Evidence

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by Marc T. Treadwell

I. INTRODUCTION

Hard cases, it is said, make bad law. Criminal prosecutions for child molestation and abuse are likely the hardest cases of all. Apart from their horrific facts, they present tremendous evidentiary challenges to prosecutors, primarily because of the victims' youth. Consequently, Georgia's appellate courts have repeatedly fashioned new evidentiary rules to assist prosecutors in such cases. Whether these hard cases make bad law no doubt depends on one's perspective. Without question, however, appeals involving child molestation and abuse continue to make new law, and the current survey period was no exception.

II. OBJECTIONS

Several cases decided during the survey period illustrate the proper ways to object to the admission of evidence. First, the court of appeals, following the lead of the supreme court's decision in Sharpe v. Department of Transportation, emphatically reaffirmed the contemporaneous objection rule, which requires that a party object timely and properly to inadmissible evidence. In Sharpe the supreme court expanded the contemporaneous objection rule and barred the use of a subsequent motion to strike to attack illegal evidence. In Macon-Bibb County Board of Tax Assessors v. J.C. Penney, Inc., the board claimed the superior court erred when it denied motions for directed verdict on the grounds that the taxpayer presented no competent evidence of the fair

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2. Id. at 267, 476 S.E.2d at 723.
market value of the property at issue. The board claimed a directed verdict was appropriate because the taxpayer's expert testimony was not based on applicable Georgia law. However, the board did not object to the testimony at the time it was offered. The court of appeals held that by failing to make a contemporaneous objection, the board waived its right to contend that the expert's testimony should have been excluded from evidence and could not, by way of a motion for directed verdict, attack that testimony.

In Crosby v. Cooper Tire & Rubber Co., the trial court instructed the jury to disregard plaintiff's expert's testimony on the grounds that the expert gave several opinions that were not disclosed during discovery. Defendant did not object to this testimony immediately but later moved to strike the testimony. The trial court granted the motion. This, the court of appeals held, was error. The contemporaneous objection rule required defendant to object to the testimony at the time it was given. In the absence of an objection, a party cannot later attack the testimony by a motion to strike.

Motions in limine, although valuable tools to resolve evidentiary disputes prior to trial or out of the presence of the jury, do not necessarily relieve a party from making appropriate objections at trial. In Ward v. State, defendant moved in limine to prevent the prosecution from referring to him in closing argument as a "career criminal." The trial court denied the motion. In his closing argument, the prosecutor made several references to defendant's vocation as a burglar but did not specifically argue that because of defendant's prior convictions the jury should infer that he was a career criminal. The court of appeals conceded that a party does not waive an objection to inadmissible evidence by failing to object to the admission of that evidence at trial if that evidence was the subject of an unsuccessful motion in limine. However, a motion in limine only preserves for review matters specifically raised by the motion. In Ward the court, perhaps making a fine distinction, concluded that the prosecutor's precise references to defendant's previous criminal activity were not specifically addressed by

4. Id. at 323, 521 S.E.2d at 235.
5. Id.
7. Id. at 857-58, 524 S.E.2d at 316-17.
8. Id. at 858, 524 S.E.2d at 317.
9. Id. The court also held that "exclusion of relevant and material evidence is not an appropriate remedy for curing a discovery omission or abuse." Id.
11. Id. at 542, 519 S.E.2d at 305.
12. Id., 519 S.E.2d at 306.
defendant's motion, and because defendant did not object when those references were made, he waived the right to raise that issue on appeal.\textsuperscript{13}

The court of appeals also reaffirmed during the survey period that a party waives the right to object to the admission of evidence that was the subject of a motion in limine if the party fails to obtain a ruling on the motion from the trial court.\textsuperscript{14}

In \textit{Holder v. State},\textsuperscript{15} the court of appeals addressed the requirement that a party make an appropriate proffer when the trial court rules evidence inadmissible. In \textit{Holder} defendant contended that the trial court improperly sustained an objection to a question intended to establish the reason defendant took the action that he did. The trial court ruled that the evidence was hearsay. On appeal, defendant contended that the evidence was admissible to explain his conduct. However, defendant did not advance this as a basis for the admission of the evidence at trial. Thus, although the trial court was aware of the substance of the evidence, the court was not aware of the reason it had been tendered.\textsuperscript{16} Because defendant failed to make an appropriate proffer, the court of appeals held that he could not raise that issue on appeal.\textsuperscript{17}

\section*{III. Judicial Notice}

In \textit{Enchanted Valley R.V. Resort, Ltd. v. Weese},\textsuperscript{18} defendants contended that plaintiff failed to introduce evidence of regulations promulgated by the Georgia Department of Human Resources.\textsuperscript{19} The court of appeals held that it was not necessary for plaintiffs to tender the regulations because the trial court properly took judicial notice of the regulations.\textsuperscript{20} \textit{Official Code of Georgia Annotated} ("O.C.G.A.") section 24-1-4,\textsuperscript{21} the court reasoned, requires a trial court to take judicial notice of regulations published under authority by the Secretary of State.\textsuperscript{22} The Administrative Procedure Act requires the Department of Human Resources to promulgate its regulations in the manner prescribed by the

\begin{thebibliography}{99}
\bibitem{13} \textit{Id.}
\bibitem{15} 242 Ga. App. 479, 529 S.E.2d 907 (2000).
\bibitem{16} \textit{Id.} at 482, 529 S.E.2d at 911.
\bibitem{17} \textit{Id.}, 529 S.E.2d at 910.
\bibitem{19} \textit{Id.} at 419, 526 S.E.2d at 128.
\bibitem{20} \textit{Id.}, 526 S.E.2d at 128-29.
\bibitem{22} 241 Ga. App. at 419, 526 S.E.2d at 128.
\end{thebibliography}
The Act also requires the Secretary of State to publish the regulations as the "Rules and Regulations of the State of Georgia." Thus, because the regulations were published in accordance with the Administrative Procedure Act, the trial court was required to take judicial notice of those regulations.

IV. RELEVANCY

A. Relevancy of Extrinsic Act Evidence

In the thirteen years the author has surveyed Georgia appellate decisions, the determination of the relevancy of extrinsic act evidence has been the most frequently addressed evidentiary issue. Accordingly, some background discussion is appropriate. Evidence is extrinsic when it concerns conduct on occasions other than the one at issue. As a general rule, extrinsic act evidence is inadmissible. However, like the rule against hearsay, the rule against extrinsic act evidence is known more for its exceptions than its flat prohibition. Extrinsic act evidence may be admissible for a substantive purpose, such as when a prosecutor tenders evidence of a similar transaction, usually a prior criminal offense. This evidence is used to prove a defendant's motive or intent when he committed the charged offense, or it may be admissible to impeach or bolster a witness, such as evidence of a felony conviction to impeach a witness' character. Sometimes evidence that may appear to be extrinsic may not, in the often arcane world of evidence, actually be extrinsic. For example, the res gestae doctrine, although typically thought of as an exception to the rule against hearsay, is often used to admit evidence that, although not directly related to the transaction at issue, is close enough to be admitted.

