEXIS 857 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constituted "improper judge shopping," obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457, 2007 Ga. App. LEXIS 712 (2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation on practice area of defendant and expert's qualifications related thereto. — Following the federal practice on the issue of admissibility of expert testimony under Fed. R. Evid. 702 as developed in Daubert v. Merrell Dow Pharmaceuticals, 509 U. S. 579, 113 S. Ct. 2786, 125 L.E.2d 469 (1993), and its progeny, the Court of Appeals concluded that the language "area of practice or specialty in which the opinion is to be given" in former O.C.G.A. § 24-9-67.1(c)(2), is dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury; the statute contemplates that "the expert may very well have a different area of practice than the defendant doctor", and it is thus the expert's qualifications, and not the defendant doctor's area of practice, that control the admissibility of the expert's testimony. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765, 2006 Ga. App. LEXIS 1183 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Dispute on credentials goes to weight and credibility. — Trial court's evidentiary ruling, denying a property owner's Daubert motion for a hearing to determine the competence of a bank's appraiser pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was not an abuse of discretion because disputes as to the expert's credientials went to the weight and credibility of the testimony, but not to the admissibility. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806, 2012 Ga. App. LEXIS 220 (2012) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation on party bearing burden of establishing reliability of expert's opinion. — The Georgia Court of Appeals held that the trial court properly utilized federal authority, including Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), as permitted by former O.C.G.A. § 24-9-67.1(f), when determining whether an expert's testimony met the requirements of former § 24-9-67.1(b); such authority imbues trial courts with "substantial discretion in deciding how to test an expert's reliability." Citing Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (Ga. 2008),

and McClain v. Metabolife Intl., 401 F.3d 1233 (11th Cir. 2005), the court noted that former O.C.G.A. § 24-9-67.1(b) is based upon Rule 702 of the Federal Rules of Evidence, which places the burden of establishing the reliability of the expert's opinion on the proponent. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Use of deposition at trial subject to expert rules. — In a medical malpractice case, the patient's survivor could not use the deposition of a surgery center's representative taken under O.C.G.A. § 9-11-30(b)(6) to establish the doctor's standard of care without regard to O.C.G.A. § 24-7-702, governing the admissibility of expert testimony; O.C.G.A. § 9-11-32(a) allowed the use of such depositions for any purpose but required application of the rules of evidence. Yugueros v. Robles, 300 Ga. 58, 793 S.E.2d 42, 2016 Ga. LEXIS 709 (2016).

Trial court should rule on admissibility before ruling on summary judgment. — Because the opinions of a homeowner's experts, if admissible, would present a jury question on the issue of an exterminator's breach of contract and the extent of the homeowner's damages, a trial court erred in failing to decide the admissibility of these opinions under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) before granting summary judgment to the exterminator. An v. Active Pest Control South, Inc., 313 Ga. App. 110, 720 S.E.2d 222, 2011 Ga. App. LEXIS 1014 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Summary judgment entered in favor of a sanitation company was vacated as to a citizen's claim that the company negligently damaged a platform, created a tripping hazard, and caused the citizen's injuries because the trial court had to rule on the admissibility of the citizen's expert witness before the court of appeals could consider whether the company bent the landing and caused a tripping hazard; the company moved to exclude the expert's testimony under former O.C.G.A. § 24-9-67.1, but the trial court never ruled on admissibility. Burroughs v. Mitchell County, 313 Ga. App. 8, 720 S.E.2d 335, 2011 Ga. App. LEXIS 1073 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Status of witness as lay or expert goes not to admissibility, but credibility. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, 1992 Ga. App. LEXIS 397 (1992), cert. denied, No. S92C0727, 1992 Ga. LEXIS 376 (Ga. Apr. 30, 1992) (decided under former O.C.G.A. § 24-9-67).

Expert witness defined. — An expert witness is one who through education, training, or experience has peculiar knowledge concerning some matter of science or skill to which the expert's testimony relates. Tifton Brick & Block Co. v. Meadow, 92 Ga. App. 328, 88 S.E.2d 569, 1955 Ga. App. LEXIS 586 (1955) (decided under former Code 1933, § 38-1710).

Construction. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Further, former O.C.G.A. § 24-9-67, and neither Daubert nor former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702 and 24-7-703) controlled the admission of evidence in criminal proceedings. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212, 2007 Ga. LEXIS 419 (2007) (decided under former O.C.G.A. § 24-9-67).

Applicable only in criminal cases. — Trial court was not required to consider a driver's expert affidavits under former O.C.G.A. § 24-9-67 in a products liability action because by the former statute's terms, the former statute applied to criminal cases, not civil cases. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190, 2011 Ga. App. LEXIS 1092 (2011), cert. dismissed, No. S12C1769, 2012 Ga. LEXIS 869 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. § 24-9-67).

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Qualifications of expert witness are addressed to sound discretion of court. Atlantic Coast Line R.R. v. Sweat, 183 F.2d 27, 1950 U.S. App. LEXIS 2905 (5th Cir. 1950) (decided under former Code 1933, § 38-1710).

Expert opinion must be helpful or necessary. — Expert opinion, like lay opinion, is received only in instances when the opinion is helpful or necessary. Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 1974 Ga. LEXIS 1083 (1974), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former Code 1933, § 38-1710).

Expert opinion is admissible on any matter of scientific or technical knowledge. Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, 1924 Ga. App. LEXIS 548 (1924) (decided under former Civil Code 1910, § 5876).

When based on facts supported by other witnesses and weight thereof is jury question. — Expert witnesses' opinions, on questions of science, skill, trade, or like questions, shall always be admissible provided the opinions are based on facts supported by other witnesses and the weight thereof is a question for the jury, to deal with as the jury sees fit, giving credence to the opinion or not. Atlantic Coast Line R.R. v. Sweat, 183 F.2d 27, 1950 U.S. App. LEXIS 2905 (5th Cir. 1950) (decided under former Code 1933, § 38-1710).

When an expert testified that the expert's opinion was based upon the plaintiff's deposition testimony, the investigating officer's report, diagrams of the accident scene drafted by the plaintiff, photographs of the plaintiff's vehicle, and information regarding the speed of the plaintiff's truck from its governor, it was a jury question as to the weight which should be assigned the opinion, and not a question of admissibility. J.B. Hunt Transp., Inc. v. Brown, 236 Ga. App. 634, 512 S.E.2d 34, 1999 Ga. App. LEXIS 134 (1999), cert. denied, No. S99C0857, 1999 Ga. LEXIS 566 (Ga. May 28, 1999), overruled in part, Rockdale Hospital, LLC v. Evans, 306 Ga. 847, 834 S.E.2d 77, 2019 Ga. LEXIS 642 (2019) (decided under former O.C.G.A. § 24-9-67).

Expert's credibility is a jury question. — Defendant's argument that the evidence was insufficient to support the defendant's conviction for possession by ingestion of methamphetamine because the testimony of the defendant's expert witness, a forensic toxicologist with a private clinical reference laboratory, called into question the validity of the state crime lab report, was rejected because the determination of the credibility of defendant's expert and the effect of the expert's testimony on the validity of the state crime lab report were for the jury. Poston v. State, 274 Ga. App. 117, 617 S.E.2d 150, 2005 Ga. App. LEXIS 679 (2005) (decided under former O.C.G.A. § 24-9-67).

Opinion proper when on matter within scope of expertise. — Expert can express an opinion on a matter when the matter inquired about lies within the domain of the profession or calling which the expert pursues. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438, 1964 Ga. App. LEXIS 888 (1964) (decided under former Code 1933, § 38-1710).

Opinions on matters outside scope of expertise. — Opinion of any witness, not on any question of science, skill, trade, or like questions is inadmissible when all the facts are capable of being clearly detailed so that the jury may form correct conclusions therefrom. Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214, 1941 Ga. App. LEXIS 367 (1941) (decided under former Code 1933, § 38-1710).

While expert witnesses may give their opinions as to facts, principles, and rules involved in the science in which the witnesses are learned, the witnesses are not, as to questions lying out of the domain of the science, art, or trade in which the witnesses are experts, exempt from the restriction of the former statute, which required witnesses to state facts and not opinions. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438, 1964 Ga. App. LEXIS 888 (1964) (decided under former Code 1933, § 38-1710).

Establishing variance from standard of care in legal malpractice cases. — Plaintiff may not establish variance from standard of care in medical or

legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. Savannah Valley Prod. Credit Ass'n v. Cheek, 248 Ga. 745, 285 S.E.2d 689, 1982 Ga. LEXIS 650 (1982) (decided under former O.C.G.A. § 24-9-67).

Matter within scope of lay knowledge or experience. — Expert testimony is usually excluded when the question is whether the subject matter is within the scope of the ordinary layman's knowledge and experience. Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 1974 Ga. LEXIS 1083 (1974), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former Code 1933, § 38-1710).

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible when the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; that is, the conclusion is beyond the ken of the average layman. Smith v. State, 247 Ga. 612, 277 S.E.2d 678, 1981 Ga. LEXIS 781 (1981), superseded by statute as stated in Gibbs v. State, 340 Ga. App. 723, 798 S.E.2d 308, 2017 Ga. App. LEXIS 126 (2017) (decided under former Code 1933, § 38-1710).

Expert may not testify as to the expert's opinion as to the existence vel non of a fact (in this case, whether a child had been abused sexually) unless the inference to be drawn from facts in evidence is beyond the ken of the jurors—that is, unless the jurors, for want of specialized knowledge, skill, or experience, are incapable of drawing—from facts in evidence—such an inference for themselves. Allison v. State, 256 Ga. 851, 353 S.E.2d 805, 1987 Ga. LEXIS 663 (1987) (decided under former O.C.G.A. § 24-9-67).

Advocate for the victims of sexual assault at a rape crisis center did not testify as to a rape trauma syndrome; rather, the advocate properly testified that there was no typical or common behavior among rape victims and that alleged victims of sexual assault might delay reporting such crimes. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521, 2005 Ga. App. LEXIS 284 (2005), cert. dismissed, No. S05C1805, 2005 Ga. LEXIS 758 (Ga. Oct. 24, 2005) (decided under former O.C.G.A. § 24-9-67).

Whether a seat belt engaged properly or an air bag deployed are not matters of science and issues requiring the expert testimony of an engineer or a metallurgist, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651, 2005 Ga. App. LEXIS 267 (2005) (decided under former O.C.G.A. § 24-9-67).

Whether someone suffers greater injuries in a car wreck when a seat belt does not work to restrain the person and the air bag does not inflate between the person and the steering wheel, windshield, and mirror are not matters of science and issues requiring the expert testimony of trauma physician or engineer, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651, 2005 Ga. App. LEXIS 267 (2005) (decided under former O.C.G.A. § 24-9-67).

Mixture of law and fact. — It is only when the drawing of the inference requires a mixture of law and fact that the question is not a proper one for opinion evidence. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1710).

Opinion of ultimate fact. — Expert opinions are advisory and are not binding upon a fact-finding tribunal when such opinions are as broad in scope as the question of fact at issue, such as the cause of death or disability. American Mut. Liab. Ins. Co. v. King, 88 Ga. App. 176, 76 S.E.2d 81, 1953 Ga. App. LEXIS 1035 (1953) (decided under former Code 1933, § 38-1710).

As a general rule, an expert witness is not allowed to express on the stand an opinion of ultimate fact or the very fact to be decided by the jury because to do so would invade the province of the jury. Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 1974 Ga. LEXIS 1083 (1974), overruled in part, Johnson v. State, 272 Ga.

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254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former Code 1933, § 38-1710); Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360, 1980 Ga. App. LEXIS 2193, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469, 1980 U.S. LEXIS 4104 (1980) (decided under former Code 1933, § 38-1710).

An expert witness may testify as to the witness's opinion on the ultimate issue in the case without invading the province of the jury so long as the subject is an appropriate one for opinion evidence. King v. Browning, 246 Ga. 46, 268 S.E.2d 653, 1980 Ga. LEXIS 1011 (1980) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1710).

If witness is asked witness's opinion as to a fact and not as to a mixed question of law and fact, the witness should be allowed to testify even though the witness's opinion is as to the ultimate issue for the jury. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1710).

If the cause and manner of an injury is the ultimate issue of fact to be determined by the jury, an expert may nevertheless give the expert's factual opinion but not the expert's legal conclusion on this issue for the benefit of the jury in their fact finding. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Code 1933, § 38-1710).

Expert may state the expert's opinion upon an ultimate fact, provided that all other requirements for admission of expert opinion were met. Baker v. State, 161 Ga. App. 670, 288 S.E.2d 280, 1982 Ga. App. LEXIS 1977 (1982) (decided under former O.C.G.A. § 24-9-67).

Legal conclusions. — Expert cannot act as a member of the jury; nor, while on the stand, can the expert transcend the functions of a witness and, under the guise of giving testimony, state a legal conclusion. Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678, 1904 Ga. LEXIS 232 (1904) (decided under former Civil Code 1895, § 5287); Herndon v. State, 178 Ga. 832, 174 S.E. 597, 1934 Ga. LEXIS 197 (1934) (decided under former Code 1933, § 38-1710); Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1710); Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360, 1980 Ga. App. LEXIS 2193, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469, 1980 U.S. LEXIS 4104 (1980) (decided under former Code 1933, § 38-1710).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase is within the sound discretion of the trial court. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345, 1980 Ga. App. LEXIS 1951 (1980) (decided under former Code 1933, § 38-1710).

Although it is permissible for the expert to give the expert's opinion to facts in issue or even the ultimate issue where such question is a proper one for opinion evidence, the expert is not permitted to state a legal conclusion as to the ultimate matter in issue. Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654, 1986 Ga. App. LEXIS 2452 (1986) (decided under former O.C.G.A. § 24-9-67).

Testimony on calculation of damages. — When plaintiffs presented expert testimony on the calculation of damages, even though the trier of fact found that the defendant was not responsible for all the damages, the plaintiff showed with reasonable certainty the total amount of damages and the degree to which those damages were attributable to defendant, and the award was affirmed. Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc., 235 Ga. App. 419, 509 S.E.2d 674 (decided under former O.C.G.A. § 24-9-67).

Opinions of an expert alone are insufficient grounds on which to grant summary judgment. Lake v. Hamilton Bank, 137 Ga. App. 600, 224 S.E.2d 522, 1976 Ga. App. LEXIS 2544 (1976) (decided under former Code 1933, § 38-1710).

Experiments. — Expert testimony can be based on experiments if the expert gives details of the experiment. Frank v.

State, 141 Ga. 243, 80 S.E. 1016, 1914 Ga. LEXIS 183 (1914) (decided under former Penal Code 1910, § 1048).

Construction with § 24-9-65. — Former Code 1933, § 38-1710 dealt with expert testimony concerning science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1708 (see now O.C.G.A. § 24-7-701) dealt with opinions of lay witnesses. Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824, 1944 Ga. App. LEXIS 366 (1944) (decided under former Code 1933, § 38-1710).

Appellate standard for admission. — When testimony of an expert accident reconstructionist was admitted by the trial court as expert opinion, the Court of Appeals erred by judging its admissibility pursuant to the standard appropriate for lay witnesses. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (decided under former O.C.G.A. § 24-9-67).

Appellate court is not bound by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 LE2d 469 (1993) and has consistently refused to apply the Daubert standard; further, as Daubert involves the application of Fed. R. Evid. 702, which has not been adopted in Georgia, Daubert has not been adopted in Georgia either. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126, 2005 Ga. App. LEXIS 83 (2005) (decided under former O.C.G.A. § 24-9-67).

Past use of expert by other party. — Plaintiff's questions regarding the prior employment of plaintiff's expert by defense counsel, asked in an attempt to rehabilitate or bolster the expert's credibility, were not admissible. Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 532 S.E.2d 159, 2000 Ga. App. LEXIS 409 (2000), cert. denied, No. S00C1249, 2000 Ga. LEXIS 587 (Ga. July 14, 2000) (decided under former O.C.G.A. § 24-9-67).

Exclusion of expert witness testimony on cross-racial eyewitness identification not reversible error. — Trial court did not abuse the court's discretion or violate the defendant's Sixth and Fourteenth Amendment rights by excluding expert testimony about cross-racial eyewitness identification; based on eyewitness testimony and the defendant's confession, the jury could have resolved the issue of whether the victims recognized the defendant without the assistance of an expert witness. Crawford v. State, 283 Ga. App. 645, 642 S.E.2d 335, 2007 Ga. App. LEXIS 148 (2007), cert. denied, No. S07C0937, 2007 Ga. LEXIS 442 (Ga. June 4, 2007) (decided under former O.C.G.A. § 24-9-67).

Limiting questioning of expert. — Trial court did not err in limiting appellate counsel's questioning of an expert witness at the hearing on the defendant's motion for new trial because there was sufficient evidence before the trial court to show what the expert's testimony would have been had defense counsel called the expert as a witness; appellate counsel called the witness and questioned the witness about the techniques used to question young children and the reliability of a young child's testimony, and the trial court decided to limit the testimony only when appellate counsel began asking specific questions about one of the interviews. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137, 2011 Ga. App. LEXIS 70 (2011) (decided under former O.C.G.A. § 24-9-67).

Subject matter improper for expert testimony. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212, 2007 Ga. LEXIS 419 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert on DNA testing. — No error resulted by admitting expert testimony on the issue of DNA testing and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga.

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App. 431, 649 S.E.2d 557, 2007 Ga. App. LEXIS 800 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on absence of DNA. — Trial counsel was not ineffective in failing to object to the testimony of an expert witness that the absence of the defendant's DNA on a ski mask recovered from the scene of the crime did not rule out the possibility that the defendant wore the mask because the witness's testimony was admissible as the opinions of experts on any question of science, skill, trade, or like questions was always admissible; and counsel extensively cross-examined the witness on the witness's conclusions, eliciting an admission from the witness that no studies supported the witness's testimony, reiterating the absence of DNA evidence implicating the defendant, and introducing into evidence the expert's report containing that finding. Mitchell v. State, 303 Ga. 491, 813 S.E.2d 367, 2018 Ga. LEXIS 204 (2018) (decided under former O.C.G.A. § 24-9-67).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the affidavits rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31, 2007 Ga. LEXIS 838 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, 2008 U.S. LEXIS 3194 (2008), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-67.1).

Basis for Opinion

1. In General

Facts that can form basis for opinion. — Expert opinions can be based upon facts which the expert has testified to, or heard others testify to, or which have been hypothetically stated to the expert. Choice v. State, 31 Ga. 424, 1860 Ga. LEXIS 355 (1860) (decided under former law); Taylor v. State, 83 Ga. 647, 10 S.E. 442, 1889 Ga. LEXIS 129 (1889) (decided under former Code 1882, § 3868).

An expert witness may give an opinion based upon the witness's own examination of a person, upon the witness's observation of that person, or upon any state of facts, supported by some evidence in the case, which the witness assumes as true. Mutual Benefit Health & Accident Ass'n v. Hickman, 100 Ga. App. 348, 111 S.E.2d 380, 1959 Ga. App. LEXIS 1014 (1959) (decided under former Code 1933, § 38-1710).

Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or if the expert has personally observed the facts, and gives the expert's opinion based upon the expert's own observation. Bullington v. Chandler, 110 Ga. App. 803, 140 S.E.2d 59, 1964 Ga. App. LEXIS 765 (1964) (decided under former Code 1933, § 38-1710).

An expert may give an opinion based on facts which the expert personally observes, and when an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the

other's findings. Millar Elevator Serv. Co. v. O'Shields, 222 Ga. App. 456, 475 S.E.2d 188 (decided under former O.C.G.A. § 24-9-67).

Expert witness's opinion predicated on facts raised by others. — An expert witness's opinion may be predicated upon facts placed in evidence by the testimony of other witnesses or by any other legal means. Mutual Benefit Health & Accident Ass'n v. Hickman, 100 Ga. App. 348, 111 S.E.2d 380, 1959 Ga. App. LEXIS 1014 (1959) (decided under former Code 1933, § 38-1710); National Trailer Convoy, Inc. v. Sutton, 136 Ga. App. 760, 222 S.E.2d 98, 1975 Ga. App. LEXIS 1482 (1975) (decided under former Code 1933, § 38-1710).

When an expert did not present sufficient evidence to show a relevant point, given lack of support for the expert's opinion, the lower court did not abuse the court's discretion in excluding the expert's testimony. Cromer v. Mulkey Enters., 254 Ga. App. 388, 562 S.E.2d 783, 2002 Ga. App. LEXIS 388 (2002) (decided under former O.C.G.A. § 24-9-67).

Opinions must be based on established facts. — Expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish; but the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury finds the facts on which the opinion rests. Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-1710).

Matter not in evidence. — An expert witness was properly precluded from expressing an opinion based on a letter containing an inadmissible summary of matter not in evidence and not within the expert's own knowledge. Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32, 1993 Ga. App. LEXIS 1568 (1993), cert. denied, No. S94C0519, 1994 Ga. LEXIS 524 (Ga. Feb. 21, 1994) (decided under former O.C.G.A. § 24-9-67).

Witness's opinion must be witness's own; the witness cannot act as a mere conduit for the opinion of others. Thus, the opinion is incompetent if the witness has no general knowledge of the witness's own. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, 1962 Ga. App. LEXIS 704, rev'd in part, 218 Ga. 525, 128 S.E.2d 926, 1962 Ga. LEXIS 552 (1962) (decided under former Code 1933, § 38-1710); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981) (decided under former Code 1933, § 38-1710).

Personal observation of fact by expert. — Opinion of experts, on matters within their area of expertise, is admissible especially when the expert has personally observed the facts and gives the expert's opinion based upon the expert's own observations. Erwin v. Gold Kist, Inc., 146 Ga. App. 372, 246 S.E.2d 404, 1978 Ga. App. LEXIS 2359 (1978) (decided under former Code 1933, § 38-1710).

Expert testimony as to illegal drug distribution trade is admissible. — Trial court did not err by allowing a district attorney's investigator to give the investigator's "guess" that a document found in appellant's possession and introduced in evidence "was 'the way people who are involved in the distribution of drugs keep records of who owes them money,' " because the testimony of the investigator involved a question of "trade," particularly concerning the procedure used in the illegal drug distribution trade in keeping records of accounts due and owing. O'Donnell v. State, 200 Ga. App. 829, 409 S.E.2d 579, 1991 Ga. App. LEXIS 1154 (1991), cert. denied, No. S91C1573, 1991 Ga. LEXIS 612 (Ga. Sept. 6, 1991) (decided under former O.C.G.A. § 24-9-67).

Expert testimony by an undercover officer about how street drug dealers operated in three person units consisting of a seller, drug handler, and money handler, and why they did so, was admissible as not "beyond the ken" of the average juror and applicable to the facts of the case. Vaughan v. State, 251 Ga. App. 221, 553 S.E.2d 335, 2001 Ga. App. LEXIS 897 (2001) (decided under former O.C.G.A. § 24-9-67).

With respect to a particular scientific procedure or technique, the trial court makes a determination whether the procedure or technique in question has

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reached a scientific stage of verifiable certainty, based upon evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159, 1994 Ga. App. LEXIS 1336 (1994), cert. denied, No. S95C0554, 1995 Ga. LEXIS 435 (Ga. Mar. 10, 1995), overruled in part, Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018) (decided under former O.C.G.A. § 24-9-67).

Expert need not have gone to scene. — When an expert bases the expert's opinion on facts within the bounds of evidence, the testimony is admissible notwithstanding the fact that the expert never went to the scene at all and based the expert's opinion on an examination of photographs. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42, 1981 Ga. App. LEXIS 2734 (1981) (decided under former Code 1933, § 38-1710).

Opinion based on findings of another. — When an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, upon the other's findings. Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391, 1979 Ga. App. LEXIS 2578 (1979) (decided under former Code 1933, § 38-1710).

Condemnor's expert properly testified as to the necessity of a transmission line even though the condemnor's opinion was based, in part, on another's findings; further, the expert conducted the condemnor's own study after the case was initially remanded and testified on remand that the transmission line was needed by 2007 to provide safe and reliable electric service to customers in North Georgia. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211, 2005 Ga. App. LEXIS 25 (2005) (decided under former O.C.G.A. § 24-9-67).

Expert opinion may not be given on another's opinion. — Expert may give an opinion upon the facts testified to by other witnesses, but not upon their opinions. Walker v. Fields, 28 Ga. 237, 1859 Ga. LEXIS 185 (1859) (decided under former law); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225, 1932 Ga. LEXIS 337 (1932) (decided under former Civil Code 1910, § 5876); McCauley v. Boston Old Colony Ins. Co., 149 Ga. App. 706, 256 S.E.2d 19, 1979 Ga. App. LEXIS 1998 (1979) (decided under former Code 1933, § 38-1710).

Expert opinion cannot be based on out-of-court representations by another. Flanagan v. State, 106 Ga. 102, 106 Ga. 109, 32 S.E. 80, 1898 Ga. LEXIS 29 (1898) (decided under former Penal Code 1895, § 1022).

Opinion based on hearsay. — When an expert witness's opinion is based on hearsay it is not error for the court to allow an expert to relate facts of which the expert has no direct personal knowledge, especially if the court gives the proper limiting instruction. White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385, 1976 Ga. LEXIS 1481 (1976), overruled in part, DeKalb County v. Trustees, Decatur Lodge No. 1602, etc., 242 Ga. 707, 251 S.E.2d 243, 1978 Ga. LEXIS 1337 (1978) (decided under former Code 1933, § 38-1710).

It is axiomatic that an expert, in utilizing the expert's expertise, may base the expert's opinion as to value upon hearsay. Hoover & Morris Dev. Co. v. FDIC, 149 Ga. App. 855, 256 S.E.2d 140, 1979 Ga. App. LEXIS 2056 (1979) (decided under former Code 1933, § 38-1710).

When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. King v. Browning, 246 Ga. 46, 268 S.E.2d 653, 1980 Ga. LEXIS 1011 (1980) (decided under former Code 1933, § 38-1710); Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443, 1980 Ga. LEXIS 1032 (1980) (decided under former Code 1933, § 38-1710); Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42, 1981 Ga. App. LEXIS 2734 (1981) (decided under former Code 1933, § 38-1710).

An expert's opinion may be based in part upon hearsay, and when it is based thereon it goes to the weight and credibility of the testimony, not its admissibility. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7, 1981 Ga. App.

LEXIS 2547 (1981) (decided under former Code 1933, § 38-1710).

Provided an expert witness is properly qualified in the field in which the expert offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159, 1994 Ga. App. LEXIS 1336 (1994), cert. denied, No. S95C0554, 1995 Ga. LEXIS 435 (Ga. Mar. 10, 1995), overruled in part, Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018) (decided under former O.C.G.A. § 24-9-67).

In an action against a utility and power company for damages arising from electromagnetic radiation, the trial court committed reversible error in admitting testimony of experts regarding a perceived consensus of opinion in the scientific community that magnetic fields from power lines are not a cause of cancer. Jordan v. Georgia Power Co., 219 Ga. App. 690, 466 S.E.2d 601 (decided under former O.C.G.A. § 24-9-67).

Forensic pediatrician who examined a battered infant was properly allowed to testify about seizures noted in the baby's medical records, and about a radiologist's report that confirmed suspicions about the extent of an injury, because the pediatrician's opinion was not based solely on those records, but also on an examination of the baby. Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131, 2006 Ga. App. LEXIS 253 (2006), cert. denied, No. S06C1239, 2006 Ga. LEXIS 752 (Ga. Sept. 18, 2006) (decided under former O.C.G.A. § 24-9-67).

Investigating police officer basing opinion on hearsay statements. — Police officer who investigates an accident cannot base the officer's opinion as to manner in which accident occurred upon hearsay statements which the officer receives during the officer's investigation unless they are a part of the res gestae. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7, 1981 Ga. App. LEXIS 2547 (1981) (decided under former Code 1933, § 38-1710).

Book learning. — Expert testimony was admissible even though based on book learning rather than knowledge gained from actual experience. Boswell v. State, 114 Ga. 40, 39 S.E. 897, 1901 Ga. LEXIS 558 (1901) (decided under former Penal Code 1895, § 1022); Miller v. Travelers Ins. Co., 111 Ga. App. 245, 141 S.E.2d 223, 1965 Ga. App. LEXIS 935 (1965) (decided under former Code 1933, § 38-1710).

Opinion based on education and experience was not speculative. — Testimony of a firearms expert, that the expert would not expect to find gunshot residue from the murder weapon, a semiautomatic pistol, was not speculative, was grounded on the expert's education and experience, and was admissible under former O.C.G.A. § 24-9-67. Tavera v. State, 279 Ga. 803, 621 S.E.2d 422, 2005 Ga. LEXIS 725 (2005) (decided under former O.C.G.A. § 24-9-67).

Restatement of textbook opinion inadmissible. — While an expert witness may support the expert's opinion by reference to books, statistical sources, and other learned sources, the witness's testimony is inadmissible when it is merely a restatement of a textbook opinion rather than an independent expression of the witness's own expert opinion. DOT v. Brand, 149 Ga. App. 547, 254 S.E.2d 873, 1979 Ga. App. LEXIS 1926 (1979) (decided under former O.C.G.A. § 24-9-67).

Medical records. — Opinion testimony based merely upon records and case history furnished the witness by other doctors and not a part of the evidence in the case was objectionable, but the error in the admission of the doctor's opinion was harmless, since during the four-day trial of the case, an enormous amount of testimony was adduced concerning the recent medical history of the decedent, the testimony included findings of diagnostic tests made during the decedent's final days, a pathologic opinion as to the cause of death could not have been made without reference to the decedent's records, and other opinion evidence based upon the records was admitted in evidence

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without objection. Andrews v. Major, 180 Ga. App. 393, 349 S.E.2d 225, 1986 Ga. App. LEXIS 2149 (1986) (decided under former O.C.G.A. § 24-9-67).

Specific article in medical journal. — It was not necessary for a doctor to have qualified as authoritative the specific article referred to in a medical journal in defense of a medical malpractice case, since the doctor did not limit the doctor's assessment of the journal's authority to the selective scope of the article. Pound v. Medney, 176 Ga. App. 756, 337 S.E.2d 772, 1985 Ga. App. LEXIS 2416 (1985) (decided under former O.C.G.A. § 24-9-67).

Jury instructions. — Charge to the jury, that opinions of experts to be of any value, must be based upon facts believed, or proven to be true, was not an improper charge, nor did it have the effect of expressing an opinion on the evidence or tending to discredit the testimony of the expert witnesses in the case. Allen v. Allen, 71 Ga. App. 272, 30 S.E.2d 665, 1944 Ga. App. LEXIS 331 (1944) (decided under former Code 1933, § 38-1710).

2. Need to State Basis

Expert and nonexpert compared. — Expert may give the expert's opinion without stating the reasons therefor, but one who was not an expert may give an opinion only when accompanied with the reasons. Wallace v. State, 204 Ga. 676, 51 S.E.2d 395, 1949 Ga. LEXIS 323 (1949) (decided under former Code 1933, § 38-1710).

Explanation unnecessary. — Opinion testimony by witnesses who qualified as expert real estate appraisers, as to the value of the condemnees' land and as to the damages which the witnesses had suffered on account of the taking, is admissible without the necessity for the witnesses to state the facts upon which the witnesses based their opinions. Housing Auth. v. Millwood, 138 Ga. App. 610, 226 S.E.2d 766, 1976 Ga. App. LEXIS 2252 (1976) (decided under former Code 1933, § 38-1710).

An expert may give the expert's opinion without stating the foundation therefor and without a hypothetical question based upon other evidence if the expert's opinion is based upon facts which the expert knows and has observed, or based upon facts in the record at the time the expert states the expert's opinion, or based partly on first-hand knowledge and partly on the facts or record. Thrift-Mart, Inc. v. Commercial Union Assurance Cos., 154 Ga. App. 344, 268 S.E.2d 397, 1980 Ga. App. LEXIS 2158 (1980) (decided under former Code 1933, § 38-1710).

Explanation permitted. — While it is not necessary that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. It matters not whether the facts are sought from the witness while on direct or on cross-examination. State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177, 1969 Ga. App. LEXIS 1079 (1969) (decided under former Code 1933, § 38-1710); Martin v. State, 151 Ga. App. 9, 258 S.E.2d 711, 1979 Ga. App. LEXIS 2413, cert. dismissed, 244 Ga. 876, 263 S.E.2d 437, 1979 Ga. LEXIS 1448 (1979) (decided under former Code 1933, § 38-1710).

Explanation necessary. — When an expert testifies to a conclusion based on information furnished by others, then all the information utilized by that expert in forming an opinion should be presented to the jury to enable the jury to evaluate the expert's testimony. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906, 1980 Ga. LEXIS 970 (1980) (decided under former Code 1933, § 38-1710).

Error to refuse to permit witness to state basis. — While it is not necessary that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. Jordan v. Department of Transp., 178 Ga. App. 133, 342 S.E.2d 482, 1986 Ga. App. LEXIS 1620 (1986) (decided under former O.C.G.A. § 24-9-67).

Basis for opinion outside scope of expertise. — An opinion of a witness is inadmissible when the information upon which the opinion is based is not given. This is true, even though the witness is an

expert on some subject, when the opinion testimony related to a subject on which the witness is not qualified as an expert. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, 1962 Ga. App. LEXIS 704, rev'd in part, 218 Ga. 525, 128 S.E.2d 926, 1962 Ga. LEXIS 552 (1962) (decided under former Code 1933, § 38-1710).

Explanation enhances weight of opinion. — When the facts upon which an expert bases the expert's opinion are stated the opinion is entitled to greater weight. State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177, 1969 Ga. App. LEXIS 1079 (1969) (decided under former Code 1933, § 38-1710).

Hypothetical Questions

Admissibility of opinion. — Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or where the expert has personally observed the facts and given the expert's opinion based on the expert's own opinion. Yates v. State, 127 Ga. 813, 56 S.E. 1017, 1907 Ga. LEXIS 483 (1907) (decided under former Civil Code 1895, § 5287); Cranshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S.E. 222, 1907 Ga. App. LEXIS 245 (1907) (decided under former Civil Code 1895, § 5287); Fincher v. Davis, 27 Ga. App. 494, 108 S.E. 905, 1921 Ga. App. LEXIS 230 (1921) (decided under former Civil Code 1910, § 5876); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225, 1932 Ga. LEXIS 337 (1932) (decided under former Civil Code 1910, § 5876); Wallace v. State, 204 Ga. 676, 51 S.E.2d 395, 1949 Ga. LEXIS 323 (1949) (decided under former Code 1933, § 38-1710).

Trial court did not err by allowing an expert to respond to the state's hypothetical question during redirect examination because the hypothetical was supported by the evidence; the expert was asked to consider a scenario based on the defendant's version of the facts and photographs of a crib in order to determine whether the victim's injury was consistent with the defendant's story. Elrod v. State, 316 Ga. App. 491, 729 S.E.2d 593, 2012 Ga. App. LEXIS 593 (2012) (decided under former O.C.G.A. § 24-9-67).

It is not necessary that question be propounded hypothetically when an expert testifies to the expert's opinion based upon facts which the expert has observed. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42, 1981 Ga. App. LEXIS 2734 (1981) (decided under former Code 1933, § 38-1710).

When hypothetical question is appropriate. — Proper mode of examining a physician or expert, when the physician or expert is not testifying from one's own knowledge, is to ask the physician or expert hypothetical questions. Kimball v. State, 63 Ga. App. 183, 10 S.E.2d 240, 1940 Ga. App. LEXIS 29 (1940) (decided under former Code 1933, § 38-1710).

When an expert is asked to give an opinion on facts not coming within the expert's own knowledge, the question should be hypothetical. Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319, 1980 Ga. App. LEXIS 2031 (1980) (decided under former Code 1933, § 38-1710).

Factual basis for hypothetical question. — When the testimony is based upon a hypothetical question, the facts assumed to be true should be such as the evidence on behalf of either party tends to establish. Flanagan v. State, 106 Ga. 102, 106 Ga. 109, 32 S.E. 80, 1898 Ga. LEXIS 29 (1898) (decided under former Civil Code 1895, § 5287); Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329, 1947 Ga. LEXIS 449 (1947) (decided under former Code 1933, § 38-1710); Ellis v. Southern Ry., 89 Ga. App. 407, 79 S.E.2d 541, 1953 Ga. App. LEXIS 977 (1953) (decided under former Code 1933, § 38-1710); Garrett v. State, 153 Ga. App. 366, 265 S.E.2d 304, 1980 Ga. App. LEXIS 1811 (1980) (decided under former Code 1933, § 38-1710).

Opinion of an expert witness may be given in response to a hypothetical question based upon facts placed in evidence by the testimony of other witnesses or by competent evidence of any nature. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76, 1976 Ga. App. LEXIS 2460 (1976) (decided under former Code 1933, § 38-1710); DuBois v. Ray, 177 Ga. App. 349, 339 S.E.2d 605, 1985 Ga. App. LEXIS 2600 (1985) (decided

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under former O.C.G.A. § 24-9-67); Horton v. Eaton, 215 Ga. App. 803, 452 S.E.2d 541, 1994 Ga. App. LEXIS 1385 (1994), cert. denied, No. S95C0626, 1995 Ga. LEXIS 547 (Ga. Apr. 6, 1995), overruled in part, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147, 2009 Ga. LEXIS 395 (2009) (decided under former O.C.G.A. § 24-9-67); Rowe v. State, 266 Ga. 136, 464 S.E.2d 811, 1996 Ga. LEXIS 7 (1996) (decided under former O.C.G.A. § 24-9-67).

When reliance is made upon circumstantial evidence alone for proof of one of the essential facts assumed in the framing of a hypothetical question, the trier of fact may consider the answer to the question only if it has first determined that the assumed fact has been satisfactorily established. Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309, 1980 Ga. App. LEXIS 2024 (1980) (decided under former Code 1933, § 38-1710).

Reliance can be made upon circumstantial evidence to establish a basis for framing a hypothetical question; the question of whether the circumstances were sufficiently proven to establish the fact contained in the hypothetical question is an issue for the trier of fact. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424, 1986 Ga. App. LEXIS 1663 (1986) (decided under former O.C.G.A. § 24-9-67).

That the testimony was circumstantial would not affect the viability of a hypothetical. Whether there was insufficient knowledge upon which the expert could render the expert's opinion goes not to the admissibility of that opinion, but to the credibility of the witness. Apac-Georgia, Inc. v. Padgett, 193 Ga. App. 706, 388 S.E.2d 900, 1989 Ga. App. LEXIS 1638 (1989) (decided under former O.C.G.A. § 24-9-67).

Method of asking question. — Attorney would be limited in framing the hypothetical question to the expert witness by the same parameters which would limit own testimony. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76, 1976 Ga. App. LEXIS 2460 (1976) (decided under former Code 1933, § 38-1710).

Weight of testimony in response to hypothetical question. — Opinion testimony of an expert can be based upon hypothetical questions and though the jury is allowed to receive the testimony of experts the jury is not bound by such testimony; such testimony is not conclusive or controlling and is submitted for whatever the jury considers it to be worth. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748, 1978 Ga. App. LEXIS 2021 (1978) (decided under former Code 1933, § 38-1710).

Weight of Opinion Evidence

Expert testimony is weighed and judged like any other; its weight and value is determined by the jury considering its nature and the layman's knowledge thereof. Buckhanon v. State, 151 Ga. 827, 108 S.E. 209, 1921 Ga. LEXIS 393 (1921) (decided under former Penal Code 1910, § 1048); see also Mitchell v. State, 6 Ga. App. 554, 65 S.E. 326, 1909 Ga. App. LEXIS 381 (1909).

Trier of fact not bound by expert testimony. — While competent expert testimony is entitled to great weight, the testimony is not so authoritative that either court, jury, or commission is bound to be governed by that testimony, since the testimony is advisory merely and intended to assist the court, jury, or commission in coming to a correct conclusion. B.F. Goodrich Co. v. Arnold, 88 Ga. App. 64, 76 S.E.2d 20, 1953 Ga. App. LEXIS 1009 (1953) (decided under former Code 1933, § 38-1710); see also Thomas v. United States Cas. Co., 218 Ga. 493, 128 S.E.2d 749, 1962 Ga. LEXIS 543 (1962) (decided under former Code 1933, § 38-1710); Miller v. Travelers Ins. Co., 111 Ga. App. 245, 141 S.E.2d 223, 1965 Ga. App. LEXIS 935 (1965) (decided under former Code 1933, § 38-1710); Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505, 1979 Ga. App. LEXIS 3065 (1979) (decided under former Code 1933, § 38-1710); Moses v. State, 245 Ga. 180, 263 S.E.2d 916, 1980 Ga. LEXIS 732 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60,

1980 U.S. LEXIS 2962 (1980), overruled in part, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490, 1993 Ga. LEXIS 326 (1993) (decided under former Code 1933, § 38-1710).

While direct and positive testimony cannot arbitrarily be rejected by a jury or other trier of facts, this rule does not apply to the opinion evidence of physicians or other experts. Accordingly, it was a question for the board's determination as to whether the board would accept the testimony of one physician, which authorized the award for the claimant, or the testimony of two other doctors, which would have authorized an award denying compensation. United States Fid. & Guar. Co. v. Doyle, 96 Ga. App. 745, 101 S.E.2d 600, 1957 Ga. App. LEXIS 682 (1957) (decided under former Code 1933, § 38-1710).

Expert testimony is not absolutely obligatory on the jury, even if uncontradicted. Smith v. Godfrey, 155 Ga. App. 113, 270 S.E.2d 322, 1980 Ga. App. LEXIS 2481 (1980) (decided under former Code 1933, § 38-1710).

Probative value of opinion evidence is for the jury. Western Union Tel. Co. v. Ford, 8 Ga. App. 514, 70 S.E. 65, 1911 Ga. App. LEXIS 13 (1911) (decided under former Civil Code 1910, § 5876); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633, 1948 Ga. App. LEXIS 693 (1948) (decided under former Code 1933, § 38-1710); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454, 1973 Ga. App. LEXIS 1468 (1973) (decided under former Code 1933, § 38-1710); Arnold v. State, 155 Ga. App. 569, 271 S.E.2d 702, 1980 Ga. App. LEXIS 2678 (1980) (decided under former Code 1933, § 38-1710).

Weight given to discredited tests in expert community. — Trial court did not err in admitting the expert testimony of the psychologist who interviewed the children even though defendant presented expert testimony that one of the tests used by the psychologist had been discredited in the psychological community; the conflicting expert opinions on test results went to the weight, rather than the admissibility, of the testimony. Hanson v. State, 263 Ga. App. 45, 587 S.E.2d 200, 2003 Ga. App. LEXIS 1088 (2003) (decided under former O.C.G.A. § 24-9-67).

Quality of expert opinion must be considered. — An expert opinion while very valuable in many situations, nevertheless has a limited weight-carrying capacity. The "quality" of such testimony must be considered. Lashley v. Ford Motor Co., 359 F. Supp. 363, 1972 U.S. Dist. LEXIS 12178 (M.D. Ga. 1972), aff'd, 480 F.2d 158, 1973 U.S. App. LEXIS 9695 (5th Cir. 1973) (decided under former Code 1933, § 38-1710).

Jury can consider expert's credentials in assessing weight. — Whether an examining physician is or is not a psychiatrist is a matter which may affect the extent of the physician's expertise in evaluating a mental condition, and therefore may affect the weight of any opinion or evaluation, a matter to be determined by a jury, but it does not affect admissibility, nor is admissibility precluded by the fact that the physician's opinions and evaluations are based on conversations with the patient. Petty v. Folsom, 229 Ga. 477, 192 S.E.2d 246, 1972 Ga. LEXIS 657 (1972) (decided under former Code 1933, § 38-1710).

Jury can consider the expert's credentials and then give such weight and credit to the expert's testimony as jury sees fit. McCoy v. State, 237 Ga. 118, 227 S.E.2d 18, 1976 Ga. LEXIS 1167 (1976) (decided under former Code 1933, § 38-1710).

Positive factual testimony outweighs negative opinion. — Affirmative and positive testimony of witnesses as to the actual facts of a particular occurrence is not overcome by testimony which is negative in its character or consists of mere opinions. West v. State, 84 Ga. 527, 10 S.E. 731, 1889 Ga. LEXIS 368 (1889) (decided under former Code 1882, § 3868).

An expert's opinion based on insufficient factual foundation or hearsay affects the weight, but not the admissibility, of the expert's testimony. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748, 1978 Ga. App. LEXIS 2021 (1978) (decided under former Code 1933, § 38-1710).

When it is developed by examination that the opinion is based on inadequate knowledge, this goes to the credibility of the witness rather than to the admissibility of the evidence. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42, 1981 Ga. App.

Weight of Opinion Evidence (Cont'd)

LEXIS 2734 (1981) (decided under former Code 1933, § 38-1710).

Jury instructions. — Even if the testimony of the civil engineer as to the distance between named points, introduced by the defendant in support of an alibi sought to be established by the defendant, could be considered as expert evidence, the omission to charge the law in regard to expert testimony as set forth in the former statute, declaring that "the opinions of experts, on any question of science, skill, trade, or like questions, shall always be admissible; and such opinions may be given on the facts as proved by other witnesses," was not, as contended, an expression of opinion as to credibility of the witness and weight of the testimony; nor was it erroneous to omit to charge on that subject without request. Stone v. State, 180 Ga. 223, 178 S.E. 435, 1935 Ga. LEXIS 225 (1935) (decided under former Code 1933, § 38-1710).

Charge that opinion evidence could be accepted by the jury and considered along with all the other evidence in the case, but that the jury was not bound by the opinions of experts or nonexperts was not error. Allen v. Allen, 71 Ga. App. 272, 30 S.E.2d 665, 1944 Ga. App. LEXIS 331 (1944) (decided under former Code 1933, § 38-1710).

Jury charge upheld. — There was no reversible error, despite the defendant's argument on appeal that the trial court's charge to the jury on DNA evidence was incomplete and prejudicial as a matter of law because: (1) a review of the record showed that the charge given by the court tracked the language set forth in the pattern charge and was otherwise a correct statement of law with respect to the collection and testing of DNA; and (2) the defendant's proposed jury charge was argumentative and composed primarily of evidentiary matters that were not proper for a jury instruction. Moreover, there was no request for the additional charge the defendant asserted was erroneously omitted present in the record. Stanley v. State, 289 Ga. App. 373, 657 S.E.2d 305, 2008 Ga. App. LEXIS 93 (2008) (decided under former O.C.G.A. § 24-9-67).

Cross-Examination

Matters admissible on cross examination. — Matters the expert may have omitted from consideration in the expert's appraisal of property were appropriate matters for cross-examination and rebuttal, and ultimately for the weight to be given the opinion by the jury. Brookhaven Supply Co. v. DeKalb County, 134 Ga. App. 878, 216 S.E.2d 694, 1975 Ga. App. LEXIS 2205 (1975) (decided under former Code 1933, § 38-1710).

Reasoning the expert used in reaching expert's opinion may be explored on cross-examination and need not be presented in toto as a condition precedent to admissibility. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748, 1978 Ga. App. LEXIS 2021 (1978) (decided under former Code 1933, § 38-1710).

Introducing inadmissible evidence by cross-examination. — Party should not be allowed to introduce in evidence an opinion of an expert witness based on hearsay by the method of cross-examining such witness when such evidence would have been entirely inadmissible on direct examination. Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-1710).

Volunteered testimony. — Testimony of an expert witness is not reversible error if the expert volunteered testimony during cross-examination which was substantially the same or similar to that later objected to. DOT v. Coley, 184 Ga. App. 206, 360 S.E.2d 924, 1987 Ga. App. LEXIS 2171 (1987) (decided under former O.C.G.A. § 24-9-67).

Illustrations

1. Opinions Admissible

Experts were permitted to testify in the following cases. — See Hook v. Stovall, Dunn & Co., 26 Ga. 704, 1859 Ga. LEXIS 407 (1859) (physician on disease) (decided under former law); Walker v. Fields, 28 Ga. 237, 1859 Ga. LEXIS 185 (1859) (willwright) (decided under former law); May v. Dorsett, 30 Ga. 116, 1860 Ga. LEXIS 48 (1860) (banking expert) (decided under former law); White v. Clements, 39 Ga. 232, 1869 Ga. LEXIS 207

(1869) (physician on disease; ethnologist on question of race) (decided under former Code 1863, § 3792); Everett v. State, 62 Ga. 65, 1878 Ga. LEXIS 300 (1878) (physician) (decided under former Code 1873, § 3868); Taylor v. State, 83 Ga. 647, 10 S.E. 442, 1889 Ga. LEXIS 129 (1889) (physician on sanity) (decided under former Code 1882, § 3868); Von Pollnitz v. State, 92 Ga. 16, 18 S.E. 301, 1893 Ga. LEXIS 5 (1893) (physician) (decided under former Code 1882, § 3868); Perry v. State, 110 Ga. 234, 36 S.E. 781, 1900 Ga. LEXIS 348 (1900) (physician) (decided under former Penal Code 1895, § 1022); Wheeler v. State, 112 Ga. 43, 37 S.E. 126, 1900 Ga. LEXIS 23 (1900) (acoustics expert on whether conversation could be overheard) (decided under former Penal Code 1895, § 1022); Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678, 1904 Ga. LEXIS 232 (1904) (physician on death but not on contributing cause) (decided under former Civil Code 1895, § 5287); Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569, 1905 Ga. LEXIS 597 (1905) (osteopath notwithstanding lack of physician's license) (decided under former Civil Code 1895, § 5287); Bullard v. State, 127 Ga. 289, 56 S.E. 429, 1907 Ga. LEXIS 233 (1907) (physician) (decided under former Penal Code 1895, § 1022); Goodwyn v. Central of Ga. Ry., 2 Ga. App. 470, 58 S.E. 688, 1907 Ga. App. LEXIS 426 (1907) (railroad engineer) (decided under former Civil Code 1895, § 5287); Glover v. State, 129 Ga. 717, 59 S.E. 816, 1907 Ga. LEXIS 564 (1907) (physician on sanity) (decided under former Penal Code 1895, § 1022); Harper v. State, 129 Ga. 770, 59 S.E. 792, 1907 Ga. LEXIS 579 (1907) (physician) (decided under former Penal Code 1895, § 1022); Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52, 1908 Ga. LEXIS 36 (1908) (expert on location of railroad and factory) (decided under former Civil Code 1895, § 5287); Cochrell v. Langley Mfg. Co., 5 Ga. App. 317, 63 S.E. 244, 1908 Ga. App. LEXIS 111 (1908) (experts on machinery) (decided under former Civil Code 1895, § 5287); Garner v. State, 6 Ga. App. 788, 65 S.E. 842, 1909 Ga. App. LEXIS 470 (1909) (gun expert on caliber of bullet) (decided under former Penal Code 1895, § 1022); Western Union Tel. Co. v. Ford, 8 Ga. App. 514, 70 S.E. 65, 1911 Ga. App. LEXIS 13 (1911) (whether sight could have been saved by timely arrival of oculist) (decided under former Civil Code 1910, § 5876); Lanier v. State, 141 Ga. 17, 80 S.E. 5, 1913 Ga. LEXIS 290 (1913) (expert testimony on manner and cause of death) (decided under former Penal Code 1910, § 1048); Wilensky v. State, 15 Ga. App. 360, 83 S.E. 276, 1914 Ga. App. LEXIS 113 (1914) (jeweler as to symbol on watch) (decided under former Penal Code 1910, § 1048); Byrd v. State, 142 Ga. 633, 83 S.E. 513, 1914 Ga. LEXIS 484 (1914) (gun expert on wound) (decided under former Penal Code 1910, § 1048); Bates v. State, 18 Ga. App. 718, 90 S.E. 481, 1916 Ga. App. LEXIS 1221 (1916) (handwriting expert on authorship of papers) (decided under former Penal Code 1910, § 1048); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, 1917 Ga. App. LEXIS 712 (1917) (accountant as to what books show) (decided under former Penal Code 1910, § 1048); Holtzendorf v. McNeil, 25 Ga. App. 792, 104 S.E. 919, 1920 Ga. App. LEXIS 216 (1920) (dentist on value of extracted tooth) (decided under former Civil Code 1910, § 5876); Bullard v. Metropolitan Life Ins. Co., 31 Ga. App. 641, 122 S.E. 75, 1924 Ga. App. LEXIS 113 (1924) (physician on death but not on contributing cause) (decided under former Civil Code 1910, § 5876); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, 1924 Ga. App. LEXIS 548 (1924) (railroad engineer) (decided under former Civil Code 1910, § 5876); Taber Mill v. Southern Brighton Mills, 49 Ga. App. 390, 175 S.E. 665, 1934 Ga. App. LEXIS 416 (1934) (expert on customs and usages of trade) (decided under former Code 1933, § 38-1710); Pollard v. Page, 56 Ga. App. 503, 193 S.E. 117, 1937 Ga. App. LEXIS 147 (1937) (physician on plaintiffs' condition, after giving basic facts) (decided under former Code 1933, § 38-1710); Southern Ry. v. Blanton, 59 Ga. App. 252, 200 S.E. 471, 1938 Ga. App. LEXIS 483 (1938) (railroad engineer on safety practices) (decided under former Code 1933, § 38-1710); Sockwell v. Lucas & Jenkins, Inc., 71 Ga. App. 765, 32 S.E.2d 201, 1944 Ga. App. LEXIS 216 (1944) (building inspector on conformance

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to building code) (decided under former Code 1933, § 38-1710); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633, 1948 Ga. App. LEXIS 693 (1948) (undertaker on cause of corpse's mutilation) (decided under former Code 1933, § 38-1710); Central Truckaway Sys. v. Harrigan, 79 Ga. App. 117, 53 S.E.2d 186, 1949 Ga. App. LEXIS 598 (1949) (physician on permanency of patient's injuries) (decided under former Code 1933, § 38-1710); Eller v. Matthews, 216 Ga. 315, 116 S.E.2d 235, 1960 Ga. LEXIS 455 (1960) (teacher on emotional state of pupil) (decided under former Code 1933, § 38-1710); State Hwy. Dep't v. Sinclair Ref. Co., 103 Ga. App. 18, 118 S.E.2d 293, 1961 Ga. App. LEXIS 844 (1961) (expert on damages to property) (decided under former Code 1933, § 38-1710); McGuire v. Davis, 437 F.2d 570, 1971 U.S. App. LEXIS 12528 (5th Cir. 1971) (physician on pain suffered by patient) (decided under former Code 1933, § 38-1710); Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76, 1976 Ga. App. LEXIS 2460 (1976) (plaintiff's attorney on reasonableness of attorney's fee) (decided under former Code 1933, § 38-1710); Hall v. State, 138 Ga. App. 20, 225 S.E.2d 705, 1976 Ga. App. LEXIS 2037 (1976) (fingerprints) (decided under former Code 1933, § 38-1710); Harris v. Atlantic Creosote Co., 142 Ga. App. 695, 236 S.E.2d 909, 1977 Ga. App. LEXIS 1409 (1977) (expert on vehicle's stopping distance) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (expert on whether wound was self-inflicted) (decided under former Code 1933, § 38-1710); Smith v. State, 247 Ga. 612, 277 S.E.2d 678, 1981 Ga. LEXIS 781 (1981), superseded by statute as stated in Gibbs v. State, 340 Ga. App. 723, 798 S.E.2d 308, 2017 Ga. App. LEXIS 126 (2017) (expert on battered woman's syndrome) (decided under former Code 1933, § 38-1710); Paxton v. State, 159 Ga. App. 175, 282 S.E.2d 912, 1981 Ga. App. LEXIS 2537, cert. denied, 248 Ga. 231, 283 S.E.2d 235, 1981 Ga. LEXIS 1121 (1981) (common origin of pubic hairs) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61, 1981 Ga. App. LEXIS 2887 (1981) (expert on mechanical engineering) (decided under former Code 1933, § 38-1710); Davis v. Williams, 165 Ga. App. 45, 299 S.E.2d 102, 1983 Ga. App. LEXIS 1758 (1983) (surveyor as to boundary line) (decided under former O.C.G.A. § 24-9-67); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470, 1984 Ga. App. LEXIS 2164 (1984) (experts in automobile engineering and systems safety analysis) (decided under former O.C.G.A. § 24-9-67); Concrete Constr. Co. v. City of Atlanta, 176 Ga. App. 873, 339 S.E.2d 266, 1985 Ga. App. LEXIS 2588 (1985) (expert in electric engineering familiar with the installation of gas lines) (decided under former O.C.G.A. § 24-9-67); Ingram v. State, 178 Ga. App. 292, 342 S.E.2d 765, 1986 Ga. App. LEXIS 1635 (1986); Height v. State, 221 Ga. App. 647, 472 S.E.2d 485. (drug investigator on amount and manner of packaging of cocaine) (decided under former O.C.G.A. § 24-9-67).

Battered women's syndrome expert was properly permitted to testify as to why a victim would not have reported instances of abuse and why the victim dismissed a complaint for divorce and reconciled with defendant; further, the expert was properly permitted to testify as to the expert's qualifications in the presence of the jury. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-67).