For years Georgia courts have routinely and liberally admitted, for substantive purposes, evidence of similar but totally unrelated transactions in criminal cases. However, as discussed in previous surveys, the Georgia Supreme Court, in *Stephens v. State* and *Williams v. State*, tightened the rules governing the admissibility of similar transaction evidence in criminal cases. In *Stephens* the supreme court held that the prosecution cannot rely solely on a certified copy of a prior conviction

24. Id. §§ 50-13-3(b), 50-13-5, 50-13-7.
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when seeking to use that conviction as similar transaction evidence. Rather, the prosecution must offer evidence proving the requisite degree of similarity or connection between the extrinsic act and the charged offense. In Williams the supreme court, in a dramatic departure from prior practice, held that the prosecution must prove, prior to trial, three elements before similar transaction evidence can be admitted. First, the prosecution must prove the relevance of the independent transaction to a legitimate issue. Second, the prosecution must prove that the defendant committed the independent offense or act. Third, the prosecution must prove a sufficient connection or similarity between the prior act or offense and the charged offense. The trial court must then make a specific determination that the prosecution has carried its burden of proving each of the three elements.

Williams and Stephens notwithstanding, courts still freely admit similar transaction evidence in criminal cases, and that was largely the case during the current survey period, particularly with regard to sex crimes. However, some supreme court justices are beginning to question the broad use of similar transaction evidence. During the survey period, a court of appeals judge, Judge Barnes, joined in this criticism. In Roberts v. State, the trial court admitted evidence of defendant's prior guilty plea for the sale of cocaine. In that offense, defendant flagged down an undercover officer's car and offered to sell the agent cocaine. In the charged offense, defendant also allegedly approached undercover agents in an attempt to sell cocaine. However, as defendant approached the officers' car, he apparently recognized the officers and dropped something on the ground. One of the officers walked directly to that spot and picked up a bag that contained cocaine. On appeal defendant contended the trial court erroneously admitted evidence of the prior offense. A majority of the six judge panel disagreed, concluding that sufficient similarities existed between the two

29. 261 Ga. at 468, 405 S.E.2d at 485.
30. Id. at 469, 405 S.E.2d at 485-86.
31. 261 Ga. at 642, 409 S.E.2d at 651.
32. Id.
36. Id. at 259-60, 526 S.E.2d at 598-99.
offenses and that the prior offense was relevant "to the issues being tried." 37

Judge Barnes dissented. 38 She began her analysis by emphasizing the clear statutory prohibition against the admission of extrinsic act evidence. 39 As an exception to the rule, trial courts may admit evidence of extrinsic acts "when a logical connection exists between the separate offense and the offense for which the defendant is on trial, so that proof of the separate offense establishes the offense for which the defendant is on trial." 40 Thus, although extrinsic act evidence is not admissible to prove a defendant's bad character, evidence of similar transactions may be admitted to prove identity, motive, plan, scheme, bent of mind, and course of conduct. However, in Judge Barnes' opinion, "as the majority opinion in this appeal illustrates, the exception has swallowed the rule." 41 Judge Barnes criticized the majority for concluding simply that the prior conviction "would be most helpful to the jury." 42 That, Judge Barnes argued, is the precise reason similar transaction evidence is inadmissible. "This 'he did it once, he must have done it again reasoning' in fact allows introduction of this evidence solely to show the defendant has a criminal character." 43 Although the State's arguments on appeal and the trial court's instructions to the jury regarding the permissible purposes of the similar transaction evidence were not consistent, Judge Barnes concluded that the evidence was admitted by the trial court to prove that defendant was the person who dropped the cocaine and to prove defendant's state of mind. 44 However, Judge Barnes argued that the evidence clearly was not admissible for those purposes. 45 The only issue in the case was whether defendant dropped the cocaine. Given that the officers saw him drop the bag, this was not a case in which the identity of an alleged perpetrator was not known, and thus similar transaction evidence was necessary to prove identity. 46 Moreover, defendant's state of mind simply was not an issue at all. 47 Finally, even if identity and state of mind were issues, the two crimes

37. Id. at 259, 526 S.E.2d at 600.
38. Id. at 263, 526 S.E.2d at 601 (Barnes, J., dissenting).
39. Id.
40. Id.
41. Id.
42. Id. (quoting Roberts, 241 Ga. App. at 261, 526 S.E.2d at 599).
43. Id. at 264, 526 S.E.2d at 601.
44. Id. at 265, 526 S.E.2d at 601-02.
45. Id., 526 S.E.2d at 602.
46. Id.
47. Id.
were not sufficiently similar. When similar transaction evidence is offered to prove identity, a higher degree of similarity is required; the prosecution must show that the two crimes are so similar that they evidence a defendant's "criminal signature." Judge Ruffin agreed with Judge Barnes' analysis but concluded that the error was harmless.

The first step in similar transaction evidence analysis is often determining whether the extrinsic act evidence is extrinsic to the charged offense. For example, as noted above, evidence of other transactions is not extrinsic to the charged offense if it falls within the res gestae of the charged offense. Also, as reported in the last two surveys, the supreme court held in Wall v. State that evidence of prior difficulties between a defendant and his victim is not extrinsic and, thus, is not subject to Uniform Superior Court Rule 31.3, which requires the prosecution to provide a defendant with notice of its intent to tender extrinsic evidence and the trial court to convene a hearing to establish whether the prosecution can prove the elements necessary to the admission of extrinsic act evidence. During the current survey period, the court of appeals, recognizing Wall, summarily disposed of several appeals contending that prosecutors violated Rule 31.3 by not giving proper notice of their intent to introduce evidence of prior difficulties between defendants and their victims.