Fingerprint comparison expert. — State's fingerprint expert was properly permitted to testify as fingerprint comparison evidence was not novel and was widely accepted in Georgia courts. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126, 2005 Ga. App. LEXIS 83 (2005) (decided under former O.C.G.A. § 24-9-67).

Contract terms. — If there was no applicable custom to determine, in a timber lease, the size of trees meant by the phrase "suitable for turpentine purposes," opinion evidence would be admissible. It should be admitted, however, not to explain the meaning of descriptive terms in

the contract, but simply for the purpose of determining what class of trees or timber as to size would come within such description. Nor would the quoted phrase be varied in the phrase's legal meaning because of the different methods of proof, for that would be the same whether a custom be shown or not, since any such custom, if existing, would presumably represent the standard of ordinarily prudent men. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 1947 Ga. LEXIS 534 (1947) (decided under former Code 1933, § 38-1710).

Expert testimony on credibility of witness. — Generally, expert testimony as to the credibility of a witness is admissible if the subject matter involves organic or mental disorders, such as insanity, hallucinations, nymphomania, retrograde amnesia, and testimony concerning physical maladies which tend to impair mental or physical faculties. Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 1974 Ga. LEXIS 1083 (1974), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former Code 1933, § 38-1710).

Expert's testimony as to whether victims' videotaped statements were coached. — Expert's testimony as to whether victims' videotaped statements were coached was inadmissible in a prosecution for child molestation since the jury saw the interviews for themselves and heard the victims' direct and cross-examination as witnesses. Wright v. State, 233 Ga. App. 358, 504 S.E.2d 261 (decided under former O.C.G.A. § 24-9-67).

An expert on insanity may give an opinion based upon the expert's own examination of a person, upon the expert's observation of that person, or upon any state of facts, supported by some evidence in the case, which the expert assumes as true. Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-1710).

Opinion on ultimate fact. — Defendant's claim that a doctor improperly gave an opinion as to an ultimate fact was rejected as the doctor did not testify concerning child neglect syndrome when the doctor testified that the doctor's overall impression was a possible child-neglect scenario, the syndrome had been recognized and expert testimony concerning the syndrome was admissible, and a treating physician could testify that the examination of a child raised a strong suspicion of child abuse. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587, 2006 Ga. App. LEXIS 1321 (2006) (decided under former O.C.G.A. § 24-9-67).

Testimony by examining nurse. — In a prosecution on charges of both child molestation and aggravated child molestation, the trial court did not abuse the court's discretion in allowing an examining registered nurse to give an opinion that a child sex abuse victim's injuries were consistent with ones caused by penetration by a finger when, prior to testifying, the nurse outlined the nurse's relevant background including completion of a sexual assault nurse examiner's program, advanced pediatric training under the supervision of a doctor involved in child abuse cases, and training and experience in performing numerous pelvic examinations on child abuse victims. Rodriguez v. State, 281 Ga. App. 129, 635 S.E.2d 402, 2006 Ga. App. LEXIS 1018 (2006) (decided under former O.C.G.A. § 24-9-67).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620, 2007 Ga. App. LEXIS 1075 (2007) (decided under former O.C.G.A. § 24-9-67).

Experts on toxicology. — As an expert witness was not a mere conduit for a toxicologist's findings, because the expert reviewed the data and testing procedures to determine the accuracy of the toxicologist's report, the expert's testimony was properly admitted. Therefore, defense counsel was not ineffective for failing to object to the testimony. Watkins v. State,

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285 Ga. 355, 676 S.E.2d 196, 2009 Ga. LEXIS 163 (2009) (decided under former O.C.G.A. § 24-9-67).

Psychologist's hypothetical based on evidence adduced at trial. — When appellant was charged with sexually molesting his daughter, and appellant acknowledged that he had sexually molested his first daughter by a previous marriage over a ten year period, the trial court did not err by admitting a psychologist's testimony about the mathematical probabilities regarding the self-rehabilitation of pedophiles or persons with incestuous behavior, since the likelihood of a person with compulsive behavior rehabilitating himself without treatment was a subject matter not within the scope of the ordinary laymen's knowledge and experience, and thus evidence regarding these matters was properly admissible under former O.C.G.A. § 24-9-67. Harwood v. State, 195 Ga. App. 465, 394 S.E.2d 109, 1990 Ga. App. LEXIS 573 (1990) (decided under former O.C.G.A. § 24-9-67).

Medical social worker. — Witness's testimony that a baby's injuries were inconsistent with the history of events the defendant had described was well within the witness's purview as a medical social worker because the witness's daily duties required consideration of medical evidence along with personal observations to determine whether factors were present which could indicate child abuse. Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131, 2006 Ga. App. LEXIS 253 (2006), cert. denied, No. S06C1239, 2006 Ga. LEXIS 752 (Ga. Sept. 18, 2006) (decided under former O.C.G.A. § 24-9-67).

Testimony of a mechanic was sufficient to prove the value of the damage to the victim's car in a case charging second degree criminal damage to property. Wyche-Hinkle v. State, 268 Ga. App. 898, 602 S.E.2d 902, 2004 Ga. App. LEXIS 1048 (2004) (decided under former O.C.G.A. § 24-9-67).

Testimony of pathologist in murder was not inadmissible because it might possibly give rise to inferences adverse to defendant. Bethea v. State, 251 Ga. 328, 304 S.E.2d 713, 1983 Ga. LEXIS 773 (1983) (decided under former O.C.G.A. § 24-9-67).

Medical expert on murder victim's fatal condition. — It was within the medical examiner's expertise to testify, based upon the examiner's observation of the blood stains at victim's condo and the significance of the blood loss indicated by those stains, that in the absence of immediate medical care victim was probably dead. White v. State, 263 Ga. 94, 428 S.E.2d 789, 1993 Ga. LEXIS 409 (1993) (decided under former O.C.G.A. § 24-9-67).

Medical examiner properly allowed to state opinion on cause of death. — County medical examiner was properly permitted to state examiner's opinion, based on the facts contained in a 1979 autopsy report, that the victim died of a gunshot wound to the abdomen, and such opinion was not the restatement of the diagnostic opinion of another expert. Turner v. State, 273 Ga. 340, 541 S.E.2d 641, 2001 Ga. LEXIS 58, cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54, 2001 U.S. LEXIS 5836 (2001) (decided under former O.C.G.A. § 24-9-67).

Testimony from medical examiner on findings. — State was properly allowed to ask a medical examiner (ME) whether the defendant's account of the homicide was consistent with the ME's findings in the autopsy as: 1) the ME did not state an opinion as to the veracity of any witness or the defendant; and 2) the ME's testimony did not go to the ultimate issue because the defendant admitted strangling the victim but claimed self-defense. Cade v. State, 289 Ga. 805, 716 S.E.2d 196, 2011 Ga. LEXIS 717 (2011) (decided under former O.C.G.A. § 24-9-67).

Forensic pathologist on single fatal blow. — Expert's testimony regarding the possibility of death by a single blow, and the possibility of subsequent head movement following death in that manner, was admissible because it was based on facts in evidence and because this testimony pertained to conclusions jurors would not ordinarily be able to draw for themselves. Maxwell v. State, 263 Ga. 57, 428 S.E.2d 76, 1993 Ga. LEXIS 356 (1993) (decided under former O.C.G.A. § 24-9-67).

Testimony by pathologist instead of physician on injury was proper. — In

a prosecution for kidnapping and aggravated assault, the trial court properly allowed a pathologist instead of a physician to testify as to whether the holes in the victim's shoe and an injury to the victim's toe were caused by a bullet; the pathologist had experience in inspecting gunshot wounds on people and in clothing and footwear. (decided under former O.C.G.A. § 24-9-67).

Expert testimony on bullet trajectory. — Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to conduct a pretrial consultation with an expert witness to utilize the evidence of the trajectory of the fatal bullet to support the defense because the defendant failed to demonstrate a reasonable probability that the trial result would have been different if counsel had made such a consultation as the undisputed evidence established that the defendant fired the first shot and was the aggressor who started the gunfight; and the fact that the defendant fired the fatal shot while trying to get away from the gunfight the defendant started did not change the analysis regarding the lack of justification as the defendant was the aggressor. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277, 2017 Ga. LEXIS 1 (2017) (decided under former O.C.G.A. § 24-7-707).

Expert trained in behavioral science. — Expert in the areas of homicide investigation and crime scene reconstruction was allowed to testify regarding the reasons why a perpetrator might reposition and cover a victim since the challenged testimony was well within the expert's range of training and experience and the average juror does not possess the experience necessary to discern the most common complex behavioral reasons for a perpetrator's acting in such a manner. Foster v. State, 273 Ga. 34, 537 S.E.2d 659, 2000 Ga. LEXIS 773 (2000) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on DNA profile. — Expert's testimony regarding the frequency in the population of the DNA profile obtained from three rape victims was admissible given the expert's credentials and expertise and the expert's testimony as to the computer program which generated the statistical frequencies to which the expert testified. Collins v. State, 267 Ga. App. 784, 600 S.E.2d 802, 2004 Ga. App. LEXIS 813 (2004) (decided under former O.C.G.A. § 24-9-67).

No error resulted by admitting expert testimony on the issue of DNA testing, and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557, 2007 Ga. App. LEXIS 800 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on pancreatic injury. — Trial court did not abuse the court's discretion in allowing the state's expert witness to testify to the cause of certain of the victim's injuries because the expert testified that one of the victim's injuries was caused by blunt force trauma without opining on how such trauma occurred; the opinion offered by the expert regarding the cause of the victim's pancreatic injury was one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion was beyond the ken of the average layman. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423, 2011 Ga. App. LEXIS 541 (2011), cert. denied, No. S11C1648, 2012 Ga. LEXIS 127 (Ga. Jan. 23, 2012) (decided under former O.C.G.A. § 24-9-67).

Pediatrician's opinion that a child had been molested was one of fact and one which the jurors would not ordinarily be able to draw for themselves, and was admissible even though the testimony indirectly involved the child's credibility. State v. Butler, 256 Ga. 448, 349 S.E.2d 684, 1986 Ga. LEXIS 871 (1986), aff'd, 181 Ga. App. 589, 353 S.E.2d 855, 1987 Ga. App. LEXIS 1494 (1987) (decided under former O.C.G.A. § 24-9-67).

Defendant had no ground to contest the trial court's decision to allow a pediatrician to give opinion testimony to show that the victims' recitation of events was consistent with child abuse because the state proffered the pediatrician as an expert in the field of child sexual abuse, and with no objection from the defense, the trial court so qualified the pediatrician. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585, 2011 Ga. App. LEXIS 1081

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(2011) (decided under former O.C.G.A. § 24-9-67).

Expert's opinion that child molested. — Expert's testimony that in expert's opinion the child had been molested without comment as to whether the defendant was the molester was not testimony as to the ultimate issue in the case and was not objectionable. Karonen v. State, 205 Ga. App. 852, 424 S.E.2d 47, 1992 Ga. App. LEXIS 1533 (1992), cert. denied, No. S93C0222, 1993 Ga. LEXIS 6 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-9-67).

Child abuse syndrome. — Trial court properly allowed a psychologist, who had examined a child molestation victim, to testify as to the psychologist's conclusion that the victim suffered from child abuse syndrome, since the testimony was not a conclusion that the victim was in fact abused and that issue was left to the jury to determine. Cooper v. State, 200 Ga. App. 560, 408 S.E.2d 797, 1991 Ga. App. LEXIS 1081 (1991) (decided under former O.C.G.A. § 24-9-67).

Trial court properly admitted an expert's testimony as to child sexual abuse syndrome as: (1) it was helpful to the jury; and (2) laymen could not understand this syndrome without expert testimony, nor would laymen be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted; further, the expert offered no opinion as to whether the victims were being truthful, but left that determination for the jury. McCoy v. State, 278 Ga. App. 492, 629 S.E.2d 493, 2006 Ga. App. LEXIS 351 (2006) (decided under former O.C.G.A. § 24-9-67).

Testimony of burglary investigator. — Testimony of a sheriff's department's burglary investigator as to whether, based on his training and experience, items are sometimes sold when items are stolen and whether the crime lab would process fingerprints taken from a burglary crime scene was admissible. Hestley v. State, 216 Ga. App. 573, 455 S.E.2d 333, 1995 Ga. App. LEXIS 220 (1995), cert. denied, No. S95C1054, 1995 Ga. LEXIS 620 (Ga. May 19, 1995) (decided under former O.C.G.A. § 24-9-67).

Testimony on blood samples based on electrophoresis procedure. — Expert witness may testify concerning identification of blood samples based on procedure known as electrophoresis, the statistical or mathematical probability of certain enzymes being found in the blood of the general population. Graham v. State, 168 Ga. App. 23, 308 S.E.2d 413, 1983 Ga. App. LEXIS 3368 (1983) (decided under former O.C.G.A. § 24-9-67).

Evidence of source of DNA. — Trial counsel was not ineffective in failing to make a meritless objection based on the state's expert's testimony as to the source of the DNA on a sock as the possible mechanisms by which epithelial cells ended up on a sock were beyond the ken of the average layman; since the evidence at issue was admissible, defendant's trial counsel was not required to object. Eley v. State, 266 Ga. App. 45, 596 S.E.2d 660, 2004 Ga. App. LEXIS 295 (2004), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-9-67).

Testimony of police officer on cocaine use admissible. — Knowledge of the amount of crack cocaine one would generally possess for personal use or the amount which might evidence distribution was not necessarily within the scope of the ordinary layman's knowledge and experience. Therefore, the testimony of a veteran police officer on the subject would have been properly admissible under former O.C.G.A. § 24-9-67. Davis v. State, 200 Ga. App. 44, 406 S.E.2d 555, 1991 Ga. App. LEXIS 762 (1991) (decided under former O.C.G.A. § 24-9-67).

Police officer's opinion testimony that the amount of cocaine seized in the execution of a search warrant upon defendant's residence would typically be intended for distribution by the defendant rather than for the defendant's personal use was properly admissible. Wise v. State, 257 Ga. App. 211, 570 S.E.2d 656, 2002 Ga. App. LEXIS 1110 (2002) (decided under former O.C.G.A. § 24-9-67).

Unqualified testimony of a police officer offered to show intent to distribute

cocaine, based on the amount of cocaine and the officer's knowledge of defendant, was not competent evidence of an intent to distribute. Stephens v. State, 219 Ga. App. 881, 467 S.E.2d 201 (decided under former O.C.G.A. § 24-9-67).

Crime lab chemist qualified regarding street value of drugs. — It was not error for the trial court to permit the state expert, a crime laboratory chemist, to testify concerning the "street value" of confiscated drugs, where the chemist testified that the chemist had accumulated knowledge of the street value of cocaine as a result of the chemist's experience over years of comparing the prices paid by undercover officers during their undercover purchases with that which was supplied to the chemist for analysis. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, 1992 Ga. App. LEXIS 618 (1992), cert. denied, No. S92C0913, 1992 Ga. LEXIS 460 (Ga. June 4, 1992) (decided under former O.C.G.A. § 24-9-67).

Although a print card was not admitted as a business record, it was relevant as the basis for an expert's conclusion that defendant's print matched that taken from the victim's vehicle; despite defendant's hearsay objection, the expert's testimony connected defendant to the crime, and the admissibility of the expert's inculpatory testimony did not depend upon the admission of the print. Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651, 2003 Ga. LEXIS 795 (2003) (decided under former O.C.G.A. § 24-9-67).

Officer is an expert on narcotics investigations. — Arresting officer should have been qualified as an expert in "narcotics investigation"; although the trial court allowed the officer's testimony over objection. Davis v. State, 209 Ga. App. 572, 434 S.E.2d 132, 1993 Ga. App. LEXIS 971 (1993) (decided under former O.C.G.A. § 24-9-67).

Officer's testimony on effects of alcohol on body. — At the time of a defendant's driving under the influence (DUI) trial, the arresting officer had over four years of law enforcement experience, had been trained in DUI detection and field sobriety testing, and had been involved in over 100 DUI arrests. Based on the officer's training and experience, the officer was qualified to testify about the effects of alcohol consumption on the body. Lanwehr v. State, 265 Ga. App. 359, 593 S.E.2d 897, 2004 Ga. App. LEXIS 113 (2004) (decided under former O.C.G.A. § 24-9-67).

Dock signals expert. — Trial court did not err in permitting witness to testify as an expert for procedures where hand signals or sight alone is insufficient in a personal injury action brought by longshoreman against state port authority. Georgia Ports Auth. v. Hutchinson, 209 Ga. App. 726, 434 S.E.2d 791, 1993 Ga. App. LEXIS 999 (1993), cert. denied, No. S93C1810, 1993 Ga. LEXIS 1081 (Ga. Nov. 4, 1993) (decided under former O.C.G.A. § 24-9-67).

Romberg sobriety test subject to Harper standard. — Admissibility of the Romberg test is subject to the Harper standard as the significance of eyelid tremors or an individual's internal clock, how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer. Mitchell v. State, 301 Ga. 563, 802 S.E.2d 217, 2017 Ga. LEXIS 545 (2017), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-7-707).

Testimony by polygraph examiner. — Trial court did not err by allowing a polygraph examiner to testify that the defendant showed deception to questions concerning an armed robbery because the defendant, by stipulation, voluntarily consented to admission of the polygraph test results. Therefore, the defendant agreed to the admission of the examiner's opinion testimony concerning the polygraph examination, and the trial court did not err by overruling the defendant's objection to the qualifications of the examiner, or by allowing the examiner to testify as an expert concerning the polygraph test which the examiner administered on the defendant. Jones v. State, 309 Ga. App.

Opinions Admissible (Cont'd)

886, 714 S.E.2d 590, 2011 Ga. App. LEXIS 480 (2011) (decided under former O.C.G.A. § 24-9-67).

Expert testimony not objectionable. — Trial court did not err in denying a defendant's motion for a new trial based on the ineffective assistance of counsel in failing to object to an expert's opinion testimony because the record did not support the defendant's argument that the expert's testimony was objectionable; the expert's testimony was limited to describing how the expert and doctors in the medical community generally performed genital examinations of female patients and did not touch on whether either the defendant or the victim was telling the truth on whether the defendant committed aggravated sexual battery, and the expert's testimony regarding the typical medical examination of a preadolescent girl's genitals was relevant to the issues raised by the defendant's defense. Lee v. State, 300 Ga. App. 214, 684 S.E.2d 348, 2009 Ga. App. LEXIS 1125 (2009) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on interviewing techniques in child abuse case not improperly restricted. — Trial court did not improperly restrict the testimony of the defendant's expert because the expert was permitted to testify at length on the propriety and effect of interviewing techniques in child sexual abuse cases; the defendant did not point out how the trial court's decision to sustain the state's objection to the expert's statement unfairly restricted the expert's testimony when the expert went on to provide the expert's criticisms of how the victim's interview was conducted. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205, 2011 Ga. App. LEXIS 96 (2011), cert. denied, No. S11C0922, 2011 Ga. LEXIS 455 (Ga. May 31, 2011) (decided under former O.C.G.A. § 24-9-67).

Testimony of fire investigation expert. — In a negligence action arising from a school bus fire, the trial court erroneously excluded the opinion of defendant's fire investigation expert as the expert stating that the opinion was the best scientific guess makeable was simply the expert's recognition of the fact that the exact cause of the fire could not be determined with absolute certainty. Early v. Morgan Fleet Services, Inc., No. A23A0148, 2023 Ga. App. LEXIS 203 (Ga. Ct. App. May 16, 2023).

Fire marshal's testimony regarding arson. — After being qualified as an expert witness, the fire marshal's testimony that the fire at the victims' residence was intentionally set did not invade the province of the jury in deciding whether the defendant had committed arson because the testimony did not address other elements of the crime of arson or directly implicate the defendant as the perpetrator of that crime; and the conclusion that the fire was intentionally set was not one jurors would ordinarily be able to draw for themselves. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365, 2016 Ga. LEXIS 236 (2016) (decided under former O.C.G.A. § 24-9-67).

Testimony by expert on geo-cell phone analytics. — Testimony by the state's expert witness on geo-cell phone analytics was admissible as the defendant could not affirmatively show that the alleged error in admitting the evidence probably affected the outcome below and, thus, constituted plain error because the expert's testimony was used to indicate how the police were able to determine that, on the day of the murder — but the day before the victim's body was disposed of by being burned — the defendant's cell phone was located about 14 miles from where the victim's burned body was found; and ample evidence actually placed the defendant at the murder scene and the location where the defendant and an individual attempted to cover up the crime. Jones v. State, 299 Ga. 40, 785 S.E.2d 886, 2016 Ga. LEXIS 353 (2016) (decided under former O.C.G.A. § 24-7-707).

Forensic analyst of telephone records. — Trial court did not abuse the court's discretion in qualifying the forensic analyst as an expert or in admitting the forensic analyst's testimony regarding the telephone calls between those involved in the drug transactions because the forensic analyst was examined extensively on specific training as an analyst of telephone records and the specialized

computer programs used in law enforcement data compilation, and because the correlation and analysis of large numbers of cellular telephone calls, using specialized computer programs and other tools and resources specific to forensic analysis, was a matter beyond the ken of the average layperson. Maldonado v. State, 325 Ga. App. 41, 752 S.E.2d 112, 2013 Ga. App. LEXIS 960 (2013), cert. denied, No. S14C0489, 2014 Ga. LEXIS 386 (Ga. May 5, 2014) (decided under former O.C.G.A. § 24-7-707).

2. Opinions Inadmissible

Testimony was inadmissible as expert testimony in the following cases. — See Wylly v. Gazan, 69 Ga. 506, 1881 Ga. LEXIS 403 (1881) (meaning of "more or less" in deed) (decided under former Code 1882, § 3868); Central R.R. v. DeBray, 71 Ga. 406, 1883 Ga. LEXIS 194 (1883) (whether employees were required to get on or off moving train) (decided under former Code 1882, § 3868); Carter v. Carter Elec. Co., 156 Ga. 297, 119 S.E. 737, 1923 Ga. LEXIS 241 (1923) (damage to business from use of similar name by competitor) (decided under former Civil Code 1910, § 5876); Davies v. Blasingame, 177 Ga. 450, 170 S.E. 477, 1933 Ga. LEXIS 199 (1933) (soundness of property title) (decided under former Code 1933, § 38-1710); United States v. Roberts, 192 F.2d 893, 1951 U.S. App. LEXIS 2811 (5th Cir. 1951) (continuing total disability a matter of law and fact) (decided under former Code 1933, § 38-1710).

Expert testimony on credibility of witness. — If the characteristic of a witness attacked does not involve some organic or mental disorder or some impairment of the mental or physical faculties by injury, disease, or otherwise, or if there has been insufficient observation by the expert, expert testimony is usually excluded. Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 1974 Ga. LEXIS 1083 (1974), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former Code 1933, § 38-1710).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that Smith v. State, 257 Ga. App. 88, 570 S.E.2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. Patterson v. State, 278 Ga. App. 168, 628 S.E.2d 618, 2006 Ga. App. LEXIS 268 (2006) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on transference theory. — Trial court's refusal to admit eyewitness expert testimony was supported by extensive corroborating evidence because there was no factual basis for allowing testimony regarding the potential for misidentification based on transference theory; the defendant presented no evidence indicating that the victim saw or could have seen any other person at the time the instant offenses took place. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645, 2011 Ga. App. LEXIS 546 (2011) (decided under former O.C.G.A. § 24-9-67).

Opinion based on out-of-court evidence. — Medical expert does not have the right to give in evidence an opinion based on information which the expert has derived from private conversations with third parties. Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-1710).

Witness invaded province of jury. — Expert witness's testimony that the childhood maltreatment syndrome or abused child syndrome was the "manner" in which the fatal injuries occurred, and that the fatal injuries occurred "in the process" of the childhood maltreatment syndrome, constituted the expert's opinion that the fatal injuries in fact resulted from child abuse. Accordingly, as the jurors had the ability to reach this conclusion personally, the trial court erred by allowing the expert witness's testimony. McCartney v. State, 262 Ga. 156, 414 S.E.2d 227, 1992 Ga. LEXIS 225 (1992), overruled in part,

Opinions Inadmissible (Cont'd)

Linson v. State, 287 Ga. 881, 700 S.E.2d 394, 2010 Ga. LEXIS 639 (2010) (decided under former O.C.G.A. § 24-9-67).

When testimony is not based on an expert opinion and is mere speculation, it is worthless and the trial court does not err in striking the testimony from the record. Gould v. State, 168 Ga. App. 605, 309 S.E.2d 888, 1983 Ga. App. LEXIS 2865 (1983) (decided under former O.C.G.A. § 24-9-67); Welborn v. State, 174 Ga. App. 853, 331 S.E.2d 890, 1985 Ga. App. LEXIS 2758 (1985) (decided under former O.C.G.A. § 24-9-67).

Medical malpractice expert's affidavit. — In a medical malpractice action, the trial court abused the court's discretion in concluding that the parents' expert affidavit was insufficient because reviewing the allegations of the complaint, the expert's affidavits, and the trial court's conclusions, the expert was not required to practice as a psychiatrist or have specialized knowledge of the standard of care of psychiatrists to satisfy the requirements of O.C.G.A. §§ 9-11-9.1 and 24-2-702(c)(2)(C). Russell v. Kantamneni, 363 Ga. App. 899, 873 S.E.2d 458, 2022 Ga. App. LEXIS 245 (2022).

Psychiatrist's reliance on psychologist's test results. — To the extent the state's psychiatric expert relied upon the opinion of another psychologist expert not before the court, the expert's testimony was inadmissible hearsay without probative value even in the absence of an objection. Brown v. State, 206 Ga. App. 800, 427 S.E.2d 9, 1992 Ga. App. LEXIS 1791 (1992), cert. denied, No. S93C0586, 1993 Ga. LEXIS 339 (Ga. Apr. 8, 1993) (decided under former O.C.G.A. § 24-9-67).

Psychologist's opinion irrelevant. — State's motion in limine seeking to exclude the testimony of a defendant's psychologist was properly granted as the defendant claimed that defendant shot the victim in self-defense; the defendant's psychological state was irrelevant. Lott v. State, 281 Ga. App. 373, 636 S.E.2d 102, 2006 Ga. App. LEXIS 1106 (2006) (decided under former O.C.G.A. § 24-9-67).

School counselor's opinion. — Admission of a school counselor's opinion that a child had been molested based on the child's behavior and demeanor during the counselor's interview of the child was reversible error. Hilliard v. State, 226 Ga. App. 478, 487 S.E.2d 81 (decided under former O.C.G.A. § 24-9-67).

Medical examiner's opinion on defendant's demeanor admissible. — Trial court did not err in allowing the testimony of the deputy medical examiner in which the examiner related observations of the defendant during an interview of the defendant because the examiner stated the general observation of the defendant's demeanor upon being told that the defendant's child had died. Smith v. State, 290 Ga. 428, 721 S.E.2d 892, 2012 Ga. LEXIS 85 (2012) (decided under former O.C.G.A. § 24-9-67).

Opinion as to alcohol content drop in dead person. — Question propounded to a forensic chemist concerning whether or not the fact that a person might have died and it had been some days before the person was found would in any way decrease the alcohol content of the victim's body was proper under former O.C.G.A. § 24-9-67. Cameron v. State, 256 Ga. 225, 345 S.E.2d 575, 1986 Ga. LEXIS 754 (1986) (decided under former O.C.G.A. § 24-9-67).

Physician's opinion of "rape." — Allowing any question and answer of a physician who examined the victim of an alleged rape which would involve the physician's opinion stated in the physician's report that "this is rape" constituted reversible error. Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654, 1986 Ga. App. LEXIS 2452 (1986) (decided under former O.C.G.A. § 24-9-67).

Ophthalmologist testimony in DUI case inadmissible. — Trial court did not err in not allowing an ophthalmologist to testify as an expert that a DUI defendant had two surgeries in the past, which could have affected the defendant's performance on walk-and-turn and one-leg-stand tests. The witness had no personal knowledge of the surgery in question or of the medical records referring to the surgeries; moreover, the defendant's live-in companion was permitted to testify at length regarding the defendant's medical issues arising from the surgery and its effect on the

defendant's ability to walk normally at the time of the arrest. Aal v. State, 290 Ga. App. 252, 659 S.E.2d 609, 2008 Ga. App. LEXIS 29 (2008) (decided under former O.C.G.A. § 24-9-67).

Officer's testimony on marijuana test results. — Officer's testimony regarding officer's training and experience with "ontrack system" urine specimen analysis for the presence of tetrahydrocannabinol was insufficient foundation for the admission of the test results. Hubbard v. State, 207 Ga. App. 703, 429 S.E.2d 123, 1993 Ga. App. LEXIS 322 (1993) (decided under former O.C.G.A. § 24-9-67).

Hair analysis results cannot be used to make positive identification of an individual. Hudson v. State, 166 Ga. App. 660, 305 S.E.2d 409, 1983 Ga. App. LEXIS 2288 (1983) (decided under former O.C.G.A. § 24-9-67).

False confession theory. — Trial court did not abuse the court's discretion or violate the defendant's Sixth and Fourteenth Amendment rights by excluding expert testimony about false confessions; the Georgia Supreme Court found that the false confession theory was not reliable and had not yet reached a verifiable stage of scientific certainty. Crawford v. State, 283 Ga. App. 645, 642 S.E.2d 335, 2007 Ga. App. LEXIS 148 (2007), cert. denied, No. S07C0937, 2007 Ga. LEXIS 442 (Ga. June 4, 2007) (decided under former O.C.G.A. § 24-9-67).

Trial court did not improperly exclude testimony from the defendant's proffered expert witness on police interrogation tactics resulting in false confessions, as such theory had not reached a verifiable stage of scientific certainty, and because the issue of whether the defendant's inculpatory statements were the results of threats or coercion was a matter the jury could discern for itself. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525, 2007 Ga. LEXIS 781 (2007), overruled in part, Garza v. State, 284 Ga. 696, 670 S.E.2d 73, 2008 Ga. LEXIS 865 (2008) (decided under former O.C.G.A. § 24-9-67).

3. Witness Qualified as Expert

Automobile mechanic. — Contention that testimony of witness qualified as an expert was erroneously admitted for the reason that the witness had testified that the witness did not see the car before impact, and therefor could not testify as to the car's value before the car was damaged, was without merit since the witness actually repaired the car, and was not only a mechanic, but had long experience in buying and selling cars of the same type and model. Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785, 1948 Ga. App. LEXIS 735 (1948) (decided under former Code 1933, § 38-1710).

Specialist in obstetrics and gynecology. — In a prosecution for rape, a physician may offer the physician's opinion as to what caused the tear in the victim's vagina over an objection that the physician's expertise to offer such an opinion has not been established, where the physician is duly qualified as a specialist in obstetrics and gynecology and testifies that one of the physician's duties at the medical center where the physician worked was to examine rape victims. Holt v. State, 147 Ga. App. 186, 248 S.E.2d 223, 1978 Ga. App. LEXIS 2842 (1978) (decided under former Code 1933, § 38-1710).

Qualified medical expert with a first-hand knowledge of the material facts is well within permissible bounds in stating the expert's opinion and inferences concerning the existence and cause of a medical condition. McGuire v. Davis, 437 F.2d 570, 1971 U.S. App. LEXIS 12528 (5th Cir. 1971) (decided under former Code 1933, § 38-1710).

Investigator testifying as an expert. — In an aggravated assault case, it was permissible for an investigator, testifying as an expert, to state that based on the investigator's experience, persons who suffered from cuts or stab wounds often did not remember being stabbed. This was a conclusion that was beyond the ken of the average layperson; even if the investigator's testimony was somewhat based upon hearsay, the opinion was mainly derived from the investigator's many years of professional experience. Jackson v. State, 291 Ga. App. 287, 661 S.E.2d 665, 2008 Ga. App. LEXIS 474 (2008) (decided under former O.C.G.A. § 24-9-67).

Officer properly qualified as expert witness in drug possession and distribution. — In a prosecution for possession of cocaine with intent to distribute

Witness Qualified as Expert (Cont'd)

(O.C.G.A. § 16-13-30(b)), as the arresting officer testified to making 35 to 40 drug-related arrests, about half of which were for possession with intent to distribute, the trial court did not abuse the court's discretion in qualifying the officer as an expert witness in drug possession and distribution. Hight v. State, 293 Ga. App. 254, 666 S.E.2d 678, 2008 Ga. App. LEXIS 839 (2008) (decided under former O.C.G.A. § 24-9-67).

Any error waived by failure to object. — Pro se defendant's claim that the trial court improperly admitted lay testimony on blood splatters was rejected as defendant failed to object to the admission of the lay opinions at trial; further, in light of the overwhelming evidence of defendant's guilt, any error was harmless. Swain v. State, 268 Ga. App. 135, 601 S.E.2d 491, 2004 Ga. App. LEXIS 870 (2004) (decided under former O.C.G.A. § 24-9-67).

Expert testimony about signatures. — Trial court did not abuse the court's discretion by ruling that expert testimony was admissible as the expert did not testify as to whether the signatures on the checks belonged to the widow, the defendant, or some other person as the expert merely testified that the signatures reviewed were substantially different and went on to describe the differences the expert noticed in a review of the materials. Carr v. State, 350 Ga. App. 461, 829 S.E.2d 641, 2019 Ga. App. LEXIS 324 (2019), cert. denied, No. S19C1422, 2020 Ga. LEXIS 15 (Ga. Jan. 13, 2020) (decided under former O.C.G.A. § 24-7-707).

Civil Cases

1. In General

Applicability to torts other than malpractice claim. — In a suit for simple negligence, negligence per se, wrongful death, intentional infliction of emotional distress, breach of contract, and negligent supervision and training, summary judgment was improperly granted to the defendants because the plaintiffs were not required to establish that the plaintiffs' expert met the requirements of O.C.G.A. § 24-7-702(c)(2)(D) as the plaintiffs' suit was not a medical malpractice action as the facility where the plaintiffs' son collapsed was a day facility that provided education, life skills, job assistance, and rehabilitation services to people with mental and physical disabilities, and the individual defendants listed in the case were non-medical personnel and personal care givers. Blake v. KES, Inc., 336 Ga. App. 43, 783 S.E.2d 432, 2016 Ga. App. LEXIS 110 (2016).

No error in excluding expert testimony. — As vehicle occupants failed to satisfy the Daubert factors or any other reasonable criteria for purposes of measuring the reliability of their expert witness's conclusions with respect to a vehicle accident that occurred in a construction zone, a trial court did not abuse the court's discretion when the court excluded the witness's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); the expert's conclusions were based solely on the expert's own assertions and were unsupported by either the Daubert factors or any other reasonable reliability criteria. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770, 2010 Ga. LEXIS 493 (2010) (decided under former O.C.G.A. § 24-9-67.1).

It was within the trial court's discretion to exclude an expert witness's testimony because a sister and a brother failed to satisfy the Daubert factors or any other reasonable criteria by which the trial court could measure the reliability of the expert's conclusions; the expert failed to cite any treatise or authority supporting the expert's opinion, and the sister and brother presented no evidence that the expert had any experience that would supply the foundation supporting the expert's conclusions. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770, 2010 Ga. LEXIS 493 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by excluding evidence of one appellant's intent as to the reconveyance of certain funds because no abuse of discretion occurred by excluding evidence of a cumulative nature that could have confused the jury about the primary issue

under consideration and created a re-trial. Interfinancial Midtown, Inc. v. Choate Constr. Co., 343 Ga. App. 793, 806 S.E.2d 255, 2017 Ga. App. LEXIS 479 (2017).

Opinion of a witness qualified as expert may be given on facts proved by other witnesses. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898, 2008 Ga. App. LEXIS 874 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Timeliness of motion in limine. — In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, while a motion in limine to exclude the customer's expert in chemistry was not timely under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court properly considered the motion and granted the motion as the customer did not make the expert available for deposition until just one week prior to trial. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544, 2009 Ga. App. LEXIS 301 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Subject matter improper for expert testimony. — In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454, 2007 Ga. App. LEXIS 701 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Objections to expert opinions not timely filed. — In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the trial court properly refused to exclude expert opinions on behalf of the tenant on the ground that the opinions were inadmissible under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); although the agent had notice that the tenant intended to rely on the experts' opinions, it did not assert its claim until the last business day before the trial and therefore failed to seek a timely ruling no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16 and as required by former § 24-9-67.1(d). Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620, 2006 Ga. App. LEXIS 1478 (2006), cert. denied, No. S07C0621, 2007 Ga. LEXIS 265 (Ga. Mar. 26, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert testimony was properly allowed in a medical negligence action because the suing patient failed to timely challenge the expert evidence via former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), by way of a pretrial hearing; moreover, even assuming that the untimeliness of the patient's request for a hearing did not waive the particular grounds asserted in a motion to strike brought at the close of evidence, the patient nevertheless waived all remaining objections to the expert testimony by failing to object contemporaneously. Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600, 2008 Ga. App. LEXIS 139 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a negligence suit involving the death of an individual in an automobile collision, a trial court erred by declaring that application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), with regard to a hitch manufacturer seeking to exclude plaintiff's expert witness, would have been unconstitutional as the motion to exclude the expert was filed several months after the final pretrial conference had already taken place and, thus, the time period within which the trial court was required to hold a hearing and rule on the motion had already passed. However, application of the former statute would not have changed the trial court's ultimate, and correct, conclusion that the hitch manufacturer's motion to exclude the expert was without merit based on the time period for ruling on the motion having already passed. Ford Motor Co. v. Gibson, 283 Ga. 398, 659 S.E.2d 346, 2008 Ga. LEXIS 296 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Objections to expert timely filed. — Trial court did not err in granting the plaintiff's motion in limine as to the defen-

In General (Cont'd)

dant's expert in a slip and fall case because the defendant did not identify the doctor as an expert witness until one business day before the consolidated pretrial order was filed, which reserved the plaintiff's right to file motions to challenge any late-disclosed experts. Vineyard Indus. v. Bailey, 343 Ga. App. 517, 806 S.E.2d 898, 2017 Ga. App. LEXIS 525 (2017), cert. denied, No. S18C0480, 2018 Ga. LEXIS 314 (Ga. May 7, 2018).

Expert's opinion must be product of reliable principles and methods. — Trial court did not abuse the court's discretion in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), and excluding the testimony of two experts in plaintiffs' personal injury suit because neither witness's testimony was shown to be the product of reliable principles and methods. One expert's testimony on the issue of causation lacked scientific support, and the other expert's testimony on the issue of labeling used standards having no specific relevance to consumer use of products, and the opinion was based solely on data obtained from the Internet and from plaintiffs' attorneys. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

2. Medical Experts

Use of word "or" or "and" in former statute. — Legislature's use of the word "or" between former O.C.G.A. § 24-9-67.1(c)(2)(A) and (c)(2)(B) (see now O.C.G.A. §§ 24-7-702, 24-7-703), followed by the legislature's use of the word "and" between former § 24-9-67.1(c)(2)(B) and (c)(2)(C), indicated that a medical expert must show either active practice or teaching for at least three of the last five years, but that whichever of these may be the case, the expert must also be a member of the same profession as the person whose performance the expert was evaluating. For the purposes of former § 24-9-67.1, a pharmacist was not a member of the same profession as a medical doctor. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136, 2008 Ga. App. LEXIS 1179 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. June 8, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Interpretation of paragraph (c)(2). — Georgia Supreme Court views the requirements of O.C.G.A. § 24-7-702 subparagraphs (c)(2)(A) and (c)(2)(B) as together being conjunctive with subparagraphs (c)(2)(C) and (c)(2)(D) and, thus, holds that, to be qualified to testify as an expert, the proffered witness must be a member of the same profession as the defendant whose conduct is at issue, or be a physician satisfying the supervision requirements of subparagraph (c)(2)(D). Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726, 2013 Ga. LEXIS 784 (2013).

Medical opinion based on incomplete history. — In an action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., the trial court did not abuse the court's discretion in excluding the testimony of an employee's treating physician as the doctor's conclusions were based on an incomplete medical history of the employee, without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians. Shiver v. Ga. & Fla. Railnet, Inc., 287 Ga. App. 828, 652 S.E.2d 819, 2007 Ga. App. LEXIS 1039 (2007), cert. denied, No. S08C0394, 2008 Ga. LEXIS 330 (Ga. Mar. 31, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Retired physician. — In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and by excluding the testimony of one of the customer's expert witnesses. The expert was not qualified since the expert was retired and not a licensed physician and the testimony of that expert was cumulative of other expert testimony admitted at trial, therefore, any alleged error was harmless. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731, 2009 Ga. App. LEXIS 479 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. June 29, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Medical malpractice. — In a patient's medical malpractice action, the testimony of an expert witness was properly ex-

cluded as the opinion was based on facts stated in a hypothetical question which were not proven by other witnesses or other competent evidence. Moreover, a motion in limine entered against the patient as to another expert witness's testimony was not addressed on appeal as the patient never called the expert to testify, and thus, the issue was abandoned. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835, 2008 Ga. App. LEXIS 389 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. Hope v. Kranc, 304 Ga. App. 367, 696 S.E.2d 128, 2010 Ga. App. LEXIS 528 (2010), cert. denied, No. S10C1724, 2010 Ga. LEXIS 801 (Ga. Oct. 18, 2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse its discretion in denying the appellants' motion to exclude an expert's opinion that the decedent's severe anemia was a proximate cause of the decedent's death as the expert did not fail to consider, or give dismissive testimony of, other possible causes of death; the expert opined that the decedent's severe anemia coupled with the decedent's other comorbidities led to his death, but that the decedent probably would not have died when the decedent did without such severe anemia; and the appellant doctor acknowledged that the decedent's severe anemia was life-threatening. MyFamilyDoc, LLC v. Johnston, 366 Ga. App. 459, 883 S.E.2d 404, 2023 Ga. App. LEXIS 23 (2023).

Nursing expert. — In a mother's medical malpractice action against a hospital, the trial court did not abuse the court's discretion by finding that the mother's witness was not admissible as an expert on whether any member of the hospital's nursing staff breached the standard of care pursuant to former O.C.G.A. § 24-9-67.1(c)(2)(D) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the witness deposed that the witness did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse-physician interactions, and did not hold out to be an expert in nursing or in the standard of care of nurses. Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 704 S.E.2d 198, 2010 Ga. App. LEXIS 1105 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse its discretion in disqualifying two of the plaintiff's expert witnesses as there was no evidence from the doctor's original affidavit or deposition testimony that the doctor was a physician who during at least three of the last five years worked, supervised, taught, or instructed nurses, and the nurse was not qualified to tender an expert opinion given the absence of evidence or testimony concerning the nurse's care or management of rehabilitation patients at risk for deep-vein thrombosis. Orr v. SSC Atlanta Operating Co., 360 Ga. App. 702, 860 S.E.2d 217, 2021 Ga. App. LEXIS 376 (2021).

Pathologist. — Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703) since it was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Same profession requirement applies to medical experts. — Under former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court erred in allowing a pharmacist to testify about a physician's negligence. A medical expert had to show either active practice or teaching for three of the last

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five years, and also had to be a member of the same profession as the person whose performance the expert was evaluating. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136, 2008 Ga. App. LEXIS 1179 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. June 8, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Georgia Supreme Court construes the same profession requirement to apply to all proffered medical experts, even those experienced in the procedure at issue through active practice. Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726, 2013 Ga. LEXIS 784 (2013).

Appellate court properly held that a trial court abused the court's discretion by allowing an obstetrician/gynecologist to testify as an expert witness regarding a nurse midwife's treatment rendered to a patient because the obstetrician/gynecologist was neither a member of the same profession as the midwife nor supervised midwives as required under O.C.G.A. § 24-7-702. Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726, 2013 Ga. LEXIS 784 (2013).

Testimony by examining physician. — Physician who has examined an injured party may describe what the physician has seen and give the physician's expert inferences therefrom. McGuire v. Davis, 437 F.2d 570, 1971 U.S. App. LEXIS 12528 (5th Cir. 1971) (decided under former Code 1933, § 38-1710).

Practicing physician was an expert witness on sanity. Petty v. Folsom, 229 Ga. 477, 192 S.E.2d 246, 1972 Ga. LEXIS 657 (1972) (decided under former Code 1933, § 38-1710).

Specialists in cardiac physiology. — Two doctors who specialized in cardiac physiology were qualified to testify about the effects on a patient of a heart medication a doctor gave to a patient, and the appellate court reversed the trial court's ruling that the doctors could not testify and the court's judgment dismissing the spouse's claims against a pharmaceutical manufacturer that produced the medication, alleging strict products liability and negligent failure to warn. Bryant v. Hoffmann-La Roche, Inc., 262 Ga. App. 401, 585 S.E.2d 723, 2003 Ga. App. LEXIS 945 (2003), cert. denied, No. S03C1724, 2003 Ga. LEXIS 1044 (Ga. Nov. 17, 2003) (decided under former O.C.G.A. § 24-9-67).

Opinion based on opinions of other health care providers. — Trial court erred in admitting a treating physician's opinions which were predicated in part on the opinions of other health care providers which were not admitted into evidence. Southern Bell Tel. & Tel. Co. v. Franklin, 196 Ga. App. 474, 396 S.E.2d 514, 1990 Ga. App. LEXIS 967 (1990), cert. denied, No. S90C1493, 1990 Ga. LEXIS 610 (Ga. Sept. 26, 1990) (decided under former O.C.G.A. § 24-9-67).

Expert on replantation. In a medical malpractice case in which the surgeon incorrectly replanted the patient's amputated portion of the index finger on the longer finger, and the amputated portion of the long finger on the index finger, the trial court did not err in concluding that the patient's medical expert was qualified to testify because, while the expert had only performed a handful of multi-digit replantation procedures, all of which took place prior to 2011, the expert possessed an appropriate level of knowledge in performing the procedure at issue as multi-digit replantation procedures were far less common than single-digit replantation procedures. Howell v. Cochran, 365 Ga. App. 80, 877 S.E.2d 625, 2022 Ga. App. LEXIS 393 (2022).

Opinion going to matter of ultimate fact. — Medical expert witness may give the expert's opinion as to the cause of an injury, but if the cause of the injury constituted the ultimate issue of fact to be determined by the fact finding tribunal, this opinion was not absolutely binding on such tribunal. Lockheed Aircraft Corp. v. Marks, 88 Ga. App. 167, 76 S.E.2d 507, 1953 Ga. App. LEXIS 1034 (1953), overruled in part, Fowler v. Atlanta, 116 Ga. App. 352, 157 S.E.2d 306, 1967 Ga. App. LEXIS 1311, 1967 Ga. App. LEXIS 1324, 1967 Ga. App. LEXIS 810 (1967) (decided under former Code 1933, § 38-1710).

When differing ultimate conclusions of physicians as to whether a doctor-patient relationship existed evinced no more than a difference of nonmedical opinion between witnesses who

happened to be physicians, those conclusions were neither admissible nor probative as expert medical testimony. Clanton v. Von Haam, 177 Ga. App. 694, 340 S.E.2d 627, 1986 Ga. App. LEXIS 1503 (1986) (decided under former O.C.G.A. § 24-9-67).

Physician's opinion of doctor-patient relationship. — No professional skill or specialized medical knowledge was necessarily required to resolve the issue whether a doctor-patient relationship existed since the initial creation of such a relationship was well within the comprehension of the average layman, and a physician's affidavit on this issue was neither probative nor admissible as expert medical testimony. Minster v. Pohl, 206 Ga. App. 617, 426 S.E.2d 204, 1992 Ga. App. LEXIS 1725 (1992) (decided under former O.C.G.A. § 24-9-67).

Rheumatologist testifying on the cause of an injured party's scleroderma. — Trial court properly allowed a customer who fell while shopping at a home products store to offer the testimony of experts who opined that scleroderma the customer developed shortly after the customer underwent surgical fusion of two vertebrae was caused by trauma the customer suffered when the customer fell, and the court did not err when the court declined to apply the test established by the Supreme Court of Georgia in its Harper decision when it decided if the customer's experts could testify. Home Depot U.S.A., Inc. v. Tvrdeich, 268 Ga. App. 579, 602 S.E.2d 297, 2004 Ga. App. LEXIS 965 (2004), cert. denied, No. S04C1974, 2004 Ga. LEXIS 983 (Ga. Oct. 25, 2004) (decided under former O.C.G.A. § 24-9-67).

Qualification requirements under O.C.G.A. § 24-7-702 do not apply to a defendant physician. Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75, 2015 Ga. App. LEXIS 144 (2015).

Federal interpretation of expert testimony in state medical malpractice claims brought in federal court. — Citing the Eleventh Circuit holding in McDowell v. Brown, 392 F.3d 1283 (11th Cir. 2004) that, when evaluating expert testimony in Georgia state medical malpractice claims brought in federal court pursuant to supplemental jurisdiction, the matter is substantive and subject to state law, the federal district court held that former O.C.G.A. § 24-9-67.1 was applicable to the medical malpractice action, and relied upon the factors specified in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993) for determining admissibility of expert testimony under Fed. R. Evid. 702 in construing former § 24-9-67.1. Dukes v. State, 428 F. Supp. 2d 1298, 2006 U.S. Dist. LEXIS 18201 (N.D. Ga.), aff'd, 212 Fed. Appx. 916, 2006 U.S. App. LEXIS 32150 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert properly qualified in medical malpractice. — Trial court did not abuse the court's discretion in determining that the patient's expert had knowledge and experience in a practice or specialty relevant to the hospitalist's alleged negligence considering the scope of the allegations of negligence in the complaint and the nature of the expert's averments and testimony regarding the expert's medical background, experience, and area of expertise. Mekoya v. Clancy, 360 Ga. App. 452, 861 S.E.2d 409, 2021 Ga. App. LEXIS 371 (2021).

Nurse's affidavit insufficient in case alleging physical therapist's negligence. — Trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) in order to provide a § 9-11-9.1 affidavit. Ball v. Jones, 301 Ga. App. 340, 687 S.E.2d 625, 2009 Ga. App. LEXIS 1385 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Certified nurse midwife qualified to testify about standard of care for nurses. — In a medical malpractice case dealing with a child's permanent disabilities, the hospital's motion for a new trial was improperly granted on the ground that a certified nurse midwife (CNM) could not testify as to the standard of care exercised by the registered professional

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nurses (RN) because the CNM was a member of the same profession as the hospital's RNs because the Georgia Registered Professional Nurse Practice Act, O.C.G.A. § 43-26-1 et seq., required a CNM to be licensed as a RN, and both RNs and CNMs were regulated by the Georgia Board of Nursing; a review of the regulatory scheme revealed that a CNM was a RN who had advanced training in a specialized area; and the expert affidavit statute listed only nurses, and the statute did not have a separate listing for CNMs. Dempsey v. Gwinnett Hosp. Sys., 330 Ga. App. 469, 765 S.E.2d 525, 2014 Ga. App. LEXIS 814 (2014), cert. denied, No. S15C0696, 2015 Ga. LEXIS 261 (Ga. Apr. 20, 2015).

Expert's allegations of standard of care pertained to conduct beyond the scope of nursing care and was excluded. — In a medical malpractice case against a hospital and emergency room doctor and nurses, expert testimony against the nurses was properly excluded under O.C.G.A. § 24-7-702 because the deviations from the standard of care alleged pertained to conduct that was beyond the scope of nursing care allowed by Georgia law under O.C.G.A. § 43-26-3(8) (defining the practice of nursing). Everson v. Phoebe Sumter Med. Ctr., Inc., 341 Ga. App. 182, 798 S.E.2d 667, 2017 Ga. App. LEXIS 165, rev'd in part, 302 Ga. 364, 806 S.E.2d 533, 2017 Ga. LEXIS 884 (2017).

Affidavit of chiropractor not admissible against physical therapist. — Trial court erred by finding that the opinion of the patient's expert satisfied O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1(c) (see now O.C.G.A. § 24-7-702), because despite the expert testimony that, as allowed by the expert's chiropractic license, the expert had practiced physical therapy for a number of years, chiropractic medicine and physical therapy were not the same professions. Bacon County Hosp. & Health Sys. v. Whitley, 319 Ga. App. 545, 737 S.E.2d 328, 2013 Ga. App. LEXIS 10 (2013), cert. denied, No. S13C0788, 2013 Ga. LEXIS 532 (Ga. June 3, 2013) (decided under former O.C.G.A. § 24-9-67.1).

Evidence of expert's personal practices admitted. — In a medical malpractice case, evidence of an expert's personal practices, unless excludable on other grounds, is admissible both as substantive evidence and to impeach the expert's opinion as to the applicable standard of care. To the extent Johnson v. Riverdale Anesthesia Assocs., 563 S.E.2d 431 (Ga. 2002), held otherwise, it is overruled. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152, 2009 Ga. LEXIS 391 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Medical causation not within scope of psychological expertise. — It is a matter within the sound discretion of the trial judge as to whether a witness has such learning and experience in a particular art, science or profession as to entitle the witness to be deemed prima facie an expert; therefore, when a neuropsychologist testified to the specific chemical which caused organic brain damage, the trial court did not abuse the court's discretion in striking portions of the affidavit of the psychologist, because medical causation is not a subject within the scope of psychological expertise. Chandler Exterminators, Inc. v. Morris, 262 Ga. 257, 416 S.E.2d 277, 1992 Ga. LEXIS 501, amended, No. S91G1591 (Ga. 1992) (decided under former O.C.G.A. § 24-9-67).

Admission of another doctor's testimony not required. — In a medical malpractice action, when a doctor was the only expert witness submitted by the suing couple, and the couple did not challenge the trial court's exclusion of another doctor's testimony, their argument that said doctor's testimony should have been admitted as a rebuttal witness was unpersuasive. Thomas v. Peachtree Orthopaedic Clinic, P.C., 290 Ga. App. 869, 660 S.E.2d 758, 2008 Ga. App. LEXIS 291 (2008), cert. denied, No. S08C1373, 2008 Ga. LEXIS 915 (Ga. Oct. 6, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Healthcare expert not qualified. — In a medical malpractice and negligence action by an arrestee against a county, jail

medical personnel, a medical lab, and lab personnel, these defendants successfully moved to exclude the testimony of an expert in correctional health on the basis of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert was not qualified to testify as to any matter outside correctional health care—specifically, the standard of care in the fields of internal medicine, infectious disease, or laboratory procedures with regard to the arrestee's state law claims; furthermore, the expert's testimony was neither relevant nor reliable under the Daubert analysis, and therefore, it was excluded pursuant to Fed. R. Evid. 702. Dukes v. State, 428 F. Supp. 2d 1298, 2006 U.S. Dist. LEXIS 18201 (N.D. Ga.), aff'd, 212 Fed. Appx. 916, 2006 U.S. App. LEXIS 32150 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert retained by the plaintiffs in a medical malpractice action, which was based on the failure to adequately inform a patient of the potential risks and complications connected with a sleep apnea procedure, was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert had not performed the procedure in question on other patients nor did the expert aver that the expert had obtained informed consents for similar procedures. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121, 2007 Ga. LEXIS 857 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656, 2007 Ga. App. LEXIS 1279 (2007), cert. denied, No. S08C0714, 2008 Ga. LEXIS 468 (Ga. May 19, 2008), cert. denied, 555 U.S. 1069, 129 S. Ct. 726, 172 L. Ed. 2d 726, 2008 U.S. LEXIS 9039 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly refused to admit the testimony of a patient's expert in a case involving a claim of an unnecessary surgical procedure because the expert, who described the physician's medical practice as a "family practice", had no surgical training or expertise. Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d 876, 2008 Ga. App. LEXIS 653 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a malpractice and wrongful death case filed against a surgeon and an anesthesiologist, as the expert retained by the decedent's spouse did not teach or practice in the area of post-surgical airway management with sufficient frequency to establish the appropriate level of knowledge to meet the criteria of former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and lacked training in anesthesiology, the expert's opinion was properly excluded. Dawson v. Leder, 294 Ga. App. 717, 669 S.E.2d 720, 2008 Ga. App. LEXIS 1283 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not err in determining that an anesthesiologist did not meet the expert-witness qualification requirements set forth in former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the anesthesiologist did not meet the licensing requirement for expert witnesses, former § 24-9-67.1(c)(1). Although the anesthesiologist's amended affidavit in support of a medical malpractice complaint indicated that the anesthesiologist held a medical license from Pennsylvania on the date of the alleged negligent act, there was no evidence that the anesthesiologist was practicing in that state, and instead, the anesthesiologist's testimony indicated that the anesthesiologist was practicing medicine in Australia; in order to comply with the licensing requirement of former § 24-7-67.1(c)(1), an expert in a professional malpractice action must be licensed and practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred. Craigo v. Azizi, 301 Ga. App. 181, 687 S.E.2d 198, 2009 Ga. App. LEXIS 1338 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Estate administrator's federal Tort Claims Act medical malpractice claims against employees of a VA medical center failed as the testimony of the administra-

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tor's only expert was properly excluded; Georgia's evidentiary rules for a physician's expert testimony applied, and the administrator's expert was not qualified to testify because of the expert's lack of expertise as a vascular surgeon or in broadly treating a patient suffering from critical ischemia. Dutton v. United States, 621 Fed. Appx. 962, 2015 U.S. App. LEXIS 10108 (11th Cir. 2015).