Character evidence, which is necessarily based on evidence of transactions other than the transaction at issue, is not considered similar transaction evidence if a defendant places his character at issue. In Godbey v. State, Judge Eldridge, in a concurring opinion, took what a majority of a three judge panel termed a dangerous position with regard to the use of character evidence. In Godbey defendant contended that the prosecution did not comply with the notice requirements of Rule 31. However, the majority concluded that defendant

48. Id.
49. Id.
50. 241 Ga. App. at 263, 526 S.E.2d at 600 (Ruffin, J., concurring specially).
52. Id. at 509, 500 S.E.2d at 907.
54. UNIF. SUP. CT. R. 31.3(D).
56. Id. at 530-31, 526 S.E.2d at 418.
57. Id. at 530, 526 S.E.2d at 417.
did not preserve his objection to the testimony.\textsuperscript{58} In his concurring opinion, Judge Eldridge argued that cases of

[c]hild molestation, child abuse, and family violence are uniquely those cases in which the victim or victims are repeatedly and secretly the subject of criminal conduct over long periods of time, and the accused may maintain a public façade of "good character," which can be used to defend against such charges.\textsuperscript{59}

In such cases, because the defendant "seeks to hide behind the masking evidence of good character," the requirements of Rule 31.3 are waived.\textsuperscript{60} In short, Judge Eldridge argued that in such cases a defendant puts his character at issue and, thus, evidence of similar transactions is admissible notwithstanding Rule 31.3.\textsuperscript{61} The problem with this analysis, Judge Eldridge recognized, is that this evidence of bad character normally would not be admissible until after defendant put up his evidence of good character.\textsuperscript{62}

While such evidence may not be introduced during the State's case-in-chief in \textit{anticipation} of a character defense, when a defendant elects to put his character into evidence, such evidence becomes admissible in rebuttal. To me, under most circumstances, it is "highly probable" that the \textit{order} of the otherwise admissible proof (in the case-in-chief—as opposed to rebuttal) would not contribute to the jury's verdict.\textsuperscript{63}

In other words, if the prosecution successfully tenders evidence of extrinsic acts in its case-in-chief even though it had failed to comply with Rule 31.3 and a defendant, in the presentation of his case, raises a character defense, then the premature admission of the extrinsic act evidence is not harmful error.

The majority strongly disagreed.\textsuperscript{64} Defendant did not state his intention to assert a character defense prior to trial; even if he had, he still may have elected not to call character witnesses or any witnesses at all.\textsuperscript{65}

The danger of allowing the State to \textit{anticipate} a character defense is that such an assertion could be made in any criminal case on slender grounds, as here, or indeed on none at all. Even if the defendant has

\textsuperscript{58} Id., 526 S.E.2d at 418.
\textsuperscript{59} Id. at 534, 526 S.E.2d at 420 (Eldridge, J., concurring specially).
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 535, 526 S.E.2d at 420.
\textsuperscript{63} Id.
\textsuperscript{64} 241 Ga. App. at 531, 526 S.E.2d at 418.
\textsuperscript{65} Id.
listed no witnesses, the defendant himself could still take the stand and testify to his good character. The State could assert in every criminal case that the defendant has a potential character defense. For that reason, I cannot agree with expanding the exception in USCR 31.3(D) to the State's case-in-chief. If that is done, the exception will swallow the rule.66

One of the more difficult issues that may arise in similar transaction evidence appeals is whether a defendant's acquittal of the similar offense bars the admission of evidence of that offense at a subsequent trial.67 In Salcedo v. State,68 the supreme court held that the doctrine of collateral estoppel bars the admission of extrinsic act evidence concerning an issue resolved in defendant's favor at a prior trial.69 During the current survey period, in Cartwright v. State,70 defendant contended that the trial court improperly admitted, during his trial for the offenses of rape, statutory rape, and aggravated sodomy, evidence of a prior incident in which he allegedly raped and sodomized a fourteen-year-old girl. A jury acquitted defendant of the prior charge. The trial court concluded that evidence of the prior offense was admissible because statutory rape was not an issue at the prior trial.71 The court of appeals agreed with the trial court's conclusion but not with its reasoning.72 The court noted that in the trial for the prior offense, defendant based his defense on a theory of consent.73 Although the court of appeals acknowledged that defendant also contended that the victim in the charged offense consented to intercourse, the court noted that when defendant entered his plea he said "I ain't done it," suggesting a denial of any intercourse with the victim.74 Based on this, the court apparently concluded that consent was not a defense to the charged offense. Thus, evidence of the prior offense, because it was distinctively similar to the charged offense, was admissible to prove that defendant committed the charged offense.75 "That use of the prior transaction evidence was proper and not foreclosed by collateral estoppel."76

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66. Id.
69. Id. at 871, 376 S.E.2d at 361.
71. Id. at 825-26, 531 S.E.2d at 400-01.
72. Id. at 827-28, 531 S.E.2d at 401-02.
73. Id. at 827, 531 S.E.2d at 402.
74. Id. at 826-27, 531 S.E.2d at 402.
75. Id. at 827, 531 S.E.2d at 402.
76. Id. at 826-27, 531 S.E.2d at 402.
Arguably, the court's view of the doctrine of collateral estoppel was unusually narrow.

Although the court of appeals in Cartwright held that the doctrine of collateral estoppel did not bar the admission of evidence of defendant's alleged prior rape, it nevertheless reversed defendant's conviction because the State did not prove the prior offense with admissible evidence.\(^7\) When the victim of the alleged prior rape refused to testify, the trial court, relying on the res gestae doctrine, allowed a police officer to testify about the victim's statement to him concerning the alleged rape.\(^8\) However, the court of appeals noted that the statement was given to the police officer sometime after the alleged rape, that the victim had spoken with her parents and another officer before giving her statement, and that the victim was "giggling" when she gave the statement.\(^9\) Clearly, the victim's statement was not part of the res gestae; thus, the trial court erred when it admitted the police officer's account of that statement.\(^8\) Because the State offered no admissible evidence to prove the prior offense, the court reversed defendant's conviction.\(^5\)

The supreme court addressed the level of proof necessary to establish the fact of the similar transaction in Hudson v. State.\(^2\) In Hudson the prosecution, to prove the similar transaction, tendered certified copies of the indictment for the prior offense, defendant's guilty plea, and the testimony of two police officers involved in the investigation of the prior offense. However, the trial court ruled that the police officers' testimony was inadmissible hearsay. Thus, certified copies of documents were the only evidence of the prior offense. Nevertheless, the jury convicted defendant.\(^3\) On appeal the supreme court noted that before evidence of an alleged similar transaction is admissible, the prosecution must prove sufficient similarities between the prior offense and the charged offense.\(^4\) The court continued stating that it has frequently been held that certified copies of the prior convictions alone are not sufficient to prove those similarities.\(^5\) Thus, the prosecution failed to meet its burden of showing the requisite similarities between the prior offense

\(^{7}\) Id. at 830, 531 S.E.2d at 403-04.
\(^{8}\) Id. at 826, 531 S.E.2d at 401.
\(^{9}\) Id. at 828, 531 S.E.2d at 402-03.
\(^{10}\) Id. at 828, 531 S.E.2d at 403.
\(^{11}\) Id. at 830, 531 S.E.2d at 404.
\(^{13}\) Id. at 479, 521 S.E.2d at 812.
\(^{14}\) Id.
\(^{15}\) Id.
and the charged offense. However, the court concluded this error was harmless.66

When the supreme court listed the long line of authority holding that certified copies of prior convictions are not alone sufficient to prove the requisite similarities between a prior offense and the charged offense,67 it noted the court of appeals decision in Adams v. State.68 In Adams a plurality held that in child sexual abuse cases, a certified copy of a prior conviction for a sex crime against a child may, with no other evidence, be enough to prove that the prior crime is sufficiently similar to the charged offense.69 The supreme court noted that it "pass[ed] no judgment on the validity" of Adams.70 The court of appeals has no reservations about Adams' validity. During the survey period, the court in Lee v. State71 affirmed defendant's conviction for statutory rape and relied on Adams to support its conclusion that a certified copy of defendant's prior child abuse conviction was, by itself, sufficient to prove that defendant committed the offense and that it bore sufficient similarities to the charged offense to be admissible as a similar transaction.72 It would seem that, sooner or later, the supreme court will have to pass judgment on the issue of whether the State can, in a child abuse case, prove a prior offense against a child simply by relying on certified copies of the conviction for the prior offense.