Active practice. — Trial court abused the court's discretion to the extent the court determined that an anesthesiologist did not meet the "active practice" requirements of former O.C.G.A. § 24-9-67.1(c)(2)(A) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because once the anesthesiologist received a medical degree and embarked upon a residency in anesthesiology, the anesthesiologist was engaged in the "active practice of such area of specialty" within the meaning of former § 24-9-67.1(c)(2)(A); years spent as a resident physician can count as years of "active practice" for purposes of former § 24-9-67.1(c)(2)(A). Craigo v. Azizi, 301 Ga. App. 181, 687 S.E.2d 198, 2009 Ga. App. LEXIS 1338 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Physician's affidavit. — Fact that a medical expert was not licensed as a medical doctor when the expert executed an expert affidavit to accompany a medical malpractice complaint, pursuant to O.C.G.A. § 9-11-9.1, did not affect the validity of the affidavit or require dismissal of the complaint as licensure was not a required element of such an affidavit under that statutory section or under case law; further, former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), assuming it was applicable to the circumstances, only required that the expert was licensed at the time of the medical negligence, which was the case for the instant expert. Tenet Healthcare Corp. v. Gilbert, 277 Ga. App. 895, 627 S.E.2d 821, 2006 Ga. App. LEXIS 167 (2006), cert. denied, No. S06C1197, 2006 Ga. LEXIS 543 (Ga. July 13, 2006), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014) (decided under former O.C.G.A. § 24-9-67.1).

In a professional malpractice case brought by a married couple, an expert's original affidavit was insufficient under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), which applied retroactively. Although the expert avowed therein that the expert had been licensed to practice medicine since 1974, the affidavit contained nothing concerning the expert's recent or continuing experience as an orthopedist. Cogland v. Hosp. Auth., 290 Ga. App. 73, 658 S.E.2d 769, 2008 Ga. App. LEXIS 75 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Doctor's affidavit complied with former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the plain language of the former statute did not require a license during three of the last five years of practice, but experience in the area of the alleged malpractice and a license at the time of the alleged malpractice. Emory Adventist, Inc. v. Hunter, 301 Ga. App. 215, 687 S.E.2d 267, 2009 Ga. App. LEXIS 1364 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Dismissal of medical malpractice suit based on affidavit. — Trial court erred in granting a hospital's motion to dismiss a survivor's wrongful death action based on O.C.G.A. § 9-11-9.1(e) because a nurse's affidavit that allegedly failed to comply with former O.C.G.A. § 24-9-67.1(c)(2) and (e) (see now O.C.G.A. §§ 24-7-702, 24-7-703), because the trial court did not consider the survivor's other affidavit submitted: an unchallenged affidavit from a medical doctor. Piscitelli v. Hosp. Auth. of Valdosta & Lowndes County, 302 Ga. App. 746, 691 S.E.2d 615, 2010 Ga. App. LEXIS 219 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Treating physician's testimony sufficient. — In a Federal Employers' Liability Act action, testimony of an employee's treating physician was not insufficient under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because after diagnosing the employee with hepatitis related to chemical exposure, the physician reviewed reports of, inter alia, a toxicologist that the chemical in a leaking train car was hydrogen sulfide and opined as to causation; the physician's opinion

was not merely based on the temporal proximity of the chemical exposure to the onset of the employee's symptoms. CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 670 S.E.2d 543, 2008 Ga. App. LEXIS 1341 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of nurses as expert witnesses. — Registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease did not lack qualifications to testify as experts about the decedent's capacity to execute a deed because the law did not require that only physicians be allowed to give testimony regarding a medical issue, but permitted others with certain training and experience to testify on issues within the scope of their expertise, and a licensed practical nurse or registered nurse was qualified to testify as an expert witness within the areas of the nurse's expertise; as to any failure to qualify the witnesses as experts, the question of whether a person possessed the qualifications of an expert witness rested entirely in the sound discretion of the trial court. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662, 2006 Ga. LEXIS 964 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. Allen v. Family Med. Ctr., P.C., 287 Ga. App. 522, 652 S.E.2d 173, 2007 Ga. App. LEXIS 1014 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. Houston v. Phoebe Putney Mem. Hosp., Inc., 295 Ga. App. 674, 673 S.E.2d 54, 2009 Ga. App. LEXIS 419 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action brought by a patient against a hospital and an employee of the hospital, the patient's expert nurse was held to be indisputably qualified under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) based on the nurse actively and regularly practicing as a licensed nurse on a full-time basis in supervising and directly performing nursing services and being a faculty member at two educational institutions accredited in the teaching of the nursing profession. Lee v. Phoebe Putney Mem. Hosp., Inc., 297 Ga. App. 692, 678 S.E.2d 340, 2009 Ga. App. LEXIS 520 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a case involving a patient who fell at the doctor's office while a nurse was weighing the patient, a trial court abused the court's discretion in concluding that a nursing expert was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The proper area of specialty was not weighing patients, in which the nurse expert had little experience, but managing patient safety while moving or directing patients, in which the nurse expert had sufficient experience at a surgical clinic. Anderson v. Mt. Mgmt. Servs., 306 Ga. App. 412, 702 S.E.2d 462, 2010 Ga. App. LEXIS 952 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Because the medical center defendants' motion to dismiss did not allege, with specificity, that the nurse was not qualified to give the expert affidavit attached to the patient's complaint alleging professional negligence, the trial court erred in granting the medical center defendants' motion to dismiss on that basis. Cantrell v. AU Med. Ctr., 358 Ga. App. 41, 853 S.E.2d 137, 2020 Ga. App. LEXIS 690 (2020), cert. denied, No. S21C0663, 2021 Ga. LEXIS 543 (Ga. July 7, 2021).

Expert in medical malpractice properly qualified. — Trial court did not abuse it's discretion in denying the construction company's motion to exclude opinion evidence on the basis that the homeowners' expert misread the construction company's expert report as any such

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contentions went to the weight, rather than the admissibility of the evidence. Wilson v. Redmond Constr., 359 Ga. App. 814, 860 S.E.2d 118, 2021 Ga. App. LEXIS 290 (2021).

Medical malpractice expert testimony sufficient to avoid directed verdict. — Patient who was allergic to latex alleged a hospital's negligent use of a latex catheter caused her to develop interstitial cystitis (IC). Though the patient's medical expert admitted that the causes of IC were unknown, and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical causation to justify denying the hospital's motion for judgment notwithstanding the verdict. EHCA Dunwoody, LLC v. Daniel, 277 Ga. App. 783, 627 S.E.2d 830, 2006 Ga. App. LEXIS 204 (2006), cert. denied, No. S06C1165, 2006 Ga. LEXIS 374 (Ga. May 18, 2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) was from an orthopedist and not a fellow neurosurgeon, as the statutory area of practice in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765, 2006 Ga. App. LEXIS 1183 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action involving alleged nerve damage to a child during delivery, a trial court properly directed a verdict in favor of the doctor upon determining that the suing parent failed to provide causation evidence as the parent's expert failed to rule in a certain possibility as to the cause of the injury at issue and, instead, assumed a cause of injury, which was unsupported by the evidence. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835, 2008 Ga. App. LEXIS 389 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice case in which the physician mistakenly placed a catheter in the patient's femoral artery instead of the femoral vein ultimately resulting in an amputation of the patient's leg, a directed verdict in favor of the physician and the employer was improperly granted because the record contained evidence regarding the standard of care for the placement of a femoral catheter, and the opinions of the patient's expert witness as to how the physician breached that standard; and neither the trial court nor the physician or the employer cited any authority in support of the proposition that a trial court could selectively disregard unobjected to evidence when considering a motion for directed verdict. Lockhart v. Bloom, 360 Ga. App. 741, 859 S.E.2d 918, 2021 Ga. App. LEXIS 382 (2021).

Emergency room doctor qualified as expert. — In a patient's suit against a doctor, the doctor was qualified to testify as to the doctor's opinion on the standard of care and causation in the case; although the doctor was not board certified in any field of medicine and had not instructed in the area of emergency medicine, the doctor met the competency standard set forth in former O.C.G.A. § 24-9-67.1(c)(2)(A) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the doctor was licensed to practice medicine for 26 years, the doctor practiced as an emergency room physician for 19 years, and the doctor was regularly engaged in the practice of emergency medicine during five of the five years preceding the doctor's treatment of the patient. Cruickshank v. Elbert County, No. 3:06-CV-101, 2008 U.S. Dist. LEXIS 40221 (M.D. Ga. May 19, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Surgical expert. — Trial court did not abuse the court's discretion in a medical malpractice action by denying the hospital defendant's motion to exclude the expert opinions of one of the plaintiffs' experts because the expert's causation opinion

that the patient plaintiff would have made a candidate for immediate surgical intervention rather than surgery down the road was reliable and, therefore, admissible. Hosp. Auth. v. Fender, 342 Ga. App. 13, 802 S.E.2d 346, 2017 Ga. App. LEXIS 309 (2017), cert. denied, No. S17C1924, 2017 Ga. LEXIS 990 (Ga. Dec. 11, 2017), cert. denied, No. S17C1923, 2017 Ga. LEXIS 992 (Ga. Dec. 11, 2017), overruled in part, Quynn v. Hulsey, 310 Ga. 473, 850 S.E.2d 725, 2020 Ga. LEXIS 761 (2020), overruled in part as stated in Miller v. Polk, 363 Ga. App. 771, 872 S.E.2d 754, 2022 Ga. App. LEXIS 218 (2022).

Active practice of medicine within last three years. — When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) that the experts were not qualified to give an opinion and dismissed the case. Akers v. Elsey, 294 Ga. App. 359, 670 S.E.2d 142, 2008 Ga. App. LEXIS 1191 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Police officer qualified as expert in wreck reconstruction. — Based on the police officer's extensive experience and training and the fact that the officer was the lead investigator in reconstructing the wreck, the trial court did not manifestly abuse its discretion in finding that the officer was qualified to give the officer's conclusion. Golden Peanut Co. v. Miller, 363 Ga. App. 384, 870 S.E.2d 511, 2022 Ga. App. LEXIS 116 (2022).

Expert qualified in journalism. — Trial court properly qualified the state's witness as an expert in journalism and First Amendment law, and specifically open records laws given that the expert had an undergraduate degree in journalism, a law degree, and a Ph.D. in journalism, and that the criminal charges against the defendant related to the trade of journalism. Garland v. State, 361 Ga. App. 724, 865 S.E.2d 533, 2021 Ga. App. LEXIS 540 (2021).

Unidentified witness testifying as expert. — In a personal injury and loss of consortium action, the trial court did not err by allowing a business to call a witness who had not been identified as an expert as: (1) the proper remedy for the erroneous admission of evidence was to request a continuance or a mistrial, neither of which the injured invitee did; (2) the invitee did not dispute that the invitee received, before trial, the substance of the witness's expected testimony, along with a curriculum vitae, but only argued that the business failed to amend the interrogatory answers; and (3) the invitee failed to object either when the business called the witness to testify, or when the business tendered the witness as an expert. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207, 2006 Ga. App. LEXIS 168 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Lender's appraiser's opinion as to foreclosed property's true market value at the time of foreclosure was properly admitted under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703). The lender's expert's appraisal was based upon extensive facts and careful analysis taking into account the potential for future recovery of a down real estate market by the discounted flow method, which the borrower conceded was reliable. Blue Marlin Dev., LLC v. Branch Banking & Trust Co., 302 Ga. App. 120, 690 S.E.2d 252, 2010 Ga. App. LEXIS 52 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Expert on steel and polymer vaults or soil conditions. — There was no abuse of discretion in allowing a witness to testify as an expert on steel and polymer vaults or soil conditions in an action seeking a permanent injunction against a cemetery group because the cemetery group failed to show that the testimony was not the product of reliable principles and methods. Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858, 2010 Ga. App. LEXIS 1126 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Testimony from children's therapists. — In a visitation dispute, it was not an abuse of discretion to allow the subject children's therapist to testify as an expert in child psychology because any dispute as to the witness's qualifications was prop-

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erly explored on cross-examination and went to the weight of the witness's testimony, rather than the admissibility of that testimony. Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715, 2011 Ga. App. LEXIS 665 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Expert in market value for foreclosure sale. — Trial court did not abuse the court's discretion by admitting the expert testimony proffered by the mortgagee because it was sufficient; competent evidence supported the finding that the foreclosure sale should be confirmed and provided proof of the true market value as of the date of the foreclosure sale. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655, 2014 Ga. App. LEXIS 54 (2014).

Appraisal expert's testimony as to the value of foreclosed property at a confirmation proceeding did not violate former O.C.G.A. § 24-9-67.1(b) because the witness was certified as an appraiser in Georgia and had extensive experience, and the expert's conclusions as to the lot purchase agreement and buildability of certain lots were subject to cross-examination. The trial court, sitting without a jury, was not required to undertake a Daubert analysis of the expert's testimony. Harper v. Ameris Bank, 326 Ga. App. 67, 755 S.E.2d 872, 2014 Ga. App. LEXIS 122 (2014) (decided under former O.C.G.A.§ 24-9-67.1).

Human factors theories expert. — In a suit arising out of a collision at a highway construction site, the trial court did not err in allowing the plaintiffs' expert testimony on human factors theories, which had been subject to publishing and peer review; however, the expert was not qualified to give an opinion regarding the placement of traffic control signs. Ga. DOT v. Owens, 330 Ga. App. 123, 766 S.E.2d 569, 2014 Ga. App. LEXIS 805 (2014).

Trial court did not err by admitting the testimony of the plaintiffs' expert in the wrongful death action because the human factors engineer was qualified to offer the opinion that the reconstruction differed from the conditions that the driver of the car in the accident experienced because the test drivers knew and expected the bump in the roadway, as the engineer was an industrial and mechanical engineer and expert in systems engineering with specific expertise in human factors engineering, and the engineer had studied and evaluated factors that affect human beings, including drivers. DOT v. Delor, 351 Ga. App. 414, 830 S.E.2d 519, 2019 Ga. App. LEXIS 411 (2019), cert. denied, No. S20C0086, 2020 Ga. LEXIS 260 (Ga. Mar. 26, 2020), overruled in part, Driskell v. Dougherty County, 363 Ga. App. 481, 871 S.E.2d 283, 2022 Ga. App. LEXIS 164 (2022).

Real estate development consultant allowed to testify. — Expert testimony of a real estate development consultant regarding whether it was possible for the property owner to subdivide the property was properly allowed as the owner asserted that it was impossible for the owner to perform that task in a timely manner because of the Urban Design Commission's involvement, but the consultant's testimony was relevant to show that the property was not under the jurisdiction of the Commission; and that, under the city's subdivision ordinance, there were no restrictions that would prevent the property from being subdivided. Allen v. CFYC Construction, LLC, 354 Ga. App. 890, 842 S.E.2d 297, 2020 Ga. App. LEXIS 243 (2020).

Testimony about bottoming out of car. — Trial court did not err by admitting the testimony of the plaintiffs' expert in the wrongful death action because the challenge went to the weight and credibility of the expert's opinion and not the opinion's admissibility, as the expert conceded that the correction changed the expert's opinion regarding whether the car in which the decedents were traveling would have "bottomed out" if the car had been traveling at a lower speed, but it did not change the expert's opinion about whether the car bottomed out at its speed at the time of the accident. DOT v. Delor, 351 Ga. App. 414, 830 S.E.2d 519, 2019 Ga. App. LEXIS 411 (2019), cert. denied, No. S20C0086, 2020 Ga. LEXIS 260 (Ga. Mar. 26, 2020), overruled in part, Driskell v. Dougherty County, 363 Ga. App. 481,

871 S.E.2d 283, 2022 Ga. App. LEXIS 164 (2022).

Caseworker allowed to testify. — In a termination of parental rights proceeding, pretermitting whether a case worker was qualified to give an expert opinion about the adverse effects of long-term foster care on the mother's twin children, because the mother failed to show prejudice in light of the other evidence supporting the termination of parental rights, the juvenile court did not err in allowing the case worker's testimony. In the Interest of T.J., 281 Ga. App. 673, 637 S.E.2d 75, 2006 Ga. App. LEXIS 1198 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Elevator inspector as expert. — In a premises liability case involving an elevator that stopped above landing level, a person who had worked for 31 years for an elevator company, with responsibilities including maintenance, repair, and upgrading of existing elevators for customers, and who was certified as a qualified elevator inspector, was properly accepted as an expert. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as board certified doctor. — During a malpractice case alleging that a patient's doctor failed to timely examine and treat the patient after the patient broke a hip at a long-term care facility, the trial court did not abuse the court's discretion in finding that the patient's expert witness (who, like the doctor, was board certified in internal medicine) was qualified under former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703). The witness saw about six patients per week, including patients who resided in long-term-care facilities; the fact that the witness had not ordered an x-ray or CT-scan or admitted anyone to the hospital in the past five years did not disqualify the witness as an expert. Carter v. Smith, 294 Ga. App. 590, 669 S.E.2d 425, 2008 Ga. App. LEXIS 1163 (2008), cert. denied, No. S09C0463, 2009 Ga. LEXIS 194 (Ga. Feb. 23, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of engineering expert. — Given an expert witness's qualifications, including the expert's advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years experience working at the DOT, and eight years experience at the local government level, and the expert's testimony based on personal knowledge of the DOT's manuals and inspection policies, a trial court did not err in allowing the witness to give an opinion of whether the DOT had complied with its storm inspection policy. Ga. DOT v. Miller, 300 Ga. App. 857, 686 S.E.2d 455, 2009 Ga. App. LEXIS 1293 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a property owner's action for trespass and nuisance, the trial court did not abuse the court's discretion by allowing the owner's expert witness to testify because the expert (1) relied on sufficient facts and data; (2) was a civil engineer with a doctorate in engineering science and mechanics; and (3) had consulted and testified as an expert in numerous water intrusion/infiltration and related cases; although the expert deposed that the expert's opinion was a theory that was impossible to prove since the expert could not repeat the owner's initial water leak, the expert had factual information showing that the owner had not had an excessive rainwater problem before a sprinkler vault leak and that chlorinated water flowed to the owner's property in large volumes and could have done so for months, and the expert had factual information that the owner experienced excessive flooding during rains thereafter. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62, 2009 Ga. App. LEXIS 1388 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. May 17, 2010) (decided under former O.C.G.A. § 24-9-67.1).

Business valuation expert should have testified. — In a negligence and breach of trust action, the special master erred by excluding the expert testimony regarding the value of the plaintiff because the expert undertook the exact type of analysis as all other valuation specialists utilize in valuing a business enterprise when public information is not available, and the opinion was relevant for the jury to determine, in conjunction with

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other testimony and evidence, the amount of damages that the defendant's alleged actions may have caused, which necessarily required consideration of opinion evidence as to the value of the business. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672, 2013 Ga. App. LEXIS 344 (2013), cert. denied, No. S13C1255, 2013 Ga. LEXIS 774 (Ga. Sept. 23, 2013) (decided under former O.C.G.A. § 24-9-67.1).

Expert testimony as to timber value. — County board of equalization's tax assessment of a 250-acre tract of timberland was affirmed as the trial court did not err in failing to exclude estimates of timber value proffered by the board's expert as the appellants failed to show that the testimony was wholly speculative or conjectural, or that it was not the product of reliable principles and methods. White Horse Partners LLLP v. Monroe County Bd. of Tax Assessors, 348 Ga. App. 603, 824 S.E.2d 57, 2019 Ga. App. LEXIS 50 (2019).

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Expert's testimony on legal causation in mesothelioma case was improperly allowed. — After the independent contractor was diagnosed with mesothelioma, and the plaintiffs sued a textile manufacturer claiming that the manufacturer negligently exposed the contractor to asbestos and caused the contractor's mesothelioma, the plaintiffs' expert witness testimony was improperly admitted because the expert's testimony improperly told the jury that it was unnecessary to resolve the extent of asbestos exposure at the manufacturer's facility and that any asbestos exposure was a contributing cause of the mesothelioma as the plaintiffs had to show that exposure to asbestos at the facility made a meaningful contribution to the contractor's mesothelioma, and a de minimis contribution was not sufficient to establish legal causation. Scapa Dryer Fabrics, Inc. v. Knight, 299 Ga. 286, 788 S.E.2d 421, 2016 Ga. LEXIS 445 (2016) (decided under former O.C.G.A. § 24-9-67.1(b)).

Expert on vehicle value. — Trial court did not err in excluding expert testimony of the value of a vehicle in the vehicle's defective condition on the date of sale because there was no evidence that the expert witness's method was relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators. Moran v. Kia Motors Am., Inc., 276 Ga. App. 96, 622 S.E.2d 439, 2005 Ga. App. LEXIS 1175 (2005), cert. denied, No. S06C0456, 2006 Ga. LEXIS 229 (Ga. Mar. 27, 2006) (decided under former O.C.G.A. § 24-9-67.1).

Economist. — In a wrongful interference with business relations and slander suit, a trial court properly excluded testimony of plaintiff's expert economist, which the plaintiff claimed would show plaintiff's financial injury as to plaintiff's tortious interference claim as the expert's reliance on the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by another agent, did not provide an adequate basis for the expert's opinion. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810, 2008 Ga. App. LEXIS 386 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Toxicologist. — In a will contest, the trial court did not abuse the court's discretion in limiting testimony from the caveatrix's expert toxicologist as to whether a person's functioning level could be determined by that person's responses to general questions as the trial court found that the expert's opinion was based on generalized statistics which would have been of dubious help to the jury. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19, 2009 Ga. LEXIS 70 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Chemistry expert. — In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, a motion in limine was properly granted under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) to exclude the customer's expert in chemistry because the expert's testing of hair products and the product's reaction to

heat did not exactly replicate the conditions under which the incident occurred; the expert used a peroxide product that was not applied to the customer's hair and used a different type of heat source. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544, 2009 Ga. App. LEXIS 301 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Attorney as expert on title law and ownership. — Whether or not an attorney at law may qualify and testify as an expert witness as to what the law is and who has title and owns property as found by the attorney from examination of title records was a part of the ultimate fact to be decided by the jury. Bishop v. Lamkin, 221 Ga. 687, 146 S.E.2d 772, 1966 Ga. LEXIS 669 (1966) (decided under former Code 1933, § 38-1710).

Expert on foreseeability of murder. — Trial court did not err in refusing to permit a mother's expert to opine that a son's murder was foreseeable because it was within the discretion of the trial court to determine that no expert testimony on the question of foreseeability was required; the jury in this case, having heard evidence of numerous prior criminal acts that occurred in or around the complex, was capable of deciding the question of foreseeability without expert testimony on the ultimate issue. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135, 2011 Ga. App. LEXIS 945 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. Mar. 5, 2012) (decided under former O.C.G.A. § 24-9-67).

Product liability action. — Trial court did not abuse the court's discretion in allowing an expert witness to testify, pursuant to former O.C.G.A. § 24-9-67, in a truck owner's products liability action against a truck modifying company regarding an allegedly defective switch that was installed on the floorboard of the truck, as the expert testified that the expert had some knowledge of electrical systems, vehicle wiring, and in investigating electrical fires; accordingly, the expert's opinion that the origin of the fire was electrical and the expert's explanation as to the meaning of a flammability rating and the expert's testimony thereon was properly admitted. Cottrell, Inc. v. Williams, 266 Ga. App. 357, 596 S.E.2d 789, 2004 Ga. App. LEXIS 368 (2004) (decided under former O.C.G.A. § 24-9-67).

Airport operations manager failed to demonstrate qualifications as an expert witness to express an opinion regarding the acceptable and safe number of pounds of force of closing pressure for automatic doors on shuttle trains, or to present a factual predicate for a lay opinion. Saltis v. Benz, 243 Ga. App. 603, 533 S.E.2d 772, 2000 Ga. App. LEXIS 500 (2000) (decided under former O.C.G.A. § 24-9-67).

Electrical engineer. — When a witness was an electrical engineer of 31 years experience, and the engineer's opinions were based on proven facts, the opinions were admissible. Little v. Georgia Power Co., 205 Ga. 51, 52 S.E.2d 322, 1949 Ga. LEXIS 520 (1949) (decided under former Code 1933, § 38-1710).

Building inspector who held a license in the inspector's individual name at the time of conducting an inspection qualified as an expert; the fact that the inspector was unaware that the inspector was also required to get a license in the name under which the inspector conducted business did not prevent the inspector's qualification as an expert. Williamson v. Harvey Smith, Inc., 246 Ga. App. 745, 542 S.E.2d 151, 2000 Ga. App. LEXIS 1339 (2000) (decided under former O.C.G.A. § 24-9-67).

A Ph. D. in entomology was not required to have a pest control operator's license before being qualified to testify in an action arising from termite infestation of property. Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (decided under former O.C.G.A. § 24-9-67).

Expert's generalizations on adolescents inadmissible. — Trial court properly granted summary judgment in favor of a drug store in a suit brought by the parents of a teenager who died while huffing butane for wrongful death and in a suit brought by the parents of two other teens who were injured when: the teens assumed the risk; the expert's affidavit presented by the parents was not based on personal knowledge from interviewing the teens, and was conclusory and specula-

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tive; to the extent that the expert's affidavit fit within former O.C.G.A. § 24-9-67, the expert's generalizations about the beliefs of adolescents about death or the propensity of adolescents to exercise poor judgment and behave irresponsibly were not appropriate yardsticks for assessing the minors' knowledge of the risk; the parents' claim that the drug store knew that the teens were going to misuse the butane was based on hearsay; and the parents' public policy claims were rejected as O.C.G.A. § 16-13-90 created a list of dangerous substances not to be sold to minors, butane was not on the list, and any change in the law had to be legislatively enacted. Garner v. Rite Aid of Ga., Inc., 265 Ga. App. 737, 595 S.E.2d 582, 2004 Ga. App. LEXIS 243 (2004) (decided under former O.C.G.A. § 24-9-67).

Expert on ordinary care in premises inadmissible. — In a negligence and premises liability action, an administrator's expert affidavit regarding the foreseeability of a shooting of the decedent, a licensee, on the premises was inadmissible as there was no need for expert testimony to determine whether ordinary care was exercised in running the premises' business; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. Hadden v. ARE Props., LLC, 280 Ga. App. 314, 633 S.E.2d 667, 2006 Ga. App. LEXIS 849 (2006) (decided under former O.C.G.A. § 24-9-67).

Defendant's expert on alco-sensor inadmissible. — Trial court did not abuse the court's discretion in refusing to admit the testimony of a defendant's expert because the mistake charged to an arresting officer in administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. Oliver v. State, 294 Ga. App. 299, 669 S.E.2d 162, 2008 Ga. App. LEXIS 1225 (2008) (decided under former O.C.G.A. § 24-9-67).

Testimony by examining psychologist about parenting. — Juvenile court properly allowed expert to testify about mother's mental health status and its effects on the mother's parenting abilities even though the testing occurred two years prior to the hearing. In the Interest of A.K., 272 Ga. App. 429, 612 S.E.2d 581, 2005 Ga. App. LEXIS 297 (2005) (decided under former O.C.G.A. § 24-9-67).

Testimony on psychiatric disorders. — Testimony of experts that plaintiff suffered from recognized psychiatric disorders that caused the plaintiff to have or complain of physical symptoms out of proportion to any injuries the plaintiff may have experienced did not go solely to the credibility of the plaintiff and was admissible. Rose v. Figgie Int'l, Inc., 229 Ga. App. 848, 495 S.E.2d 77 (decided under former O.C.G.A. § 24-9-67).

Expert testimony as to the practices of an industry is admissible. Dan Gurney Indus., Inc. v. Southeastern Wheels, Inc., 168 Ga. App. 504, 308 S.E.2d 637, 1983 Ga. App. LEXIS 2829 (1983) (decided under former O.C.G.A. § 24-9-67).

Expert could rely on the Safety Code for Elevators and Escalators in forming the expert's opinion. Millar Elevator Serv. Co. v. O'Shields, 222 Ga. App. 456, 475 S.E.2d 188 (decided under former O.C.G.A. § 24-9-67).

In an action for libel, there was no error in the admission of the testimony of a journalism professor who testified as to certain generally recognized minimum standards in journalism and then stated the professor's opinion that the conduct described in a hypothetical question did not meet these standards. News Publishing Co. v. DeBerry, 171 Ga. App. 787, 321 S.E.2d 112, 1984 Ga. App. LEXIS 3006 (1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2112, 85 L. Ed. 2d 477, 1985 U.S. LEXIS 2766 (1985) (decided under former O.C.G.A. § 24-9-67).

Reconstruction of accident. — Expert accident reconstructionist was not

qualified to render an opinion as to which of two impacts caused plaintiff's injury. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (decided under former O.C.G.A. § 24-9-67).

Highway signal engineer. — Trial court did not abuse court's discretion in permitting a Department of Transportation engineer, qualified as a signal engineer, to testify whether the state was negligent in designing an intersection and signal timing at the intersection. Fouts v. Builders Transp., Inc., 222 Ga. App. 568, 474 S.E.2d 746 (decided under former O.C.G.A. § 24-9-67).

Legal malpractice and the standard of care. — Trial court did not abuse the court's discretion in granting a motion in limine in a legal malpractice action to exclude a purported expert witness on the standard of care, under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), because the witness, although a member of the state bar, worked as a merchant for a family owned business and was not then engaged in any activities that constituted practicing law in Georgia under O.C.G.A. § 15-19-50. Further, the trial court's misguided analogy to a medical malpractice expert under former § 24-9-67.1(c)(2)(D) did not result in reversible error. Wilson v. McNeely, 307 Ga. App. 876, 705 S.E.2d 874, 2011 Ga. App. LEXIS 26 (2011), cert. denied, No. S11C0946, 2011 Ga. LEXIS 632 (Ga. Sept. 6, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Security experts. — Trial court did not abuse the court's discretion in refusing to permit a mother's expert on security practices to testify about the content of certain service call lists on which the expert had relied in forming the expert's opinions about the adequacy of security at the complex because the mother made no showing that the circumstances of the various incidents reflected on the lists were substantially similar to the murder of her son, such that those incidents would bear directly upon the question of foreseeability; the lists were confusing, and substantial explanation would have been required for the jury to understand the lists. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135, 2011 Ga. App. LEXIS 945 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. Mar. 5, 2012) (decided under former O.C.G.A. § 24-9-67.1).

Expertise on driving and tires. — Trial court did not err in determining that the affidavits of a driver's experts were inadequate under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703) to defeat summary judgment in favor of a manufacturer in the driver's products liability action because the affidavits did not describe the facts or data upon which the experts' opinions were based, did not explain the principles or methods the experts used to reach the experts' conclusions about the tire, and did not provide support for a conclusion that the experts had applied those principles and methods reliably in the experts' inspections of the tire. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190, 2011 Ga. App. LEXIS 1092 (2011), cert. dismissed, No. S12C1769, 2012 Ga. LEXIS 869 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. § 24-9-67.1).

Gas experts. — Trial court did not err in the court's determinations that plaintiffs' expert was not qualified to serve as an expert in the case and that the expert's opinions were not sufficiently reliable on the question of whether a gas company was negligent because the expert failed to cite any treatise or authority supporting the belief that, under readily ascertainable and verifiable standards recognized in the field, the gas company's actions in connection with the explosion fell below the standard of care. Anderson v. Atlanta Gas Light Co., 324 Ga. App. 801, 751 S.E.2d 589, 2013 Ga. App. LEXIS 941 (2013), cert. denied, No. S14C0480, 2014 Ga. LEXIS 280 (Ga. Mar. 28, 2014).

Safety of alternative designs in vehicle accidents. — In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not err in excluding the testimony and statistical analyses of the defendant's two experts regarding the overall safety of the challenged design to the overall safety of available alternative designs because the evidence was irrelevant as it concerned the overall safety of various vehicles, but the plaintiffs' claims related only to the

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safety of the fuel system design in rear impacts; the prejudice and confusion from the proposed testimony outweighed the testimony's probative value; and neither expert satisfied the requirements for the admission of expert testimony. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754, 2016 Ga. App. LEXIS 646 (2016), aff'd, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

No error in excluding biochemist's testimony. — Given the biochemist's failure to conduct any tests, the biochemist's lack of knowledge regarding thermal burns, and the biochemist's failure to review the child's medical records, the trial court was authorized to reject as speculative the biochemist's claim that nothing else could have caused the burns to the child's feet other than the sanitizer used to clean the playground. At best, the biochemist's causation opinions were grounded in the assumption that the bottoms of the child's feet were exposed to the sanitizer, even though the record contained no evidence of exposure to that chemical. Stern v. Pettis, 357 Ga. App. 78, 847 S.E.2d 824, 2020 Ga. App. LEXIS 456 (2020), cert. denied, No. S21C0374, 2021 Ga. LEXIS 338 (Ga. May 17, 2021).

Real estate appraiser qualified to testify. — In an action involving a permanent nuisance caused by noises from a power plant that used gas-fired combustion turbine units, a certified real estate appraiser with 22 years of experience in the area, described at length the methodology the appraiser used to arrive at a reduction in value for the property at issue as a result of the nuisance and the appraiser's reasons for employing that method, was properly allowed to testify under O.C.G.A. § 24-7-702. Oglethorpe Power Corp. v. Estate of Forrister, 332 Ga. App. 693, 774 S.E.2d 755, 2015 Ga. App. LEXIS 384 (2015), cert. denied, No. S15C1689, 2015 Ga. LEXIS 704 (Ga. Oct. 5, 2015).

Expert on property value. — In an action to acquire land, a duly qualified expert may state the expert's opinion as to value without the necessity of stating the facts on which the expert's opinion is based. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478, 1979 Ga. App. LEXIS 2783 (1979) (decided under former Code 1933, § 38-1710).

In an action to acquire land, if the expert testifies that the expert's opinion is based in part on a personal inspection of the property, it is no ground for objection that the expert's inspection was made subsequent to the taking. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478, 1979 Ga. App. LEXIS 2783 (1979) (decided under former Code 1933, § 38-1710).

In an action to acquire land, it was not error to allow expert testimony as to the rental value of the property over the county's objection that the figure was based on the rental value of other property which was not shown to be comparable as the comparability of the other property was a matter going to the weight to be given the testimony, not its admissibility, and further, the testimony was relevant on the issue of consequential damages for the temporary loss of use of the property. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478, 1979 Ga. App. LEXIS 2783 (1979) (decided under former Code 1933, § 38-1710).

Expert surveyor's reliance on hearsay. — Trial court did not err in overruling a landowner's objection to the admission of evidence of a survey conducted by another surveyor employed by the landowner's neighbors in that the survey was prepared in partial reliance on data outside of the surveyor's personal knowledge; an expert may base the expert's opinion on hearsay and may be allowed to testify as to the basis for the expert's findings, and the lack of the expert's personal knowledge goes to the weight assigned to the opinion. Ellis v. Holder, 267 Ga. App. 503, 600 S.E.2d 425, 2004 Ga. App. LEXIS 692 (2004) (decided under former O.C.G.A. § 24-9-67).

Value of condemned land. — Expert's opinion as to what expert would pay for condemned land was probative of the land's fair market value and improperly excluded by the trial court. Jotin Realty Co. v. Department of Transp., 174 Ga.

App. 809, 331 S.E.2d 605, 1985 Ga. App. LEXIS 1965 (1985) (decided under former O.C.G.A. § 24-9-67).

Expert on safety and causation. — Propriety of expert opinion as to whether a particular condition is safe or unsafe certainly is within the scope and purview of an expert's opinion; moreover, testimony as to causation is a proper matter for expert testimony. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100, 1981 Ga. App. LEXIS 1963 (1981) (decided under former O.C.G.A. § 24-9-67).

Licensed contractor could opine what would be revealed by home inspection. — In a tenant's claim for injuries against the tenant's landlord after a staircase collapsed, the trial court erred in disregarding the tenant's expert's opinion that a pre-purchase structural inspection would have led the landlord to discover the defects; although the expert was not a home inspector, the expert was a licensed residential and commercial contractor. Pajaro v. S. Ga. Bank, 339 Ga. App. 334, 793 S.E.2d 209, 2016 Ga. App. LEXIS 622 (2016).

Striking surveyor's affidavits held proper. — In a suit between two landowners to enforce the terms of an easement, the trial court did not abuse the court's discretion in excluding two affidavits from a surveyor in determining land elevation as no testimony was offered regarding any knowledge, skill, experience, training, or education the witness possessed in that capacity, and no evidence was presented as to the principles and methods the witness employed including whether the methods were reliable. McGuire Holdings, LLLP v. TSQ Partners, LLC, 290 Ga. App. 595, 660 S.E.2d 397, 2008 Ga. App. LEXIS 379 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Police officer as expert in negligence case. — In a negligence case, assuming that admission of a police officer's affidavit opining as to the cause of an accident was error under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the error was harmless in light of other evidence showing that the proximate cause of the accident was the driver's own negligence, including the driver's statements to treating physicians that the driver was reaching for the driver's cell phone when the driver ran off the road and a statement to the insurance adjustor that the driver was distracted. Kecskes v. City of Mt. Zion, 300 Ga. App. 348, 685 S.E.2d 329, 2009 Ga. App. LEXIS 1131 (2009), cert. dismissed, No. S10C0445, 2010 Ga. LEXIS 353 (Ga. Apr. 19, 2010) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of police officer on auto accident. — Investigating officer's opinion testimony regarding the sequence of events involved in a vehicle collision is admissible evidence as a police officer with investigative experience on automobile collisions is an expert who may testify as to the cause of an accident the officer investigated. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385, 2003 Ga. App. LEXIS 1161 (2003), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018) (decided under former O.C.G.A. § 24-9-67).

Forensic toxicologist permitted to testify on effects of methamphetamine. — In a wrongful death and negligence action, in which the decedent was riding a motorcycle when the decedent collided with an automobile occupied by the defendants, an investigator was qualified to present the investigator's opinion as to why the decedent contributed to the accident because the investigator's conclusion was based partly on the area's hilly terrain, and its associated reduced visibility, as well as witness statements; the investigator had received training and conducted traffic investigations; and the investigator walked and photographed the scene, marked the locations of the motorcycle and the automobile at the time of impact, ascertained the weather and lighting conditions, and noted the scene's hilly terrain. Clack v. Hasnat, 354 Ga. App. 502, 841 S.E.2d 210, 2020 Ga. App. LEXIS 186 (2020).

In a wrongful death and negligence action, in which the decedent was riding a motorcycle when the decedent collided with an automobile occupied by the defendants, a forensic toxicologist with the Georgia Bureau of Investigation did not

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testify to perception-reaction time or whether the positive methamphetamine test was the result of illegal or prescription drugs for which the forensic toxicologist was allegedly not qualified to testify; however, the forensic toxicologist was qualified as an expert regarding the matters to which the forensic toxicologist did testify, including the effects of methamphetamine on behavior and conduct. Clack v. Hasnat, 354 Ga. App. 502, 841 S.E.2d 210, 2020 Ga. App. LEXIS 186 (2020).

Toxicologist and pharmacologist, who was not a medical doctor, was competent to give an opinion in a medical malpractice action that a drug prescribed by defendants caused plaintiff's miscarriage since the testimony was not offered to address the applicable standard of care but to show causation. Sinkfield v. Shi-Han Oh, 229 Ga. App. 883, 495 S.E.2d 94 (decided under former O.C.G.A. § 24-9-67).

Officer qualified as expert on gangs. — Police officer was properly qualified as an expert in gang identity and investigation as the officer was a state certified gang investigator; that the officer was trained in gang identity and investigation; that the officer trained new hires about gangs; and that the officer regularly monitored six Clayton County-based gangs, and was knowledgeable about the neighborhoods in which the gangs operated. The officer also testified that the officer knew the colors associated with the defendant's gang and had seen photographs of their gang signs. Burgess v. State, 292 Ga. 821, 742 S.E.2d 464, 2013 Ga. LEXIS 369 (2013).

Expert's conclusion could not serve as basis for summary judgment. — Expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to the opinion. Layfield v. DOT, 280 Ga. 848, 632 S.E.2d 135, 2006 Ga. LEXIS 462 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert on elevators. — In a premises liability case involving an elevator that stopped above landing level, the trial court properly allowed the plaintiffs' expert to give opinion testimony that the elevator maintenance provider did not follow industry standards in maintaining the elevator; the expert based the opinion on the expert's personal knowledge of the elevator industry, the expert's review of the elevator maintenance records, and the deposition testimony of the provider's mechanics. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Speculative opinion testimony by expert improperly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court should have excluded the opinion of an expert that if the elevator maintenance provider had followed a more aggressive maintenance schedule for the elevator, the condition in the elevator that led to its mis-leveling would almost certainly have been discovered or prevented before a passenger was injured; the expert had showed no basis for the opinion. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert on diminution of value. — In a breach of contract and bad faith refusal to pay claim under a policy of lender's title insurance, since a retrial was issued on another issue, whether environmental stigma was a title defect covered by the title insurance policy was an issue that could be addressed again as to actual damages but the trial court properly permitted the insured's expert to testify as to diminution of the subject property's value. Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 337 Ga. App. 638, 788 S.E.2d 542, 2016 Ga. App. LEXIS 385 (2016), cert. denied, No. S16C1843, 2017 Ga. LEXIS 117 (Ga. Feb. 27, 2017).

Capacity to execute a deed. — Even if registered nurses and licensed practical

nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease lacked qualifications to testify as experts about the decedent's capacity to execute a deed, a trial court did not err in permitting the nurses to testify because even a lay witness could give evidence on the question of capacity as long as the witness gave sufficient facts to form the basis of the witness's opinion; the witnesses offered detailed testimony about the decedent's inability to recognize the decedent's sibling or sign the decedent's own name, the decedent's chronic disorientation, the decedent's need for constant redirection and reorientation, and other factual observations the nurses made about the decedent's mental state and the decedent's apparent lack of capacity. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662, 2006 Ga. LEXIS 964 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Striking valuation testimony proper. — Trial court did not manifestly abuse the court's discretion by striking certain testimony of the condemnee's expert witness regarding valuation on the ground that the testimony was without sufficient foundation since the testimony was based on an assumption of the value as if the subject property had already been subdivided, which it had not; in making its ruling, the trial court properly discerned that, even though a different use of the property was shown to have been reasonably probable, a jury cannot evaluate the property as though the new use were an accomplished fact. Woodland Partners Ltd. P'ship v. DOT, 286 Ga. App. 546, 650 S.E.2d 277, 2007 Ga. App. LEXIS 735 (2007), cert. denied, No. S07C1767, 2007 Ga. LEXIS 698 (Ga. Sept. 24, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Probative value. — To the extent that an affidavit as to the value of a truck was offered as an expert opinion, the affidavit lacked probative value as there was no evidence that the valuation method the affiant used was reliable. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750, 2007 Ga. App. LEXIS 722 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Employee of state environmental agency. — In a suit against a permittee by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD), the permittee objected to testimony of an EPD employee on the ground that the employee was not qualified as an engineer under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The trial court, however, qualified the witness and permitted the employee to testify as an expert in biologic and anaerobic processes, and did not abuse the court's discretion in doing so. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175, 2008 Ga. LEXIS 546 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Individuals not qualified as mechanical experts. — In a personal injury case when a driver alleged that a loose tie rod caused the driver to lose control of the steering, neither of the driver's experts was qualified to render an opinion as to the cause of the accident; the first expert did not have adequate knowledge or experience with the mechanical aspects of a vehicle to determine if mechanical failure caused the vehicle to lose control and also had no experience in evaluating design defects, and the second expert, an experienced mechanic and a police officer, had no experience in the area of accident reconstruction or in evaluating the circumstances surrounding catastrophic mechanical failure. Smith v. Liberty Chrysler-Plymouth-Dodge, Inc., 285 Ga. App. 606, 647 S.E.2d 315, 2007 Ga. App. LEXIS 597 (2007), cert. denied, No. S07C1526, 2007 Ga. LEXIS 861 (Ga. Nov. 5, 2007), cert. denied, 552 U.S. 1317, 128 S. Ct. 1883, 170 L. Ed. 2d 757, 2008 U.S. LEXIS 3278 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert on falls policy. — Since the plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries and the death of an elderly patient, in any event, the witness was not competent to testify based upon the witness's sheer lack of knowledge regarding fall prevention because the witness never authored a falls policy and the witness's knowledge of those policies was strictly limited to the policy in effect at the witness's place of employment, the witness had no knowledge of the Morse Fall Scale, which was

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the method of fall risk assessment utilized in this case, prior to being retained, and the witness admitted in deposition that the witness did not rely on any textbooks or teachings to base the witness's opinions and that the witness performed no literary searches prior to forming the witness's opinion. Sanders v. United States, No. CV 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

Expert on polyp removal. — Trial court erred in granting the doctor's motion in limine to exclude the testimony of the patient's expert on the grounds that the expert was not qualified to provide an expert opinion on hysteroscopic removal of fibroids and that the expert's testimony was speculative as the expert had significant experience in removing polyps though hysteroscopic procedures and the removal of fibroids via hysteroscopy was not markedly different from removal of polyps via that procedure. Cartledge v. Montano, 325 Ga. App. 322, 750 S.E.2d 772, 2013 Ga. App. LEXIS 958 (2013), cert. denied, No. S14C0570, 2014 Ga. LEXIS 267 (Ga. Mar. 28, 2014).

Same specialty not required. — Trial court did not abuse the court's discretion in finding the plaintiffs' expert affiant competent to testify as the expert was a licensed medical doctor and did not have to have the same speciality as the physician to be considered a member of the same profession and the expert had taught in the area of cardiac electrophysiology during the relevant time period. Graham v. Reynolds, 343 Ga. App. 274, 807 S.E.2d 39, 2017 Ga. App. LEXIS 483 (2017), cert. denied, No. S18C0460, 2018 Ga. LEXIS 310 (Ga. May 7, 2018).

Doctor as expert on pulmonary embolisms. — In a case decided under former O.C.G.A. § 24-9-67.1, a doctor was properly qualified as an expert since the doctor acted as a consultant on the causation of pulmonary embolisms and consulted emergency room physicians about some of the patient's tests and researched the issue. Bonds v. Nesbitt, 322 Ga. App. 852, 747 S.E.2d 40, 2013 Ga. App. LEXIS 624 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Expert with different speciality than defendant doctor. — Trial court properly denied a doctor's motion to exclude testimony from the patient's expert witness, despite the fact that the expert had a different specialty than the doctor, as such was allowed under the plain language of former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and the expert's testimony addressed the doctor's alleged misdiagnosis of the patient's condition, which was the ultimate issue in the case. Mays v. Ellis, 283 Ga. App. 195, 641 S.E.2d 201, 2007 Ga. App. LEXIS 9 (2007), cert. denied, No. S07C0697, 2007 Ga. LEXIS 326 (Ga. Apr. 24, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Urologist. — Trial court did not abuse the court's discretion in denying a hospital board's motion to exclude the testimony of the plaintiff's medical expert in a medical malpractice suit because under the plaintiff's complaint the ultimate issues to be decided were whether the hospital staff and the board's urologists committed malpractice by failing to timely evaluate the plaintiff's injury, not whether the board's urologists negligently performed the exploratory surgery or that the urologists negligently removed the plaintiff's testicle contrary to urological standards of care; the area of practice or specialty in which the opinion was to have been given in the case was an area of practice in which the plaintiff's medical expert possessed the requisite knowledge and experience under former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703). MCG Health, Inc. v. Barton, 285 Ga. App. 577, 647 S.E.2d 81, 2007 Ga. App. LEXIS 584 (2007), cert. denied, No. S07C1491, 2007 Ga. LEXIS 821 (Ga. Oct. 29, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert on hematoma. — Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the trial court correctly deter-

mined that the expert's opinion was based on sufficient facts and data in order to be admissible at trial; the expert deposed that the expert's opinion of the cause of the patient's epidural hematoma was derived from applying the expert's medical knowledge and the expert's experience with previous cases to the patient's medical records and deposition testimony regarding the incident given by the doctor and the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807, 2009 Ga. App. LEXIS 1287 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Experts on erectile dysfunction. — In a medical malpractice action, the trial court's order granting the defending doctor's motion to exclude the patient's expert witness testimony as the testimony related to the causation and permanence of the patient's erectile dysfunction based on a certain test was vacated because the order could be interpreted as requiring the exclusion of all the expert's opinion testimony as to the cause and permanence of the patient's erectile dysfunction. Smith v. Rodillo, 330 Ga. App. 365, 765 S.E.2d 432, 2014 Ga. App. LEXIS 738 (2014), cert. denied, No. S15C0665, 2015 Ga. LEXIS 262 (Ga. Apr. 20, 2015).

Expert's testimony on death following paralysis caused by medical negligence. — In a wrongful death case, the trial court did not manifestly abuse the court's discretion in denying the defendants' motion to exclude an expert's opinion because the expert's opinion that the decedent would not have died with the conditions which took the victim's life had the victim not become paralyzied due to the alleged medical malpractice was based on the expert's review of the decedent's medical records. Emory Univ. v. Willcox, 355 Ga. App. 542, 844 S.E.2d 889, 2020 Ga. App. LEXIS 350 (2020).

Performance of procedures in dental malpractice. — In a dental malpractice case, an expert witness's testimony about available treatment options for the patient's tumor in the patient's mandible was improperly excluded because the expert was not unqualified to render an opinion as the expert did not have to have performed a particular medical procedure within five years prior to the case to testify. Ouanzin v. Coast Dental Servs., 354 Ga. App. 168, 840 S.E.2d 686, 2020 Ga. App. LEXIS 140 (2020), cert. denied, No. S20C1041, 2020 Ga. LEXIS 822 (Ga. Sept. 28, 2020).

Jury instructions on standard of care. — In a medical malpractice case when evidence of an expert's personal practices is admitted, the trial court must give jury instructions that clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice; and clarify concepts such as burden of proof and credibility of witnesses. In addition, the party whose expert has been cross-examined has the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152, 2009 Ga. LEXIS 391 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Criminal Cases

1. Procedural Considerations

Giving testimony based on lab report not yet admitted into evidence. — Expert medical witness could not give an opinion on the cause of death based on lab report which had not yet been admitted into evidence, but error in allowing such opinion was cured when the lab report was later introduced into evidence. Vaughn v. State, 249 Ga. 803, 294 S.E.2d 504, 1982 Ga. LEXIS 1199 (1982) (decided under former O.C.G.A. § 24-9-67).

Introduction of fingerprint magnifications not necessary when expert testified as to expert's comparisons. — Expert in field of fingerprint identification was qualified to state opinion based on expert's analysis and comparison that fingerprints found at scene of the crime were those of appellant; and in presenting this expert testimony, it was not necessary for state to introduce magnification of prints to demonstrate at trial the points of similarity. W.B.S. v. State, 163 Ga. App. 471, 294 S.E.2d 705, 1982 Ga. App. LEXIS 2539 (1982) (decided under former O.C.G.A. § 24-9-67).

When witness is tendered as an expert. — Witness who was not tendered as

Procedural Considerations (Cont'd)

an expert until near the end of the witness's testimony and after cross-examination qualified as an expert at the inception of the witness's testimony and could properly render an expert opinion. In re C.W.D., 232 Ga. App. 200, 501 S.E.2d 232 (decided under former O.C.G.A. § 24-9-67).

Testimony by examining psychologist on abuse. — In a child molestation case, there was no error in allowing certain expert testimony by a psychologist. The psychologist was properly allowed to explain conclusions based on tests developed either in the scientific community or from the psychologist's own clinical experience; the psychologist could testify that the victim's symptoms and accounts were highly consistent with sexual abuse; and because the trial court was authorized to conclude that one's ability to manufacture stories of abuse based upon his or her intelligence quotient (IQ) level fell beyond the ken of the average juror, the psychologist was properly allowed to testify that a person with the victim's IQ of 74 would have difficulty fabricating a detailed fictional account of abuse. Mullis v. State, 292 Ga. App. 218, 664 S.E.2d 271, 2008 Ga. App. LEXIS 736 (2008) (decided under former O.C.G.A. § 24-9-67).

Failure to identify expert before hearing not grounds to exclude testimony. — Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to present the testimony of an expert witness who could have established that, based upon the video, the defendant could not have inflicted the muzzle wound to the victim's right leg and that the victim accidentally shot the victim's own leg because the jury was able to determine for itself whether the defendant was ever close enough to the victim to cause a muzzle contact wound; and it was undisputed that the shot to the victim's leg was not the fatal wound. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277, 2017 Ga. LEXIS 1 (2017) (decided under former O.C.G.A. § 24-7-707).

In a child deprivation hearing, a parent's claim that the trial court erred by allowing the state to call an expert witness without identifying the expert or producing the medical records in advance of the hearing was meritless because: (1) the parent's discovery request did not ask the state to identify each person whom the state expected to call as an expert witness at trial; and (2) the parent did not show prejudice from the lack of any additional information other than a broad assertion of insufficient time to prepare for the hearing. In the Interest of A.A., 293 Ga. App. 471, 667 S.E.2d 641, 2008 Ga. App. LEXIS 977 (2008) (decided under former O.C.G.A. § 24-9-67).

Failure to retain crime scene reconstruction or firearms expert. — Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to consult with or retain a crime scene reconstruction or firearms expert to explain the events the video portrayed because the jury could draw its own conclusions about the events shown on the video; the defendant failed to show that the testimony of an expert witness with respect to what the expert observed on the video would have been admissible or that the jury would have accepted the expert's testimony over what the jury observed; and, even if admissible, the jurors could have disregarded the expert's testimony about what the expert saw in the video if it conflicted with what the jurors saw for themselves. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277, 2017 Ga. LEXIS 1 (2017) (decided under former O.C.G.A. § 24-7-707).

2. Qualification as Expert

Medical examiner proper expert on observations from autopsy. Medical examiner's testimony was not without proper foundation as the examiner was qualified, tendered, and admitted as an expert and, therefore, the examiner was permitted to give opinion testimony based on observations during the autopsy, as well as on facts provided by other witnesses; the examiner testified that the opinion as to the manner of death was based on the appearance of the wound, the path and course of the bullet, the presence of a laceration to the head of the victim, and the absence of a gun at the scene.

Smith v. State, 276 Ga. 97, 575 S.E.2d 450, 2003 Ga. LEXIS 9 (2003) (decided under former O.C.G.A. § 24-9-67).

Testimony by medical examiner regarding whether injuries were accidental. — In the defendants' murder trial in which the defendants claimed a shooting was accidental as the parties struggled, because the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting did not opine as to the defendants' mental intent for any crime or defense, there was no violation of O.C.G.A. § 24-7-704, and because the examiner's opinion was based on the examiner's specialized knowledge and training, O.C.G.A. § 24-7-707, any objection would have been meritless. Eller v. State, 303 Ga. 373, 811 S.E.2d 299, 2018 Ga. LEXIS 130 (2018), overruled in part, Lester v. State, 310 Ga. 81, 849 S.E.2d 425, 2020 Ga. LEXIS 738 (2020) (decided under former O.C.G.A. § 24-7-707).

Expert on handwriting analysis. Defendant alleged that the witness was not qualified as a handwriting expert because the witness failed the test to become a member of the American Board of Forensic Document Examiners and was only a trainee member of the American Society of Forensic Document Examiners; although this is true, the witness testified to becoming a member of the Southeastern Association of Forensic Document Examiners after completing two years of training, that the witness had been performing handwriting analysis on a daily basis for the Georgia Crime Lab for the last eight years, that the witness had examined thousands of documents, and that the witness had been qualified as an expert witness in criminal cases tried in a Georgia superior court approximately eighteen times; thus, there was no abuse of discretion by the trial court in qualifying the witness as an expert in forensic document examination. Poole v. State, 270 Ga. App. 432, 606 S.E.2d 878, 2004 Ga. App. LEXIS 1468 (2004), cert. denied, No. S05C0578, 2005 Ga. LEXIS 271 (Ga. Mar. 28, 2005) (decided under former O.C.G.A. § 24-9-67).

Advocate for the victims of sexual assault at a rape crisis center was properly qualified as an expert as the advocate had been through 50 hours of sexual assault training and had two years of experience, in which the advocate had counseled over 100 purported victims of sexual assault; further, the advocate had published one article that was presented at a seminar. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521, 2005 Ga. App. LEXIS 284 (2005), cert. dismissed, No. S05C1805, 2005 Ga. LEXIS 758 (Ga. Oct. 24, 2005) (decided under former O.C.G.A. § 24-9-67).

Expert in domestic violence. Certification of an expert was not an abuse of discretion as the witness had over 20 years of experience in the field of domestic violence and an educational background in psychology. Miller v. State, 273 Ga. App. 761, 615 S.E.2d 843, 2005 Ga. App. LEXIS 612 (2005) (decided under former O.C.G.A. § 24-9-67).

Expert on Shaken Baby Syndrome. Employee of the Department of Family and Children Services was properly allowed to testify that a victim's condition and behavior was consistent with Shaken Baby Syndrome based on the employee's extensive experience and training with respect to fatal child abuse and Shaken Baby Syndrome; the fact that the employee did not hold a medical degree went only to the weight of the employee's testimony, and the employee's evidence was cumulative of that given by physicians. Waits v. State, 282 Ga. 1, 644 S.E.2d 127, 2007 Ga. LEXIS 305 (2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-67).