The court of appeals addressed the nature of the evidence that can be used to establish a similar transaction in Dixon v. State.73 In Dixon the trial court admitted defendant's "Alford" plea to a prior offense as evidence that defendant committed that offense.74 An Alford plea, which takes its name from the United States Supreme Court's decision in North Carolina v. Alford,75 allows a defendant to "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."76 Defendant contended this was error, arguing that an Alford plea was similar to a plea of nolo contendere.77

66. Id. at 481, 521 S.E.2d at 813.
67. Id. at 479-80, 521 S.E.2d at 812-13.
69. 271 Ga. App. at 480, 521 S.E.2d at 813.
70. Id. n.5.
72. Id. at 183-84, 525 S.E.2d at 429.
74. Id. at 644-45, 524 S.E.2d at 735.
76. 240 Ga. App. at 645, 524 S.E.2d at 735 (quoting Alford, 400 U.S. at 37).
77. Id.
The court of appeals acknowledged that a plea of nolo contendere, by statute, cannot be used "as an admission of guilt or otherwise or for any purpose."\(^9\) However, the court noted a critical procedural distinction between an *Alford* plea and a plea of nolo contendere: When a party seeks to enter an *Alford* plea, the court must find that a factual basis exists for the guilty plea.\(^9\) An *Alford* plea is, in fact, a guilty plea while a nolo contendere plea does not conclusively establish a defendant's guilt.\(^9\) Therefore, the trial court properly admitted defendant's *Alford* plea as part of the proof that he committed the prior offense.\(^1\)

The scope of admissible extrinsic act evidence is generally narrower in civil cases than in criminal cases. At first glance this may seem odd because it would seem that courts should be more reluctant to admit highly prejudicial extrinsic act evidence in criminal cases, in which freedom and occasionally life are at stake. However, a logical basis exists for this disparate treatment. Civil cases rarely involve issues of intent, motive, scheme, or other issues relevant in cases involving criminal misconduct. Rather, civil cases typically involve unintentional conduct, such as negligence, and regardless of the actor's intent, liability is created. In such cases, the fact that a defendant was, for example, negligent on a prior occasion is simply not probative of whether he was negligent on another occasion. The effect of such evidence is simply to suggest that because defendant was negligent before, he is more likely to be negligent again. This, of course, is the very reason that extrinsic act evidence is not admissible.\(^1\)

However, as illustrated by several cases decided during the survey period, extrinsic act evidence is admissible in civil cases if it is relevant to a legitimate issue. In *Woodall v. Rivermont Apartments, L.P.*,\(^1\) the court of appeals held that evidence of prior violent crimes occurring in the vicinity of defendants' apartment complex was admissible to prove that an attack on plaintiff at the apartment complex was foreseeable.\(^1\) This holding is fairly straightforward. The prior violent crimes put defendants on notice that a criminal attack was foreseeable. Because plaintiff, to prove his case that defendants were liable for the criminal attack on him, had to show that the attack was foreseeable, evidence of the prior attacks was admissible. The court then turned to

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98. *Id.* (quoting O.C.G.A. § 17-7-95(c) (1997)).
99. *Id.*, 524 S.E.2d at 736.
100. *Id.* at 646, 524 S.E.2d at 736.
101. *Id.*
104. *Id.* at 40-41, 520 S.E.2d at 745.
the more difficult question of whether evidence of twenty separate nonviolent property crimes was admissible. The trial court examined each crime separately and concluded that none was sufficiently similar to the attack on plaintiff to make it relevant to the issue of foreseeability. The court of appeals agreed that none of the property crimes, standing alone, was relevant to prove that the criminal attack on plaintiff was foreseeable to defendants. However, the court then addressed an issue of first impression—"whether evidence of a crime that, standing alone, would not raise an issue of foreseeability may be relevant when considered in light of other evidence." The court noted that the apartment complex was adjacent to an area with a high incidence of violent crimes and that defendants were concerned about security issues relating to the increase in crime at the apartment complex. The court then concluded that evidence of an increase in property crimes, although not similar to the attack on plaintiff, was relevant to the question of whether defendants should have foreseen a risk of personal injury to their tenants from a criminal attack.

The court of appeals also reaffirmed that in product liability actions evidence of similar manufacturing defects may be admissible to prove the existence of a defect, notice or prior knowledge of the defect, causation, or conduct warranting punitive damages. Similarly, in Mills v. Norfolk Southern Railway Co., the court of appeals held that evidence of prior failures of a railroad crossing signal and gate was admissible to prove defendant's notice of the malfunctioning crossing equipment.

On the other hand, the court of appeals decision in Taylor v. RaceTrac Petroleum, Inc. demonstrates that the extrinsic act evidence must be relevant to a legitimate issue. In Taylor plaintiffs contended that defendant was liable for the wrongful death of their son because defendant illegally sold alcohol to the driver of a car in which their son was a passenger. Their son was killed when the drunken driver wrecked the car. On appeal plaintiffs contended the trial court erroneously

105. Id. at 38, 520 S.E.2d at 743.
106. Id. at 37, 520 S.E.2d at 743.
107. Id. at 39, 520 S.E.2d at 744.
108. Id.
109. Id. at 40-41, 520 S.E.2d at 745.
110. Id. at 40, 520 S.E.2d at 745.
113. Id. at 324, 526 S.E.2d at 586-87.
admitted evidence of their son's prior drug and alcohol use, his reckless
driving, and other conduct by their son on other occasions. Defendant
contended that this evidence was relevant to the issue of damages
because such conduct would affect the son's life expectancy. The
court of appeals agreed with plaintiffs and reversed the judgment
entered in defendant's favor. The court acknowledged that evidence
of long-term drug or alcohol abuse may affect life expectancy and, thus,
can be admissible on the issue of damages in a wrongful death ac-
tion. However, the "anecdotal evidence" tendered by defendant was
inadequate to prove any effect on life expectancy. Moreover, even
if the evidence was relevant to the issue of damages, the potential
prejudice of the evidence on the issue of liability required the bifurcation
of the trial so that the jury, when it decided the issue of liability, would
not be affected by harmful evidence relevant only to the issue of
damages.