Child abuse accommodation syndrome. — Expert testimony by a licensed psychologist regarding child abuse accommodation syndrome was properly admitted because the expert testified regarding how the victim's demeanor was consistent with having been sexually abused and not whether the victim was telling the truth. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806, 2013 Ga. App. LEXIS 295 (2013), cert. denied, No. S13C1093, 2013 Ga. LEXIS 679 (Ga. Sept. 9, 2013) (decided under former O.C.G.A. § 24-7-707).

Qualified as expert in administration of intelligence tests for criminal defendants. — Trial court did not abuse the court's discretion by qualifying a li-

Qualification as Expert (Cont'd)

censed professional counselor and qualified psychometrist as an expert in the administration of intelligence tests after hearing testimony regarding the counselor's relevant education and experience based on the fact that the counselor did not independently perform the Wechsler Adult Intelligence Scales-Third Edition test (WAIS-III) on the defendant and merely assisted in the test's administration, nor did the trial court err in admitting the sufficiently relevant and reliable evidence regarding the WAIS-III test administered since the counselor's supervisor did not have to be physically present in the room with the defendant during the counselor's testing session in order to supervise the counselor. Further, the defendant failed to show that the tests results were unreliable after the counselor's unrebutted testimony regarding the manner in which the testing was conducted. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31, 2007 Ga. LEXIS 838 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, 2008 U.S. LEXIS 3194 (2008), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-67).

Expert in street level narcotics. — An investigator testified that the investigator had been employed in law enforcement since 1988; that the investigator had received 240 hours of narcotics training; that the investigator had attended a regional drug training academy specializing in the recognition of clandestine methamphetamine labs; that the investigator had attended informant management classes, undercover drug classes, and drug identification classes; that the investigator had previously investigated cases involving possession of narcotics with the intent to distribute and manufacturing of the same, including methamphetamine; and, among other things, that the investigator used confidential informants to assess new trends in the world of illegal narcotics. Based on this training and experience, there was no abuse of discretion by the trial court in qualifying the investigator as an expert in the street level narcotics trade, the characteristics of a methamphetamine lab, and the identification of a substance as possible methamphetamine. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880, 2008 Ga. App. LEXIS 1041 (2008) (decided under former O.C.G.A. § 24-9-67).

Officer is an expert on narcotics investigations. — Trial court did not abuse the court's discretion during the defendant's trial for possession of cocaine with the intent to distribute in allowing the arresting officer to testify as an expert witness on the issue of the defendant's intent to distribute crack cocaine because the officer had over 900 hours of specialized training as a narcotics officer, was familiar with how crack cocaine was typically packaged and sold, and had made numerous drug-related arrests, at least 50 of which involved crack cocaine. Further, the officer's testimony was relevant to the issue of whether the defendant possessed the cocaine with the intent to distribute the cocaine and was within the scope of the officer's expertise. Thomas v. State, 321 Ga. App. 214, 741 S.E.2d 298, 2013 Ga. App. LEXIS 340 (2013), cert. denied, No. S13C1182, 2013 Ga. LEXIS 777 (Ga. Sept. 23, 2013), overruled in part, Langley v. State, 313 Ga. 141, 868 S.E.2d 759, 2022 Ga. LEXIS 14 (2022) (decided under former O.C.G.A. § 24-7-707).

Testimony of forensic toxicologist. — In a prosecution for driving under the influence, testimony of the forensic toxicologist who tested the defendant's blood was properly admitted as expert testimony as the witness had a permit from the Georgia Bureau of Investigation to perform chemical analyses of blood specimens received from the police, and the defendant subsequently had the opportunity to cross-examine the witness about the witness's credentials and testimony. Fowler v. State, 294 Ga. App. 864, 670 S.E.2d 448, 2008 Ga. App. LEXIS 1194 (2008), cert. denied, No. S09C0529, 2009 Ga. LEXIS 204 (Ga. Feb. 23, 2009), overruled in part, State v. Henry, 312 Ga. 632, 864 S.E.2d 415, 2021 Ga. LEXIS 650 (2021) (decided under former O.C.G.A. § 24-9-67).

Nurse as an expert on sexual assault examinations. — Evidence was sufficient for a rational trier of fact to find

the defendant guilty of aggravated sodomy of one victim and rape and aggravated sodomy of a second victim because the jury was authorized to conclude, based on a nurse's testimony and the medical evidence, that penetration occurred; the nurse was properly tendered and accepted as an expert in the subject of sexual assault examinations, and the nurse testified that the first victim's external injuries established the potential for penetration. Blash v. State, 304 Ga. App. 542, 697 S.E.2d 265, 2010 Ga. App. LEXIS 570 (2010) (decided under former O.C.G.A. § 24-9-67).

Officer qualified as shoe-print matching expert. — Juvenile court did not abuse the court's discretion in determining that an officer possessed the requisite skill and experience to testify as an expert because the officer was experienced, had investigated thousands of crimes, was trained in crime scene observation, and had handled other cases involving shoe-print matching. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827, 2010 Ga. App. LEXIS 743 (2010) (decided under former O.C.G.A. § 24-9-67).

Expert in value of transportation equipment in theft by taking case. — Trial court did not abuse the court's discretion in qualifying a witness as an expert in the valuation of transportation equipment because the witness testified that the witness had been in the repossession business 22 years, with another 6 or 8 years dealing specifically with equipment repossession, that the witness was qualified to estimate the value and condition of transportation equipment, and that the witness had been qualified as an expert 15-20 times in other court proceedings. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620, 2010 Ga. App. LEXIS 773 (2010) (decided under former O.C.G.A. § 24-9-67).

Qualification as expert in commercial sexual exploitation of children. — Trial court did not abuse the court's discretion in qualifying a witness as an expert in commercial sexual exploitation of children as the witness testified that the witness was the director of forensic services at the Georgia Center for Child Advocacy; had conducted over one thousand forensic interviews; had been qualified as a forensic-interview expert approximately 46 times; had undergone training for mental health providers in the area of commercial sexual exploitation of children and become a facilitator to train others on the topic; and had attended symposiums and seminars with instruction from the Federal Bureau of Investigation on how to work with sexually exploited children. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654, 2015 Ga. App. LEXIS 139 (2015), cert. denied, No. S15C1105, 2015 Ga. LEXIS 412 (Ga. June 1, 2015) (decided under former O.C.G.A. § 24-7-707).

Expert in pimping, culture, terminology and relationship dynamics. — Trial court did not abuse the court's discretion in qualifying a witness as an expert in pimping culture, terminology, and relationship dynamics between pimps and prostitutes because the witness testified that the witness was the director of forensic services for Fulton County, Georgia; worked with various law enforcement agencies in Georgia to train them in understanding cycles of abuse regarding sexual exploitation; had trained with the National Center for Missing and Exploited Children to study the effects of sexual exploitation, exploring the dynamics between demeanor of pimps and exploited teenagers; and had studied pimping and prostitution by extensive review of scholarly literature on the subject. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654, 2015 Ga. App. LEXIS 139 (2015), cert. denied, No. S15C1105, 2015 Ga. LEXIS 412 (Ga. June 1, 2015) (decided under former O.C.G.A. § 24-7-707).

Police officer qualified as expert. — Trial court did not abuse the court's discretion by allowing one of the investigating police officers to testify as an expert regarding interviewing witnesses to a crime because the officer testified that the officer had extensive training in conducting investigations and interviewing witnesses and 11 years of experience doing so and did not offer any opinion as to the truthfulness of the boys, who were the victims of the crime. Smith v. State, 342

Qualification as Expert (Cont'd)

Ga. App. 656, 805 S.E.2d 251, 2017 Ga. App. LEXIS 395 (2017) (decided under former O.C.G.A. § 24-7-707).

Forensic interviewer as expert. — Although the defendant argued that the trial court should have looked to the forensic interviewer's level of experience in 2012, when the interviewer conducted the forensic interviews, rather than 2016, when the interviewer gave the interviewer's expert opinion because the defendant asserted that, due to the interviewer's inexperience in 2012, the interviewer did not properly conduct the forensic interviews, those criticisms went to the weight and credibility of the interviewer's testimony about the opinions the interviewer reached based on the allegedly flawed interviews, which were matters for the factfinder, and not to the interviewer's qualifications as an expert in 2016. Kruel v. State, 344 Ga. App. 256, 809 S.E.2d 491, 2018 Ga. App. LEXIS 15 (2018) (decided under former O.C.G.A. § 24-7-707).

Investigator as expert on domestic violence. — Testimony as to a former investigator's credentials laid an adequate foundation for the investigator to testify about the cycle of domestic violence, why victims are reluctant to report domestic violence, and why they stay with their assailants. Pauley v. State Two Cases, 355 Ga. App. 47, 842 S.E.2d 499, 2020 Ga. App. LEXIS 251 (2020) (decided under former O.C.G.A. § 24-7-707).

3. Appointment of Expert by Court

Appointment discretionary with court. — Granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court. Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436, 1980 Ga. LEXIS 1030 (1980) (decided under former Code 1933, § 38-1710).

Appointment of expert witnesses lies within the sound discretion of the trial court and, absent a showing of an abuse of that discretion, the Court of Appeals will not interfere. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398, 1981 Ga. LEXIS 834 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398, 1983 U.S. LEXIS 4712 (1983); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275, 1981 Ga. App. LEXIS 2149 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103, 1981 Ga. App. LEXIS 2717 (1981) (decided under former Code 1933, § 38-1710).

Trial court's comments on witness's status held prejudicial. — Trial court's comments, adding the influence of the court's personal opinion on the expert status of a witness and identifying the witness in common with the court as a state-paid employee, were prejudicial comments on the evidence during a competency trial. Jones v. State, 189 Ga. App. 232, 375 S.E.2d 648, 1988 Ga. App. LEXIS 1358 (1988) (decided under former O.C.G.A. § 24-9-67).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 398 et seq.

Am. Jur. Trials.

Defense Use of Economist, 31 Am. Jur. Trials 287.

ALR.

Medical negligence in extraction of tooth, established through expert testimony, 18 A.L.R.6th 325.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 A.L.R.6th 613.

Admissibility of expert testimony by nurses, 24 A.L.R.6th 549.

Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 A.L.R.6th 439.

Admissibility of computer forensic testimony, 40 A.L.R.6th 355.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 A.L.R.6th 595.

Admissibility of biomedical engineer testimony, 43 A.L.R.6th 327.

Necessity and admissibility of expert

testimony to establish malpractice or breach of professional standard of care by architect, 47 A.L.R.6th 303.

Qualification as expert to testify in legal malpractice action, 82 A.L.R.6th 281.

Admissibility and propriety of use of Abel Assessment for Sexual Interest test, 84 A.L.R.6th 263.

Use and effect of Comparative Bullet Lead Analysis (CBLA) in criminal cases, 92 A.L.R.6th 549.

Requirement for, and admissibility of, expert testimony to determine whether use of particular amount of force in course of making arrest was unreasonable, 95 A.L.R.6th 641.

Propriety of expert historian testimony, 4 A.L.R.7th 4.

Admissibility of expert testimony regarding false confessions, 11 A.L.R.7th 6.

Admissibility and effect of evidence of "psychosocial short stature," "psychosocial dwarfism," or the like in cases involving parent-child relationship, 13 A.L.R.7th 1.

Admissibility of expert testimony on grooming behavior involving sexual conduct with child, 13 A.L.R.7th 9.

Admissibility, sufficiency, and other issues concerning expert evidence to prove or disprove shaken baby syndrome, 16 A.L.R.7th 5.

Admissibility of expert testimony concerning extremist groups and associated persons and organizations, 39 A.L.R.7th Art. 6.

Admissibility and weight, in criminal case, of expert or scientific evidence respecting microscopic analysis of human hair, 43 A.L.R.7th Art. 9.

24-7-703. Bases of expert opinion testimony.

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

History.

Code 1981, § 24-7-703, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Bases of an expert's opinion testimony, Fed. R. Evid. 703.

Law reviews.

For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005).

For comment, "Georgia's Codification of Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?," see 23 Ga. St. U.L. Rev. 481 (2006).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under subsection (a) of former O.C.G.A. § 24-9-67.1 are included in the annotations for this Code section.

Constitutionality. — Trial court properly found that former O.C.G.A. § 24-9-67.1(a) and (b)(1) (see now O.C.G.A. §§ 24-7-702, 24-7-703)were contradictory in that paragraph (b)(1) limited experts to relying on potentially admissible facts and data, whereas subsection (a) stated that facts and data relied upon need not be admissible. Since the two provisions could not be harmonized and, read together, they rendered the former statute

unconstitutionally vague; however, the trial court was not required to strike the former statute in the statute's entirety. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court did not err in rejecting plaintiffs' equal protection challenge since plaintiffs could not establish the necessary element of an equal protection claim that plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases are not similarly situated to those engaged in criminal prosecutions. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Application of Daubert standard. — After a trial court found that an expert's testimony failed the first element of Daubert because the expert's theory was essentially untestable and had not been tested, the trial court properly exercised the court's discretion in weighing the fourth Daubert factor—whether the theory had attained general acceptance within the scientific community—less heavily than the other three Daubert factors. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

As the trial court's finding that the plaintiff's expert was a "quintessential expert for hire" was supported by the evidence, it was within the trial court's discretion to apply the Daubert factors with greater rigor in determining the admissibility of the expert's opinion. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court's denial of Daubert motion presumed correct. — Trial court's evidentiary ruling, denying a property owner's Daubert motion to exclude a bank's appraiser's expert testimony pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was presumed correct since no transcript from the hearing thereon appeared in the record. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806, 2012 Ga. App. LEXIS 220 (2012) (decided under former O.C.G.A. § 24-9-67.1).

Ineffective assistance of counsel not established as to sequestration of expert issue. — Trial counsel was not deficient in failing to properly invoke sequestration because the trial court did not abuse the court's discretion in allowing the state's expert to testify in rebuttal based in part on their review of the recorded testimony of the appellant's expert; accordingly, even if the appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused the court's discretion in excepting the state's expert from the rule. Davis v. State, 299 Ga. 180, 787 S.E.2d 221, 2016 Ga. LEXIS 407 (2016).

No error in excluding expert testimony. — Trial court did not err in excluding expert testimony of the value of a vehicle in the vehicle's defective condition on the date of sale because there was no evidence that the expert witness's method was relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators. Moran v. Kia Motors Am., Inc., 276 Ga. App. 96, 622 S.E.2d 439, 2005 Ga. App. LEXIS 1175 (2005), cert. denied, No. S06C0456, 2006 Ga. LEXIS 229 (Ga. Mar. 27, 2006) (decided under former O.C.G.A. § 24-9-67.1).

In an action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., the trial court did not abuse the court's discretion in excluding the testimony of an employee's treating physi-

cian as the doctor's conclusions were based on an incomplete medical history of the employee, without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians. Shiver v. Ga. & Fla. Railnet, Inc., 287 Ga. App. 828, 652 S.E.2d 819, 2007 Ga. App. LEXIS 1039 (2007), cert. denied, No. S08C0394, 2008 Ga. LEXIS 330 (Ga. Mar. 31, 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a patient's medical malpractice action, the testimony of an expert witness was properly excluded as the opinion was based on facts stated in a hypothetical question which were not proven by other witnesses or other competent evidence. Moreover, a motion in limine entered against the patient as to another expert witness's testimony was not addressed on appeal as the patient never called the expert to testify, and thus, the issue was abandoned. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835, 2008 Ga. App. LEXIS 389 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a wrongful interference with business relations and slander suit, a trial court properly excluded testimony of plaintiff's expert economist, which the plaintiff claimed would show plaintiff's financial injury as to plaintiff's tortious interference claim as the expert's reliance on the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by another agent, did not provide an adequate basis for the expert's opinion. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810, 2008 Ga. App. LEXIS 386 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a will contest, the trial court did not abuse the court's discretion in limiting testimony from the caveatrix's expert toxicologist as to whether a person's functioning level could be determined by that person's responses to general questions as the trial court found that the expert's opinion was based on generalized statistics which would have been of dubious help to the jury. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19, 2009 Ga. LEXIS 70 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, a motion in limine was properly granted under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) to exclude the customer's expert in chemistry because the expert's testing of hair products and the product's reaction to heat did not exactly replicate the conditions under which the incident occurred; the expert used a peroxide product that was not applied to the customer's hair and used a different type of heat source. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544, 2009 Ga. App. LEXIS 301 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and by excluding the testimony of one of the customer's expert witnesses. The expert was not qualified since the expert was retired and not a licensed physician and the testimony of that expert was cumulative of other expert testimony admitted at trial, therefore, any alleged error was harmless. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731, 2009 Ga. App. LEXIS 479 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. June 29, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. Hope v. Kranc, 304 Ga. App. 367, 696 S.E.2d 128, 2010 Ga. App. LEXIS 528 (2010), cert. denied, No. S10C1724, 2010 Ga. LEXIS 801 (Ga. Oct. 18, 2010) (decided under former O.C.G.A. § 24-9-67.1).

As vehicle occupants failed to satisfy the Daubert factors or any other reason-

able criteria for purposes of measuring the reliability of their expert witness's conclusions with respect to a vehicle accident that occurred in a construction zone, a trial court did not abuse the court's discretion when the court excluded the witness's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); the expert's conclusions were based solely on the expert's own assertions and were unsupported by either the Daubert factors or any other reasonable reliability criteria. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770, 2010 Ga. LEXIS 493 (2010) (decided under former O.C.G.A. § 24-9-67.1).

It was within the trial court's discretion to exclude an expert witness's testimony because a sister and a brother failed to satisfy the Daubert factors or any other reasonable criteria by which the trial court could measure the reliability of the expert's conclusions; the expert failed to cite any treatise or authority supporting the expert's opinion, and the sister and brother presented no evidence that the expert had any experience that would supply the foundation supporting the expert's conclusions. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770, 2010 Ga. LEXIS 493 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a mother's medical malpractice action against a hospital, the trial court did not abuse the court's discretion by finding that the mother's witness was not admissible as an expert on whether any member of the hospital's nursing staff breached the standard of care pursuant to former O.C.G.A. § 24-9-67.1(c)(2)(D) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the witness deposed that the witness did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse-physician interactions, and did not hold out to be an expert in nursing or in the standard of care of nurses. Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 704 S.E.2d 198, 2010 Ga. App. LEXIS 1105 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703) since it was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537, 2011 Ga. App. LEXIS 495 (2011), cert. denied, No. S11C1620, 2011 Ga. LEXIS 857 (Ga. Oct. 17, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in refusing to permit a mother's expert on security practices to testify about the content of certain service call lists on which the expert had relied in forming the expert's opinions about the adequacy of security at the complex because the mother made no showing that the circumstances of the various incidents reflected on the lists were substantially similar to the murder of her son, such that those incidents would bear directly upon the question of foreseeability; the lists were confusing, and substantial explanation would have been required for the jury to understand the lists. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135, 2011 Ga. App. LEXIS 945 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. Mar. 5, 2012) (decided under former O.C.G.A. § 24-9-67.1).

Medical expert proper. — In a medical malpractice action, the trial court's order granting the defending doctor's motion to exclude the patient's expert witness testimony as the testimony related to the causation and permanence of the patient's erectile dysfunction based on a certain test was vacated because the order could be interpreted as requiring the exclusion of all the expert's opinion testimony as to the cause and permanence of the patient's erectile dysfunction. Smith v. Rodillo, 330 Ga. App. 365, 765 S.E.2d 432, 2014 Ga. App. LEXIS 738 (2014), cert. denied, No. S15C0665, 2015 Ga. LEXIS 262 (Ga. Apr. 20, 2015).

Qualification as an expert not satisfied. — Trial court did not err in refusing to qualify the employees' witness as an

expert because the witness's testimony provided no evidence, let alone expert testimony, that would preclude summary judgment in favor of the Georgia Department of Human Services, and under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court had discretion in determining whether expert testimony was necessary; any use of the witness as an expert in the case was wholly unnecessary because the areas of the expert's specialized knowledge were not issues beyond the ken of lay persons. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 708 S.E.2d 660, 2011 Ga. App. LEXIS 270 (2011), cert. denied, No. S11C1146, 2011 Ga. LEXIS 622 (Ga. Sept. 6, 2011) (decided under former O.C.G.A. § 24-9-67.1).

Expert must be member of same profession. — Under former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court erred in allowing a pharmacist to testify about a physician's negligence. A medical expert had to show either active practice or teaching for three of the last five years, and also had to be a member of the same profession as the person whose performance the expert was evaluating. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136, 2008 Ga. App. LEXIS 1179 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. June 8, 2009) (decided under former O.C.G.A. § 24-9-67.1).

Nurse's affidavit insufficient in case alleging physical therapist's negligence. — Trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) in order to provide a § 9-11-9.1 affidavit. Ball v. Jones, 301 Ga. App. 340, 687 S.E.2d 625, 2009 Ga. App. LEXIS 1385 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Evidence of expert's personal practices admitted. — In a medical malpractice case, evidence of an expert's personal practices, unless excludable on other grounds, is admissible both as substantive evidence and to impeach the expert's opinion as to the applicable standard of care. To the extent Johnson v. Riverdale Anesthesia Assocs., 563 S.E.2d 431 (Ga. 2002), held otherwise, it is overruled. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152, 2009 Ga. LEXIS 391 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of a witness qualified as expert may be given on facts proved by other witnesses. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898, 2008 Ga. App. LEXIS 874 (2008) (decided under former O.C.G.A. § 24-9-67.1).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the affidavits rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31, 2007 Ga. LEXIS 838 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, 2008 U.S. LEXIS 3194 (2008), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-9-67.1).

Striking surveyor's affidavits held proper. — In a suit between two landowners to enforce the terms of an ease-

ment, the trial court did not abuse the court's discretion in excluding two affidavits from a surveyor in determining land elevation as no testimony was offered regarding any knowledge, skill, experience, training, or education the witness possessed in that capacity, and no evidence was presented as to the principles and methods the witness employed including whether the methods were reliable. McGuire Holdings, LLLP v. TSQ Partners, LLC, 290 Ga. App. 595, 660 S.E.2d 397, 2008 Ga. App. LEXIS 379 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Applicability. — Because former O.C.G.A. § 24-9-67.1(a) (see now O.C.G.A. §§ 24-7-702, 24-7-703), which governed expert witness testimony in civil actions, did not apply to probation revocation hearings, the trial court's ruling to permit the expert's testimony regarding the presence of marijuana in a joint seized from the probationer was not erroneous as the state was not required to comply with Daubert to prove the expert's qualifications. Carlson v. State, 280 Ga. App. 595, 634 S.E.2d 410, 2006 Ga. App. LEXIS 682 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constitutes "improper judge shopping," obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457, 2007 Ga. App. LEXIS 712 (2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, when a doctor was the only expert witness submitted by the suing couple, and the couple did not challenge the trial court's exclusion of another doctor's testimony, their argument that said doctor's testimony should have been admitted as a rebuttal witness was unpersuasive. Thomas v. Peachtree Orthopaedic Clinic, P.C., 290 Ga. App. 869, 660 S.E.2d 758, 2008 Ga. App. LEXIS 291 (2008), cert. denied, No. S08C1373, 2008 Ga. LEXIS 915 (Ga. Oct. 6, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Subject matter improper for expert testimony. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212, 2007 Ga. LEXIS 419 (2007) (decided under former O.C.G.A. § 24-9-67.1).

In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454, 2007 Ga. App. LEXIS 701 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Healthcare expert not qualified. — In a medical malpractice and negligence action by an arrestee against a county, jail medical personnel, a medical lab, and lab personnel, these defendants successfully moved to exclude the testimony of an expert in correctional health on the basis of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert was not qualified to testify as to

any matter outside correctional health care—specifically, the standard of care in the fields of internal medicine, infectious disease, or laboratory procedures with regard to the arrestee's state law claims; furthermore, the expert's testimony was neither relevant nor reliable under the Daubert analysis, and therefore, it was excluded pursuant to Fed. R. Evid. 702. Dukes v. State, 428 F. Supp. 2d 1298, 2006 U.S. Dist. LEXIS 18201 (N.D. Ga.), aff'd, 212 Fed. Appx. 916, 2006 U.S. App. LEXIS 32150 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert retained by the plaintiffs in a medical malpractice action, which was based on the failure to adequately inform a patient of the potential risks and complications connected with a sleep apnea procedure, was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert had not performed the procedure in question on other patients nor did the expert aver that the expert had obtained informed consents for similar procedures. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121, 2007 Ga. LEXIS 857 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656, 2007 Ga. App. LEXIS 1279 (2007), cert. denied, No. S08C0714, 2008 Ga. LEXIS 468 (Ga. May 19, 2008), cert. denied, 555 U.S. 1069, 129 S. Ct. 726, 172 L. Ed. 2d 726, 2008 U.S. LEXIS 9039 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly refused to admit the testimony of a patient's expert in a case involving a claim of an unnecessary surgical procedure because the expert, who described the physician's medical practice as a "family practice", had no surgical training or expertise. Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d 876, 2008 Ga. App. LEXIS 653 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a malpractice and wrongful death case filed against a surgeon and an anesthesiologist, as the expert retained by the decedent's spouse did not teach or practice in the area of post-surgical airway management with sufficient frequency to establish the appropriate level of knowledge to meet the criteria of former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and lacked training in anesthesiology, the expert's opinion was properly excluded. Dawson v. Leder, 294 Ga. App. 717, 669 S.E.2d 720, 2008 Ga. App. LEXIS 1283 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Treating physician's testimony sufficient. — In a Federal Employers' Liability Act action, testimony of an employee's treating physician was not insufficient under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because after diagnosing the employee with hepatitis related to chemical exposure, the physician reviewed reports of, inter alia, a toxicologist that the chemical in a leaking train car was hydrogen sulfide and opined as to causation; the physician's opinion was not merely based on the temporal proximity of the chemical exposure to the onset of the employee's symptoms. CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 670 S.E.2d 543, 2008 Ga. App. LEXIS 1341 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of nurses as expert witnesses. — Registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease did not lack qualifications to testify as experts about the decedent's capacity to execute a deed because the law did not require that only physicians be allowed to give testimony regarding a medical issue, but permitted others with certain training and experience to testify on issues within the scope of their expertise, and a licensed practical nurse or registered nurse was qualified to testify as an expert witness within the areas of the nurse's expertise; as to any failure to qualify the witnesses as experts, the question of whether a person possessed the qualifications of an expert wit-

ness rested entirely in the sound discretion of the trial court. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662, 2006 Ga. LEXIS 964 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. Allen v. Family Med. Ctr., P.C., 287 Ga. App. 522, 652 S.E.2d 173, 2007 Ga. App. LEXIS 1014 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. Houston v. Phoebe Putney Mem. Hosp., Inc., 295 Ga. App. 674, 673 S.E.2d 54, 2009 Ga. App. LEXIS 419 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action brought by a patient against a hospital and an employee of the hospital, the patient's expert nurse was held to be indisputably qualified under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) based on the nurse actively and regularly practicing as a licensed nurse on a full-time basis in supervising and directly performing nursing services and being a faculty member at two educational institutions accredited in the teaching of the nursing profession. Lee v. Phoebe Putney Mem. Hosp., Inc., 297 Ga. App. 692, 678 S.E.2d 340, 2009 Ga. App. LEXIS 520 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a case involving a patient who fell at the doctor's office while a nurse was weighing the patient, a trial court abused the court's discretion in concluding that a nursing expert was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The proper area of specialty was not weighing patients, in which the nurse expert had little experience, but managing patient safety while moving or directing patients, in which the nurse expert had sufficient experience at a surgical clinic. Anderson v. Mt. Mgmt. Servs., 306 Ga. App. 412, 702 S.E.2d 462, 2010 Ga. App. LEXIS 952 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Medical malpractice expert testimony sufficient to avoid directed verdict. — Patient who was allergic to latex alleged a hospital's negligent use of a latex catheter caused her to develop interstitial cystitis (IC). Though the patient's medical expert admitted that the causes of IC were unknown, and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical causation to justify denying the hospital's motion for judgment notwithstanding the verdict. EHCA Dunwoody, LLC v. Daniel, 277 Ga. App. 783, 627 S.E.2d 830, 2006 Ga. App. LEXIS 204 (2006), cert. denied, No. S06C1165, 2006 Ga. LEXIS 374 (Ga. May 18, 2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) was from an orthopedist and not a fellow neurosurgeon, as the statutory area of practice in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765, 2006 Ga. App. LEXIS 1183 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action involving alleged nerve damage to a child during delivery, a trial court properly directed a verdict in favor of the doctor upon determining that the suing parent failed to provide causation evidence as the parent's expert failed to rule in a certain possibility

as to the cause of the injury at issue and, instead, assumed a cause of injury, which was unsupported by the evidence. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835, 2008 Ga. App. LEXIS 389 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Police officer as expert. — In a negligence case, assuming that admission of a police officer's affidavit opining as to the cause of an accident was error under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the error was harmless in light of other evidence showing that the proximate cause of the accident was the driver's own negligence, including the driver's statements to treating physicians that the driver was reaching for the driver's cell phone when the driver ran off the road and a statement to the insurance adjustor that the driver was distracted. Kecskes v. City of Mt. Zion, 300 Ga. App. 348, 685 S.E.2d 329, 2009 Ga. App. LEXIS 1131 (2009), cert. dismissed, No. S10C0445, 2010 Ga. LEXIS 353 (Ga. Apr. 19, 2010) (decided under former O.C.G.A. § 24-9-67.1).