B. Miscellaneous Relevancy Issues

In *Vaughn v. Protective Insurance Co.*, the trial court granted
defendants' motion in limine to prohibit plaintiff and his counsel from
referring to the fact that defendants' counsel had employed plaintiff's
expert in other cases. At the subsequent trial, defendants attacked the
expert's credibility. On appeal plaintiff contended that his attorney, in
an effort to bolster the expert's credibility, should have been allowed to
establish that defendants' attorney had employed the expert in twelve
to fifteen similar cases. The court of appeals disagreed. The
fact that the expert had been employed by defendants' counsel was not
relevant to the question of whether the expert was competent and
qualified. Simply because defendants' attorney hired the expert in
other cases did not raise the inference that the attorney necessarily
thought the expert was a competent expert witness. As an advocate,
the attorney no doubt was more interested in finding an expert willing
to offer an opinion favorable to his clients than finding a competent or
qualified expert.

115. Id. at 761-62, 519 S.E.2d at 283-84.
116. Id. at 766, 519 S.E.2d at 286.
117. Id. at 762, 519 S.E.2d at 284.
118. Id.
119. Id. at 763, 519 S.E.2d at 285.
121. Id. at 83-84, 532 S.E.2d at 163-64.
122. Id. at 84, 532 S.E.2d at 164.
123. Id.
124. Id.
V. PRIVILEGES

In *Price v. State Farm Mutual Automobile Insurance Co.*, a case discussed in last year's survey, the court of appeals held that the psychiatric-patient privilege is waived if a party fails to object timely to a request for the production of a psychiatrist's records pursuant to O.C.G.A. section 9-11-34(c)(1), Georgia's provision for obtaining discovery from nonparties. The full court of appeals returned to this issue during the survey period in *Hopson v. Kennestone Hospital, Inc.* In *Hopson* the hospital sued plaintiff for nonpayment of a bill. Plaintiff counterclaimed, contending that the hospital improperly produced her psychiatric records in prior litigation. The hospital responded that because plaintiff failed to object timely to the production of those records in the prior litigation, she waived the privilege. The court of appeals disagreed and overruled *Price.*

The court of appeals reasoned that O.C.G.A. section 9-11-34(c)(1) only establishes that a party may obtain discovery of documents that are within the scope of discovery defined by O.C.G.A. section 9-11-26(b), which provides that parties may discover only matter that is not privileged. Thus, a request for the production of documents under O.C.G.A. section 9-11-34(c) constitutes only a request that a party produce nonprivileged records. Because privileged psychiatric-patient communications are not within the scope of the request, there is no burden on the patient to object to the request and assert the privilege. By not objecting to the request, plaintiff waived only whatever objection she may have had to nonprivileged material in her medical records.

The court of appeals decision, although laudable in its effort to protect psychiatric-patient communications, is problematic. Although psychiatric-patient communications are afforded greater protection than general doctor-patient communications, all such communications are privileged. Therefore, any request for the production of medical records would

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129. Id. at 829-30, 526 S.E.2d at 624.
130. Id. at 830, 526 S.E.2d at 624.
132. Id.
133. Id.
134. Id.
encompass privileged communications even if they did not contain psychiatric-patient communications. Thus, pursuant to Hopson, a hospital or doctor should not produce any records containing privileged communications, whether those communications are between a psychiatrist and a patient or between other medical providers and patients. It is questionable whether this is the intent of the court of appeals holding in Hopson. It would seem more likely that the court intended to provide special protection for the absolute privilege of psychiatric-patient communications.

VI. WITNESSES

A. Impeachment Generally

Two cases decided during the survey period illustrate the critical, although often unrecognized, distinction between impeaching a witness' general credibility or character and impeaching specific testimony. In Thrasher v. State and Vehaun v. State, defendants contended that prosecutors improperly impeached their character by asking them about, respectively, a prior conviction for selling cocaine and flight to avoid a rape prosecution. In Thrasher defendant testified that he did not "fool with" cocaine. In Vehaun defendant testified that he fled to another state simply because of a jealous husband. In both cases, the court of appeals held that prosecutors were allowed to impeach defendants with evidence of their prior misconduct—evidence that otherwise would be inadmissible evidence of bad character—because that evidence disproved their specific testimony. As the court noted in Thrasher, "when a defendant testifies and falsely denies past criminal conduct or misdeeds, the State may introduce evidence that reflects negatively on the defendant's character insofar as that evidence 'proves the falsity of specific testimony of the defendant.'" Therefore, evidence that is inadmissible to impeach a defendant's general credibility or character may be admissible to impeach that defendant's specific testimony.

137. 243 Ga. App. at 702, 534 S.E.2d at 439.
138. 244 Ga. App. at 137, 534 S.E.2d at 874.
139. 243 Ga. App. at 703, 534 S.E.2d at 440; 244 Ga. App. at 137, 534 S.E.2d at 874.
140. Id. (quoting Jones v. State, 257 Ga. 753, 759, 363 S.E.2d 529, 534 (1988)).
B. Impeachment By Prior Inconsistent Statement

The court of appeals decision in *Fulton-Fritchlee v. Douglas*\(^\text{141}\) illustrates an important distinction between the use of a prior inconsistent statement for impeachment and the use of a prior inconsistent statement for substantive purposes. In *Fulton-Fritchlee* defendant used plaintiff's prior medical records, without first showing the records to plaintiff's counsel, to impeach plaintiff's testimony. On appeal plaintiff contended that this was error.\(^\text{142}\) The court of appeals disagreed.\(^\text{143}\) Because the records were used to impeach plaintiff's testimony, the procedure for using the records is prescribed by O.C.G.A. section 24-9-83,\(^\text{144}\) which requires a party to show or read to a witness the alleged contradictory statement.\(^\text{145}\) The statute does not require that the written statement first be shown to opposing counsel, even when the witness is the opposing party. However, if defendant wanted to introduce the documents into evidence, presumably meaning that they would be used for substantive purposes, then the documents would be treated as any other evidence offered for substantive purposes.