Expert's conclusion could not serve as basis for summary judgment. — Expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to the opinion. Layfield v. DOT, 280 Ga. 848, 632 S.E.2d 135, 2006 Ga. LEXIS 462 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Opinion testimony properly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court properly allowed the plaintiffs' expert to give opinion testimony that the elevator maintenance provider did not follow industry standards in maintaining the elevator; the expert based the opinion on the expert's personal knowledge of the elevator industry, the expert's review of the elevator maintenance records, and the deposition testimony of the provider's mechanics. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert's opinion admissible when no personal knowledge. Trial court did not err by allowing the state's expert to testify about defendant's state of mind, even though the expert did not interview or evaluate defendant, because O.C.G.A. § 24-7-703 permitted an expert to express opinions based on facts of which the expert did not have personal knowledge. McCalop v. State, No. S23A0210, 2023 Ga. LEXIS 84 (Ga. May 2, 2023).

Speculative opinion testimony by expert improperly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court should have excluded the opinion of an expert that if the elevator maintenance provider had followed a more aggressive maintenance schedule for the elevator, the condition in the elevator that led to its mis-leveling would almost certainly have been discovered or prevented before a passenger was injured; the expert had showed no basis for the opinion. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Psychologist testimony on bonding in parental rights termination case. — In a case terminating the mother's parental rights, the clinical psychologist's testimony regarding the psychologist's bonding evaluation on the child was properly admitted because the psychologist, who was tendered as an expert on child psychology and attachment and bonding without objection, explained that the psychologist formed the psychologist's opinions based on an interview, observation, and testing; the psychologist testified that the methods the psychologist used and the information the psychologist gathered were of the type regularly used by others in the psychologist's profession; and the psychologist's opinion was not objectionable on the grounds that the opinion em-

braced an ultimate issue to be decided by the trier of fact. In the Interest of R. S. T., 345 Ga. App. 300, 812 S.E.2d 614, 2018 Ga. App. LEXIS 208 (2018).

Objections to expert opinions not timely filed. — In a negligence suit involving the death of an individual in an automobile collision, a trial court erred by declaring that application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), with regard to a hitch manufacturer seeking to exclude plaintiff's expert witness, would have been unconstitutional as the motion to exclude the expert was filed several months after the final pretrial conference had already taken place and, thus, the time period within which the trial court was required to hold a hearing and rule on the motion had already passed. However, application of the former statute would not have changed the trial court's ultimate, and correct, conclusion that the hitch manufacturer's motion to exclude the expert was without merit based on the time period for ruling on the motion having already passed. Ford Motor Co. v. Gibson, 283 Ga. 398, 659 S.E.2d 346, 2008 Ga. LEXIS 296 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Capacity to execute a deed. — Even if registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease lacked qualifications to testify as experts about the decedent's capacity to execute a deed, a trial court did not err in permitting the nurses to testify because even a lay witness could give evidence on the question of capacity as long as the witness gave sufficient facts to form the basis of the witness's opinion; the witnesses offered detailed testimony about the decedent's inability to recognize the decedent's sibling or sign the decedent's own name, the decedent's chronic disorientation, the decedent's need for constant redirection and reorientation, and other factual observations the nurses made about the decedent's mental state and the decedent's apparent lack of capacity. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662, 2006 Ga. LEXIS 964 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Striking valuation testimony proper. — Trial court did not manifestly abuse the court's discretion by striking certain testimony of the condemnee's expert witness regarding valuation on the ground that the testimony was without sufficient foundation since the testimony was based on an assumption of the value as if the subject property had already been subdivided, which it had not; in making its ruling, the trial court properly discerned that, even though a different use of the property was shown to have been reasonably probable, a jury cannot evaluate the property as though the new use were an accomplished fact. Woodland Partners Ltd. P'ship v. DOT, 286 Ga. App. 546, 650 S.E.2d 277, 2007 Ga. App. LEXIS 735 (2007), cert. denied, No. S07C1767, 2007 Ga. LEXIS 698 (Ga. Sept. 24, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Probative value. — To the extent that an affidavit as to the value of a truck was offered as an expert opinion, the affidavit lacked probative value as there was no evidence that the valuation method the affiant used was reliable. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750, 2007 Ga. App. LEXIS 722 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Employee of state environmental agency. In a suit against a permittee by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD), the permittee objected to testimony of an EPD employee on the ground that the employee was not qualified as an engineer under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The trial court, however, qualified the witness and permitted the employee to testify as an expert in biologic and anaerobic processes, and did not abuse the court's discretion in doing so. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175, 2008 Ga. LEXIS 546 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Individuals not qualified as mechanical experts. In a personal injury case when a driver alleged that a loose tie rod caused the driver to lose control of the steering, neither of the driver's experts was qualified to render an opinion as to the cause of the accident; the first expert did not have adequate knowledge or expe-

rience with the mechanical aspects of a vehicle to determine if mechanical failure caused the vehicle to lose control and also had no experience in evaluating design defects, and the second expert, an experienced mechanic and a police officer, had no experience in the area of accident reconstruction or in evaluating the circumstances surrounding catastrophic mechanical failure. Smith v. Liberty Chrysler-Plymouth-Dodge, Inc., 285 Ga. App. 606, 647 S.E.2d 315, 2007 Ga. App. LEXIS 597 (2007), cert. denied, No. S07C1526, 2007 Ga. LEXIS 861 (Ga. Nov. 5, 2007), cert. denied, 552 U.S. 1317, 128 S. Ct. 1883, 170 L. Ed. 2d 757, 2008 U.S. LEXIS 3278 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), and excluding the testimony of two experts in plaintiffs' personal injury suit because neither witness's testimony was shown to be the product of reliable principles and methods. One expert's testimony on the issue of causation lacked scientific support, and the other expert's testimony on the issue of labeling used standards having no specific relevance to consumer use of products, and the opinion was based solely on data obtained from the Internet and from plaintiffs' attorneys. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603, 2008 Ga. LEXIS 249 (2008) (decided under former O.C.G.A. § 24-9-67.1).

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 that the experts were not qualified to give an opinion and dismissed the case. Akers v. Elsey, 294 Ga. App. 359, 670 S.E.2d 142, 2008 Ga. App. LEXIS 1191 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert allowed to testify. In a personal injury and loss of consortium action, the trial court did not err by allowing a business to call a witness who had not been identified as an expert as: (1) the proper remedy for the erroneous admission of evidence was to request a continuance or a mistrial, neither of which the injured invitee did; (2) the invitee did not dispute that the invitee received, before trial, the substance of the witness's expected testimony, along with a curriculum vitae, but only argued that the business failed to amend the interrogatory answers; and (3) the invitee failed to object either when the business called the witness to testify, or when the business tendered the witness as an expert. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207, 2006 Ga. App. LEXIS 168 (2006) (decided under former O.C.G.A. § 24-9-67.1).

There was no abuse of discretion in allowing a witness to testify as an expert on steel and polymer vaults or soil conditions in an action seeking a permanent injunction against a cemetery group because the cemetery group failed to show that the testimony was not the product of reliable principles and methods. Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858, 2010 Ga. App. LEXIS 1126 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a visitation dispute, it was not an abuse of discretion to allow the subject children's therapist to testify as an expert in child psychology because any dispute as to the witness's qualifications was properly explored on cross-examination and went to the weight of the witness's testimony, rather than the admissibility of that testimony. Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715, 2011 Ga. App. LEXIS 665 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Even though the lab report and data themselves were not in evidence, there was no hearsay violation in allowing the Georgia Bureau of Investigation scientists to testify to their opinion that the DNA from the rape kit was a match to the defendant. Moss v. State, 366 Ga. App. 33, 879 S.E.2d 821, 2022 Ga. App. LEXIS 485 (2022).

Expert's testimony based on another expert's report admissible. — Trial court did not err in admitting a forensic biologist's testimony regarding

tests done by a second forensic biologist because the forensic biologist examined the second biologist's case file and notes for accuracy, evaluated the steps taken by the second biologist to reach a conclusion, and reached a conclusion identical to, but independent of, the second biologist's conclusion that the DNA from the underwear and comforter matched the defendant or the defendant's identical twin. Sanchious v. State, 359 Ga. App. 649, 859 S.E.2d 814, 2021 Ga. App. LEXIS 260 (2021).

Medical examiner's testimony on cause of death permitted. — Trial court did not err in denying the defendant's motion to exclude the testimony of the medical examiner as to the cause of the murder victim's death due to the destruction of the medical records reviewed because although the testimony partially depended on hearsay contained in the medical records, such records were the type of evidence on which an expert could rely and no Brady violation occurred as the defendant was notified of the testimony prior to trial. Burney v. State, 309 Ga. 273, 845 S.E.2d 625, 2020 Ga. LEXIS 469 (2020).

Surgeon allowed to testify. — Under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), a vascular surgeon was qualified to give an opinion in a medical malpractice case against an orthopedic surgeon because the vascular surgeon did not allege that the doctor was negligent in the performance of a patient's knee replacement surgery, only in the failure to assess the vascular issues involved, particularly in light of the patient's medical history. Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655, 2006 Ga. App. LEXIS 831 (2006), cert. denied, No. S06C1966, 2007 Ga. LEXIS 112 (Ga. Jan. 8, 2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert testimony as to gang activity. — Sufficient evidence, including expert testimony, supported the appellants' convictions because the evidence established that the appellants were associated with a criminal street gang and that the armed robbery and aggravated assault the appellants engaged in constituted criminal street gang activity and were intended to further the interests of the gang. Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67, 2016 Ga. LEXIS 769 (2016).

Caseworker allowed to testify. — In a termination of parental rights proceeding, pretermitting whether a case worker was qualified to give an expert opinion about the adverse effects of long-term foster care on the mother's twin children, because the mother failed to show prejudice in light of the other evidence supporting the termination of parental rights, the juvenile court did not err in allowing the case worker's testimony. In the Interest of T.J., 281 Ga. App. 673, 637 S.E.2d 75, 2006 Ga. App. LEXIS 1198 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert on DNA testing. — No error resulted by admitting expert testimony on the issue of DNA testing and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557, 2007 Ga. App. LEXIS 800 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Elevator inspector as expert. — In a premises liability case involving an elevator that stopped above landing level, a person who had worked for 31 years for an elevator company, with responsibilities including maintenance, repair, and upgrading of existing elevators for customers, and who was certified as a qualified elevator inspector, was properly accepted as an expert. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59, 2007 Ga. App. LEXIS 945 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as medical expert. — Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the trial court correctly determined that the expert's opinion was based on sufficient facts and data in order to be admissible at trial; the expert deposed that the expert's opinion of the cause of the patient's epidural hematoma was derived from applying the expert's medical knowledge and the expert's experience with previous cases to the patient's medical records and deposition testimony regarding the incident given by the doctor

and the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807, 2009 Ga. App. LEXIS 1287 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the expert reviewed the medical records of the patient's case as well as the deposition testimony of the doctor and the patient before using a differential diagnosis to explain the expert's theory of the cause of the patient's epidural hematoma; the trial court denied the motion in limine based on the expert's use of differential diagnosis because, the expert explained, based on prior experiences and medical knowledge as applied to the medical records, time-line, and testimony given in the case, why the expert believed that the patient's interaction with the doctor caused the epidural hematoma either to form or to worsen to the point that it caused the damage suffered by the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807, 2009 Ga. App. LEXIS 1287 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as DOT expert. — Given an expert witness's qualifications, including his advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years experience working at the DOT, and eight years experience at the local government level, and the expert's testimony based on personal knowledge of the DOT's manuals and inspection policies, a trial court did not err in allowing the witness to give an opinion of whether the DOT had complied with its storm inspection policy. Ga. DOT v. Miller, 300 Ga. App. 857, 686 S.E.2d 455, 2009 Ga. App. LEXIS 1293 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as water intrusion/infiltration expert. — In a property owner's action for trespass and nuisance, the trial court did not abuse the court's discretion by allowing the owner's expert witness to testify because the expert (1) relied on sufficient facts and data; (2) was a civil engineer with a doctorate in engineering science and mechanics; and (3) had consulted and testified as an expert in numerous water intrusion/infiltration and related cases; although the expert deposed that the expert's opinion was a theory that was impossible to prove since the expert could not repeat the owner's initial water leak, the expert had factual information showing that the owner had not had an excessive rainwater problem before a sprinkler vault leak and that chlorinated water flowed to the owner's property in large volumes and could have done so for months, and the expert had factual information that the owner experienced excessive flooding during rains thereafter. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62, 2009 Ga. App. LEXIS 1388 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. May 17, 2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court should rule on admissibility before ruling on summary judgment. — Because the opinions of a homeowner's experts, if admissible, would present a jury question on the issue of an exterminator's breach of contract and the extent of the homeowner's damages, a trial court erred in failing to decide the admissibility of these opinions under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) before granting summary judgment to the exterminator. An v. Active Pest Control South, Inc., 313 Ga. App. 110, 720 S.E.2d 222, 2011 Ga. App. LEXIS 1014 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Summary judgment entered in favor of a sanitation company was vacated as to a citizen's claim that the company negligently damaged a platform, created a tripping hazard, and caused the citizen's injuries because the trial court had to rule on the admissibility of the citizen's expert witness before the court of appeals could consider whether the company bent the landing and caused a tripping hazard; the company moved to exclude the expert's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), but the trial court never ruled on admissibility. Burroughs v. Mitchell

County, 313 Ga. App. 8, 720 S.E.2d 335, 2011 Ga. App. LEXIS 1073 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Jury instructions. — In a medical malpractice case when evidence of an expert's personal practices is admitted, the trial court must give jury instructions that clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice; and clarify concepts such as burden of proof and credibility of witnesses. In addition, the party whose expert has been cross-examined has the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152, 2009 Ga. LEXIS 391 (2009) (decided under former O.C.G.A. § 24-9-67.1).

RESEARCH REFERENCES

Am. Jur. Trials.

Defense Use of Economist, 31 Am. Jur. Trials 287.

ALR.

Medical negligence in extraction of tooth, established through expert testimony, 18 A.L.R.6th 325.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 A.L.R.6th 613.

Admissibility of expert testimony by nurses, 24 A.L.R.6th 549.

Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 A.L.R.6th 439.

Admissibility of computer forensic testimony, 40 A.L.R.6th 355.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 A.L.R.6th 595.

Admissibility of biomedical engineer testimony, 43 A.L.R.6th 327.

Necessity and admissibility of expert testimony to establish malpractice or breach of professional standard of care by architect, 47 A.L.R.6th 303.

Admissibility and propriety of use of Abel Assessment for Sexual Interest test, 84 A.L.R.6th 263.

Use and effect of Comparative Bullet Lead Analysis (CBLA) in criminal cases, 92 A.L.R.6th 549.

Requirement for, and admissibility of, expert testimony to determine whether use of particular amount of force in course of making arrest was unreasonable, 95 A.L.R.6th 641.

Propriety of expert historian testimony, 4 A.L.R.7th 4.

Admissibility of expert testimony regarding false confessions, 11 A.L.R.7th 6.

Admissibility and effect of evidence of "psychosocial short stature," "psychosocial dwarfism," or the like in cases involving parent-child relationship, 13 A.L.R.7th 1.

Admissibility of expert testimony on grooming behavior involving sexual conduct with child, 13 A.L.R.7th 9.

Admissibility, sufficiency, and other issues concerning expert evidence to prove or disprove shaken baby syndrome, 16 A.L.R.7th 5.

Admissibility of expert testimony concerning extremist groups and associated persons and organizations, 39 A.L.R.7th Art. 6.

24-7-704. Ultimate issue opinion.

(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion

or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

History.

Code 1981, § 24-7-704, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Opinion on an ultimate issue, Fed. R. Evid. 704.

Law reviews.

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

JUDICIAL DECISIONS

Testimony regarding whether injuries were accidental admissible. — In the defendants' murder trial in which the defendants claimed a shooting was accidental as the parties struggled, because the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting did not opine as to the defendants' mental intent for any crime or defense, there was no violation of O.C.G.A. § 24-7-704, and because the examiner's opinion was based on the examiner's specialized knowledge and training, O.C.G.A. § 24-7-707, any objection would have been meritless. Eller v. State, 303 Ga. 373, 811 S.E.2d 299, 2018 Ga. LEXIS 130 (2018), overruled in part, Lester v. State, 310 Ga. 81, 849 S.E.2d 425, 2020 Ga. LEXIS 738 (2020) (decided under former O.C.G.A. § 24-7-707).

Officer's testimony about field sobriety tests. — Trial counsel was not ineffective in failing to object to testimony of the officer about field sobriety tests that allegedly went to the ultimate issue and invaded the province of the jury because the defendant could not show the outcome would have been different had counsel objected since the evidence of guilt was strong, the officer did not misstate the law, and the jurors were properly instructed on what evidence they could consider. Swanson v. State, 366 Ga. App. 584, 884 S.E.2d 1, 2023 Ga. App. LEXIS 46 (2023).

Lay testimony on ultimate issue grounds no longer generally prohibited. — There was no error in the trial court's admission of the complained-of statement of one of the female accomplice's recorded interview with the police because the officer's statement regarding a party to a crime did not constitute ultimate issue opinion testimony; and, even if the statement did, the current Evidence Code — unlike the former Code — did not generally prohibit lay witness testimony on ultimate issue grounds. Butler v. State, 310 Ga. 892, 855 S.E.2d 551, 2021 Ga. LEXIS 75 (2021).

Lay witnesses' testimony that defendant had murdered victims. — At the defendant's murder trial, the witnesses' opinion testimony that the defendant killed the victims was rationally based on the witnesses' perception and helpful to understanding the witnesses' testimony and, therefore, admissible under O.C.G.A. § 24-7-701; even if the witnesses' opinion addressed an ultimate issue, the testimony was not objectionable under O.C.G.A. § 24-7-704(a). One witness saw the defendant with the victims shortly before the victims were killed, and the defendant told the other that the defendant had "offed them boys." Grier v. State, 305 Ga. 882, 828 S.E.2d 304, 2019 Ga. LEXIS 324 (2019).

Lay testimony on why defendant's charges upgraded. —To the extent the trial court concluded that the investigator's testimony was proper lay testimony because it was based on personal knowledge about why the defendant's charges were upgraded, the Georgia Supreme Court saw no abuse of discretion in the trial court denying the defendant's motion for mistrial on that basis. Taylor v. State, 315 Ga. 630, 884 S.E.2d 346, 2023 Ga. LEXIS 42 (2023).

Testimony on nature of victim's injuries. — Although the defendant argued

that the testimonies of the experts at a minimum injected the impermissible inference that the defendant caused the 18-month-old child's injuries intentionally, that was simply not the case because the expert's testimony concerned the nature of the injuries inflicted on the victim, not the mental state of the defendant; whether the accused committed an intentional act to harm the victim is a different question than whether someone likely committed an intentional act to harm the victim. Wade v. State, 304 Ga. 5, 815 S.E.2d 875, 2018 Ga. LEXIS 445 (2018).

Fire marshall's testimony regarding arson. — After being qualified as an expert witness, the fire marshal's testimony that the fire at the victims' residence was intentionally set did not invade the province of the jury in deciding whether the defendant had committed arson because the testimony did not address other elements of the crime of arson or directly implicate the defendant as the perpetrator of that crime; and the conclusion that the fire was intentionally set was not one jurors would ordinarily be able to draw for themselves. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365, 2016 Ga. LEXIS 236 (2016).

Detective's testimony regarding venue and shooting. — Detective's answers to the defendant's questions regarding the surveillance recording of the shooting did not violate the ultimate issue rule, and the defendant could not show harm because evidence of the defendant's guilt was compelling; and the defendant could not show that the complained-of comments likely affected the outcome of the defendant's trial as, although it might have been improper for the detective to share the detective's subjective belief that the defendant was the shooter seen on the surveillance recording with the jury explicitly, that the detective believed the defendant was the shooter seen on the surveillance recording would have come as no surprise to the jury. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Detective testifying as lay witness. — Even though a detective's comments during a video interview touched on the ultimate issues of the case, whether the shooting was an accident, the trial court did not err in refusing to redact the comments because O.C.G.A. § 24-7-704(a) did not bar the admission of the comments even if the comments touched on the ultimate issue because the detective was testifying as a lay witness. Mack v. State, 306 Ga. 607, 832 S.E.2d 415, 2019 Ga. LEXIS 518 (2019).

Trial court did not commit plain error in allowing a police officer to testify that the shooting of the victim was not in self-defense because the officer testified as a lay witness rather than an expert and could draw on his professional experiences to guide his opinion without being treated as an expert. Taylor v. State, 365 Ga. App. 30, 877 S.E.2d 286, 2022 Ga. App. LEXIS 374 (2022).

Detective's testimony that witness was not an accomplice. — Trial court did not err by allowing a detective to testify that the witness was not an accomplice to the crime because O.C.G.A. § 24-7-704 abolished the prohibition on lay opinion testimony concerning the ultimate issue in a case. Fisher v. State, 309 Ga. 814, 848 S.E.2d 434, 2020 Ga. LEXIS 604 (2020).

Expert testimony on malingering during police interview did not go to ultimate issue. — Trial court did not err by allowing the state's expert to testify that the defendant was malingering during the defendant's police interview and that the defendant's relationship with the victim was mutually abusive and dysfunctional because it was not impermissible state of mind testimony going to the ultimate issue, as the testimony did not implicate the defendant's mental state at the time the defendant used the knife against the victim. McCalop v. State, No. S23A0210, 2023 Ga. LEXIS 84 (Ga. May 2, 2023).

Psychologist opinion testimony on ultimate issue properly admitted. — In a case terminating the mother's parental rights, the clinical psychologist's testimony regarding the psychologist's bonding evaluation on the child was properly admitted because the psychologist, who was tendered as an expert on child psychology and attachment and bonding without objection, explained that the psy-

chologist formed the psychologist's opinions based on an interview, observation, and testing; the psychologist testified that the methods the psychologist used and the information the psychologist gathered were of the type regularly used by others in the psychologist's profession; and the psychologist's opinion was not objectionable on the grounds that the opinion embraced an ultimate issue to be decided by the trier of fact. In the Interest of R. S. T., 345 Ga. App. 300, 812 S.E.2d 614, 2018 Ga. App. LEXIS 208 (2018).

Psychologist's opinion testimony on defendant's past sanity properly excluded. — Any error in the exclusion of a psychologist's statement of opinion was not error because any error was harmless and would not warrant reversal as the psychologist's statement was from two years prior to the commission of the murders of the defendant's two infant daughters; and it was a statement of opinion that the defendant did, in fact, know right from wrong when the defendant was discharged from the hospital; thus, any inference the jury might have drawn from the psychologist's statement of opinion concerning the defendant's past sanity would have been of marginal help to the defense on the issue of whether the defendant was insane at the time of the crimes charged. Morgan v. State, 307 Ga. 889, 838 S.E.2d 878, 2020 Ga. LEXIS 102 (2020).

Expert's testimony on mental state and culpability unsolicited. — Defendant's motion for mistrial was properly denied because the testimony of the trial court's expert witness on the defendant's mental state and culpability was unsolicited by the state, which had merely asked if the defendant was experiencing psychosis at the time of the shooting; the expert's remark was cut off promptly, and the trial court instructed the jury to disregard the remark; and the trial court instructed the jury, as the defendant requested, that the expert should not have testified as to whether the defendant was criminally responsible at the time of the shooting, and the defendant raised no objection to any of the language used by the trial court. Parker v. State, 309 Ga. 736, 848 S.E.2d 117, 2020 Ga. LEXIS 600 (2020).

Psychologist's testimony on whether defendant knew right from wrong. — Trial court did not commit plain error by allowing a psychologist's testimony because the defendant failed to make an affirmative showing that a different outcome would have occurred in light of the presumption of sanity as the admissible evidence showed the defendant could distinguish right from wrong at the relevant time and the defendant failed to draw any connection between the defendant's mental illness and an (asserted) inability to distinguish right from wrong. Croyle v. State, 360 Ga. App. 157, 860 S.E.2d 844, 2021 Ga. App. LEXIS 314 (2021).

Limitation on doctor's testimony proper. — Trial court did not abuse the court's discretion by limiting a doctor's testimony because the court allowed the expert to testify at length about the forensic interview and what the expert opined were problems with the process, as well as why certain outcries were more likely to be the result of a scripted response. What the trial court prohibited was the expert's testimony about the contents of the police reports, which was a proper limitation. Hambrick v. State, 353 Ga. App. 666, 839 S.E.2d 664, 2020 Ga. App. LEXIS 31 (2020), cert. denied, No. S20C0935, 2020 Ga. LEXIS 806 (Ga. Sept. 28, 2020).

Doctor's testimony did not encompass who inflicted injury. — Since the doctor's testimony encompassed the intentional and aggressive nature of the bite marks to the child victim but did not identify the defendant as having inflicted the bites, the doctor's testimony was not improper. Robinson v. State, 309 Ga. 729, 848 S.E.2d 441, 2020 Ga. LEXIS 603 (2020).

24-7-705. Disclosure of facts or data underlying expert opinion.

An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination.

History.
Code 1981, § 24-7-705, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Disclosing the facts or data underlying an expert's opinion, Fed. R. Evid. 705.

JUDICIAL DECISIONS

Order to disclose notes proper. — Trial court did not abuse the court's discretion when the court ordered pretrial disclosure of a potential expert's notes as necessary for meaningful cross-examination because it was reasonable for the court to have concluded that the expert based an opinion, at least in part, on information obtained from the defendant's answering questions. Harris v. State, 314 Ga. 238, 875 S.E.2d 659, 2022 Ga. LEXIS 169 (2022).

24-7-706. Court appointed experts.

Except as provided in Chapter 7 of Title 9 or Code Section 17-7-130.1, 17-10-66, 29-4-11, 29-5-11, 31-14-3, 31-20-3, 44-6-166.1, 44-6-184, or 44-6-187, the following procedures shall govern the appointment, compensation, and presentation of testimony of court appointed experts:

(1) The court on its own motion or on the motion of any party may enter an order to show cause why any expert witness should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Each appointed expert witness shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Each appointed expert witness shall advise the parties of his or her findings, if any. Except as provided in Article 3 of Chapter 12 or Article 6 of Chapter 13 of this title, such witness's deposition may be taken by any party. Such witness may be called to testify by the court or any party. Each expert witness shall be subject to cross-examination by each party, including a party calling the witness;

(2) Appointed expert witnesses shall be entitled to reasonable compensation in whatever sum the court allows. The compensation fixed shall be payable from funds which may be provided by law in criminal proceedings and civil proceedings involving just compensation for the taking of property. In other civil proceedings, the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs;

(3) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness; and

(4) Nothing in this Code section shall limit a party in calling expert witnesses of the party's own selection.

History.
Code 1981, § 24-7-706, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 97, § 3/HB 744.
Cross references.
Court appointed expert witnesses, Fed. R. Evid. 706.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2011, "and proceedings" was deleted following "civil proceedings" in the second sentence of paragraph (2).
Editor's notes.
Ga. L. 2012, p. 97, § 1/HB 744, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Uniform Partition of Heirs Property Act.'"

24-7-707. [Repealed] Expert opinion testimony in criminal proceedings.

History.
Code 1981, § 24-7-707, enacted by Ga. L. 2011, p. 99, § 2/HB 24; repealed by Ga. L. 2022, p. 201, § 2/HB 478, effective July 1, 2022.
Editor's notes.
Ga. L. 2022, p. 201, § 2/HB 478 repealed this Code section and, in light of the similarity of the statutory provisions, annotations have been transferred to Code Section 24-7-702.