Also during the survey period, the court of appeals reaffirmed that when a witness merely states that she does not remember a fact, as opposed to denying a fact, then she cannot be impeached with prior statements which suggest that plaintiff did, at least at one time, recall what she now claims she cannot remember.\(^\text{146}\) Rather, the appropriate response is to refresh the recollection of plaintiff with the prior statement.\(^\text{147}\)

C. Refreshing Recollection

There is some confusion in Georgia law with regard to the use of a writing not prepared by a witness to refresh the witness' recollection. In *Woods v. State*,\(^\text{148}\) a case discussed in a previous survey, the supreme court held that a witness' recollection could be refreshed by any

\(\text{141. 240 Ga. App. 413, 523 S.E.2d 349 (1999).}\)
\(\text{142. Id. at 414, 523 S.E.2d at 351.}\)
\(\text{143. Id. at 415, 523 S.E.2d at 351.}\)
\(\text{144. O.C.G.A. § 24-9-83 (1995).}\)
\(\text{145. 240 Ga. App. at 414, 523 S.E.2d at 351.}\)
\(\text{147. Id. at 825, 522 S.E.2d at 258. In Bischoff the court of appeals also held that defendant properly used plaintiff's complaint in a prior lawsuit to impeach her testimony regarding the extent of the injuries she suffered in a prior collision. Id. at 826, 522 S.E.2d at 259.}\)
\(\text{148. 269 Ga. 60, 495 S.E.2d 282 (1998).}\)
writing, whether or not the writing was prepared by the witness "so long as the witness testifies from personal recollection."¹⁴⁹ Thus, in Woods the supreme court held that the trial court erroneously refused to allow defendant to show a police officer's report to a witness to refresh his recollection.¹⁵⁰

During the current survey period, the court of appeals held in McEntyre v. McCrae¹⁵¹ that the trial court properly barred defendant from using a letter prepared by plaintiff's employer to refresh plaintiff's recollection after plaintiff apparently testified that she had not been asked for permission to release her employment records. The letter stated that the employer had asked the employee three times and that she had refused to give her consent to the release of the records.¹⁵² The court of appeals simply held that a party cannot use a document to refresh a witness' recollection when that document was not prepared by the witness, or at her direction, or in her presence.¹⁵³

The holding in McEntyre is inconsistent with the holding in Woods with regard to refreshing recollection. However, it would seem that the situation in McEntyre was similar to that in Woods because defendant was not really attempting to refresh the plaintiff's recollection but rather wanted to use the third party writing to impeach the witness. Thus, as in Woods, any error was harmless.

D. Sequestration

The supreme court's decision in Jones v. State¹⁵⁴ is a good illustration of the proper application of the rule of sequestration. In Jones a witness telephoned defendant's attorney during defendant's trial for murder. The witness told the attorney that the State was threatening to imprison him to force him to testify falsely. The next day, defendant's counsel informed the court of this conversation. The trial judge concluded that this conversation was a violation of the rule of sequestration and instructed jurors that they could consider this violation in

¹⁴⁹. Id. at 62, 495 S.E.2d at 285.
¹⁵⁰. Id. at 63, 495 S.E.2d at 285. However, the supreme court went on to hold that the error was harmless because defendant's true goal was not to refresh the witness' recollection but rather to impeach the witness. Id. In other words, the court concluded that defendant was attempting to impeach the witness with a writing he did not prepare and thus the trial court, albeit for the wrong reason, properly barred defendant from using the document in his examination of the witness.
¹⁵². Id. at 149, 522 S.E.2d at 733.
¹⁵³. Id.
determining credibility of the witness.\textsuperscript{155} The supreme court held that this was an error.\textsuperscript{156} The court noted that the rule of sequestration does not prohibit an attorney from talking with a witness.\textsuperscript{157} Rather, the rule prohibits attorneys and parties from talking jointly with witnesses or informing a witness of prior testimony.\textsuperscript{158} Therefore, the supreme court concluded the trial court improperly instructed the jury that a violation of the rule had occurred and this could be considered in assessing the witness' credibility.\textsuperscript{159}

VII. OPINION TESTIMONY

A. Subject Matter of Expert Testimony

In almost every survey article written by the author since 1988, the author has attempted to analyze the numerous cases in which the courts have struggled with the question of whether expert testimony is admissible to prove or disprove that a child was sexually abused. Because this struggle emanated from two apparently conflicting supreme court decisions, \textit{State v. Butler}\textsuperscript{160} and \textit{Allison v. State},\textsuperscript{161} the author has referred to this struggle as the \textit{Butler/Allison} debate. In the 1992 survey, the author optimistically reported that the \textit{Butler/Allison} debate had been resolved by the supreme court's decision in \textit{Harris v. State}.\textsuperscript{162} That report was dreadfully premature as evidenced again by two decisions during the current survey period.

In \textit{Atkins v. State},\textsuperscript{163} a six judge panel of the court of appeals addressed defendant's contention that a pediatrician improperly testified that the victim's medical history was consistent with the medical history she would expect from a victim of molestation.\textsuperscript{164} The court acknowledged the apparent contradiction between \textit{Butler} and \textit{Allison}.\textsuperscript{165} In \textit{Butler} the supreme court "established a very broad view regarding the admissibility of a pediatrician's opinion that a child had actually been abused based on a physical examination and medical history."\textsuperscript{166}
However, in *Allison* the supreme court "appeared to restrict the broad admissibility of an expert's conclusion that molestation *actually* occurred." Relying on *Allison*, the court in *Atkins* stated that an expert cannot testify that abuse actually took place if there is no tangible physical evidence of the abuse, but the expert can testify that the victim's symptoms are consistent with a determination that the victim is suffering from an abuse syndrome. Then in *Harris*, the supreme court, although not expressly overruling *Butler*, held that a pediatrician may not testify that an act of abuse actually occurred even if the testimony is based upon a physical examination. However, relying on the dissenting opinions in *Harris*, the court of appeals noted that an expert may testify that findings are consistent with an act of molestation. Thus, because the pediatrician in *Atkins* only testified that her findings were consistent with an act of abuse, the admission of her testimony was not error.

In an opinion reflecting exasperation over the number of appeals spawned by the *Butler/Allison* debate, the court of appeals in *Odom v. State* seemed to send a message to defense lawyers and prosecutors.

Since the State is required to prove its case, expert opinion testimony often becomes necessary, especially in instances of the abuse of very young children—as in this case. And we have seen these "improper opinion testimony" claims of error again and again on appeal, because (1) the inconsistency of appellate consensus over what constitutes improper opinion testimony has made the raising of such claims worth a try in almost every case, regardless of the merits of the claims; and (2) the State's prosecutors ask open-ended questions of their experts that inevitably elicit improper opinion testimony regarding either the ultimate issue or the credibility of the victim. In affirming Odom's conviction, we have an opportunity to review both of these aspects: the utterly meritless claim raised on the chance that it might be taken seriously, and the merited claim of error occurring because of a prosecutor's question that inevitably called for improper opinion testimony.

The court of appeals then examined the several instances of expert testimony that defendant claimed constituted an opinion on the ultimate

167. *Id.*, 533 S.E.2d at 156.
168. *Id.* at 494, 533 S.E.2d at 156.
169. 261 Ga. at 387, 405 S.E.2d at 483.
170. 243 Ga. App. at 494, 533 S.E.2d at 156.
173. *Id.* at 228, 531 S.E.2d at 209 (footnotes omitted).
issue. First, defendant claimed that one expert improperly testified that
the victim was referred to her for treatment of “[a]lleged child sexual
abuse and post traumatic stress disorder.”174 Defendant contended
that this improperly bolstered the child's testimony because the expert
would not have been treating the child for child sexual abuse unless she
believed the child.175 This argument irked the court of appeals because
it demonstrated “how far-fetched some of these ‘improper expert
testimony’ claims can be.”176 Clearly, the expert's testimony did not
express an opinion regarding the merits of the referral.

Next, defendant contended that an expert's testimony that the three-
year-old victim’s description of what happened and the extent of his
knowledge about matters that normally would not be known to a three
year-old, “was most consistent with a history of sex abuse.”177 De- fend-
ant argued that this was a direct opinion from the expert that the
victim had been sexually abused.178 The court of appeals strongly
disagreed.179 Rather, the expert simply testified that the findings of
her physical examination and her evaluation of the victim's behavior
were consistent with sexual abuse.180 This opinion, the court conclud-
ed, was based on matters “beyond the ken of the average juror” and,
thus, was a permissible expert opinion.181 It was still left to the jury
to decide whether the victim had been molested.182

However, another expert testified that, in his opinion, the child had
been sexually abused.183 The trial court sustained defendant's objec-
tion to this testimony and, on appeal, the court of appeals agreed that
this testimony constituted improper opinion testimony on the ultimate
issue.184 Moreover, the court of appeals pinned the blame for the
testimony on the prosecutor's open-ended question.185

As long as such errors are made by prosecutors who will not learn the
distinctions discussed supra and thus cannot prepare their experts for
such distinctions, “improper opinion testimony” claims—with and
without merit—will be raised again and again on appeal of sexual

174. Id. at 229, 531 S.E.2d at 209.
175. Id.
176. Id.
177. Id., 531 S.E.2d at 210.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id. at 230, 531 S.E.2d at 210.
184. Id.
185. Id.
abuse convictions. And reversals (in my view, warranted and unwarranted because of the lack of appellate consensus) will be forthcoming, thereby putting the child/victim through the trauma of retrial. 186

However, this improper question did not require reversal of defendant's conviction because the trial court directed the jury to disregard the improper testimony, because defendant did not move for a mistrial, and because the evidence against defendant was overwhelming. 187

The court of appeals decision in Jenkins v. State 188 did not directly involve the Butler/Allison issue of whether an expert can testify that a child has been the victim of abuse. However, it did concern the basic issue involved in the Butler/Allison debate—whether an expert has impermissibly testified on the ultimate issue. In Jenkins several police officers testified that, in their opinion and based on the amount of crack cocaine found in defendant's possession, defendant intended to distribute crack cocaine rather than simply keep it for personal use. Defendant, who was charged with intent to distribute cocaine, contended that this opinion testimony was inadmissible because it went to the ultimate issue in the case. 189 The court of appeals disagreed. 190 The court noted that expert testimony on the ultimate issue is admissible if the "conclusion of the expert is one beyond the ken of the average layman." 191 Because the average layman would not necessarily know how much cocaine someone would generally possess for personal use or how much cocaine would evidence an intent to distribute, the court held that the trial court properly allowed the officers to testify that defendant intended to distribute cocaine. 192

The question of whether an expert can testify with regard to the reliability of eyewitness testimony was raised again during the survey period. As reported in a previous survey, the supreme court affirmed a trial court's refusal to permit defendant's expert witness to testify about potential inaccuracies in eyewitness identification. 193 In Norris v. State, 194 the supreme court reasoned that a witness' credibility is
within the exclusive province of the jury. While an eyewitness may be impeached by cross examination, the credibility of the eyewitness may not be disparaged by another witness, even an expert witness.

During the current survey period, the supreme court qualified this holding. In Johnson v. State, defendant contended that the trial court improperly granted the State's motion in limine prohibiting him from relying on expert testimony attacking the reliability of eyewitness identification. The court of appeals disagreed and affirmed defendant's conviction. The supreme court granted certiorari to consider whether a defendant's constitutional rights require vesting trial courts with the discretion to admit appropriate expert testimony regarding the reliability of eyewitness identifications. The court began its lengthy examination of the treatment of this issue by courts throughout the country by noting that its decision in Norris had been interpreted as an absolute bar to the admission of expert testimony on the reliability of eyewitness identifications. The court acknowledged that only a minority of jurisdictions adhered to such an absolute ban. However, the court refused to join what defendant contended was the "modern trend," which required a trial court to admit such expert testimony when the prosecution's case depends entirely upon eyewitness identification. After considering the authorities and the merits of both positions, the court adopted a middle approach: Expert testimony on the reliability of eyewitness identifications should not be absolutely prohibited, but neither should it necessarily be admitted simply because the State's case is built entirely on eyewitness identification. Rather, trial courts are vested with the discretion to decide, based on the facts of the case before them, whether to admit such evidence.

Where eyewitness identification of the defendant is a key element of the state's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and

195. Id. at 890, 376 S.E.2d at 654.
196. Id.
198. Id. at 254, 526 S.E.2d at 550-51.
199. Id., 526 S.E.2d at 551.
200. Id. at 255, 526 S.E.2d at 551.
201. Id. at 256, 526 S.E.2d at 552.
202. Id. at 255-56, 526 S.E.2d at 551-52.
203. Id. at 257, 526 S.E.2d at 552-53.
204. Id., 526 S.E.2d at 553.
whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification.\textsuperscript{206}

Finally, the court of appeals reaffirmed during the survey period that the reliability of the Abuscreen Ontrak Test, a test performed on urine samples to reveal marijuana use, has not been sufficiently recognized to allow a trial court to take judicial notice that the reliability of the Ontrack system has been established with verifiable certainty.\textsuperscript{206} Thus, pursuant to Harper v. State,\textsuperscript{207} the party relying on the Ontrack system results must adduce evidence establishing the reliability of the test.

\textbf{B. Expert Witnesses}

The court of appeals rendered several decisions during this survey period that clarify some of the finer points regarding expert witnesses. First, the mere fact that an expert is not licensed in a particular field does not mean that he cannot be qualified as an expert in that field.\textsuperscript{208}

Second, an expert witness can base his opinion on facts known to him personally or on facts of which he has been made aware by a hypothetical question.\textsuperscript{209} However, if his opinion is based solely on inadmissible hearsay, then his opinion is inadmissible.\textsuperscript{210}

With regard to the use of hypothetical questions, the court of appeals decision in Cornelius v. Macon-Bibb County Hospital Authority\textsuperscript{211} makes clear that the proper parameters of hypothetical questions vary depending on whether the expert is a party. In Cornelius the trial court sustained defendant's objection to plaintiff's hypothetical question posed to defendant, who was a doctor, on the grounds that facts stated in the hypothetical question were not in evidence.\textsuperscript{212} This, the court of appeals held, was error.\textsuperscript{213} While it is generally true that a hypotheti-

\textsuperscript{205} Id. at 257, 526 S.E.2d at 552-53.
\textsuperscript{207} 249 Ga. 519, 292 S.E.2d 389 (1982).
\textsuperscript{212} Id. at 483, 533 S.E.2d at 424.
\textsuperscript{213} Id.
EVIDENCE

A. Definition of Hearsay

If asked the definition of hearsay, most Georgia lawyers almost certainly would say that hearsay is an out of court statement offered to prove the truth of the matter asserted therein. In fact, this is the definition of hearsay used most frequently by Georgia courts. However, this is not Georgia's statutory definition of hearsay. The statute defines hearsay as "that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons." Thus, a witness' out of court statement is hearsay under the common definition of hearsay, but it would not be hearsay under the statutory definition because the statement does not rest on the "veracity and competency" of someone other than the witness.

For the first time since the author has been reviewing Georgia evidence decisions, a Georgia appellate court used the statutory definition of hearsay to conclude that a statement was not hearsay, notwithstanding the fact that it was hearsay under the common definition. In *Bowers v. State*, defendant contended the trial court erred when it allowed a witness to testify that she warned the victim not to report an assault by the victim's father because the father could be imprisoned. Defendant contended that this was an out of court statement by the witness and therefore was hearsay. The court of appeals disagreed. Relying on the statutory definition of hearsay, the court concluded that because the statement was made by the witness, it was not dependent upon the competency and veracity of others and, therefore, was not hearsay.

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214. Id. (quoting Cambron v. Canal Ins. Co., 246 Ga. 147, 150, 269 S.E.2d 426, 429 (1980)).
218. Id. at 124, 526 S.E.2d at 165-66.
219. Id. at 124, 526 S.E.2d at 165.
220. Id., 526 S.E.2d at 165-66.
In another case decided during this survey period, *Sturkey v. State*, the supreme court apparently used a hybrid definition of hearsay. The court held that evidence of a victim's threat two weeks before the victim's death was not hearsay because it did not depend on the victim's credibility and was not offered to prove the truth of the victim's statement.

B. Constitutional Implications of Hearsay

In criminal cases, the use of hearsay evidence frequently raises the issue of whether the evidence violates the confrontation clause of the Sixth Amendment to the United States Constitution. Case law has considerably modified the constitutional principles governing this conflict over the past several years. The author has attempted to chronicle these modifications in previous Georgia and Eleventh Circuit survey articles, that detailed discussion will not be repeated here.

During the current survey period, the court of appeals addressed the constitutional limitations on the use of hearsay evidence in the context of alleged *Bruton* violations. In *Bruton v. United States*, the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated when codefendants are tried jointly, the prior statement of one codefendant is used to implicate the other codefendant, and the codefendant who made the statement does not testify at trial. However, such an out of court statement implicating a codefendant may be admissible if the statement falls within a firmly rooted exception to the rule against hearsay. In *York v. State*, the court held that the res gestae exception to the rule against hearsay is such a firmly rooted exception and, thus, permits the introduction of a statement notwithstanding the fact it violates *Bruton*.

C. The Necessity Exception

The author has in previous surveys marveled at the evolution of Georgia's necessity exception to the rule against hearsay. Regardless of one's opinion on the wisdom of greatly expanding the use of hearsay testimony primarily in criminal cases, the necessity exception is now

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222. *Id.* at 573, 522 S.E.2d at 465.
225. *Id.* at 137.
226. *Id.* at 129 n.3.
228. *Id.* at 286, 528 S.E.2d at 831.
firmly ensconced, and perhaps it is time to stop marveling at the amazingly rapid development of the necessity exception and simply report on the appellate courts' continued refinement of the exception.

In last year's survey, the author reported that the supreme court, in Chapel v. State, modified the two-pronged test for the admission of evidence under the necessity exception. When proving the first prong of the test, the unavailability of the declarant, the court in Chapel held that the party offering the evidence must also show that "the statement is relevant to a material fact and that the evidence is more probative on that material fact than other evidence that may be procured and offered." Based on cases decided during the current survey period, it does not appear that the new Chapel prong to the necessity exception test will have much practical effect on the admission of necessary hearsay evidence.

Most necessity exception cases involve statements by a deceased victim to friends, relatives, and coworkers. Given the unavailability of the declarant, these cases typically raise the issue of whether the hearsay evidence satisfies the second prong of the necessity exception test—whether the circumstances of the statement provide "particularized guarantees of trustworthiness." For example, in Abraha v. State, the victim made statements incriminating defendant to witnesses who were her good friends and confidants. The court noted that the statements were consistent with the physical evidence and that the victim had no motive to fabricate the statements to her close friends. This, the court concluded, was sufficient to establish the trustworthiness of the victim's statements.

On the other hand, in McWilliams v. State, the supreme court reversed defendant's conviction because the prosecution failed to establish that the victim's statements to her sister were sufficiently trustworthy. In McWilliams the prosecution apparently only established the sibling relationship. While the court acknowledged that "uncontradicted statements made to one in whom the deceased declarant placed great confidence and to whom she turned for help with

230. Id. at 155, 510 S.E.2d at 807.
234. Id. at 313, 518 S.E.2d at 898.
235. Id. at 313-14, 518 S.E.2d at 898.
236. Id.
238. Id. at 656, 521 S.E.2d at 826.
her problems are admissible under the necessity exception.\textsuperscript{239} the court found no evidence that the victim and her sister had such a relationship.\textsuperscript{240} Accordingly, the court reversed defendant's conviction.\textsuperscript{241}

In \textit{Downs v. State},\textsuperscript{242} the declarant was a victim of battery who refused to testify based on spousal privilege. Her statements incriminating the defendant were made to her daughter, but the daughter testified that her relationship with her mother had not always been close and that the statements were not made until the preliminary hearing on the charges against defendant. Also, the mother's statements to the daughter were not consistent.\textsuperscript{243} In view of this, the court held the victim's statements were not sufficiently trustworthy to satisfy the second prong of the necessity exception test.\textsuperscript{244}

Next to statements to family, friends, and coworkers, most cases applying the necessity exception have involved statements made by victims to law enforcement officers. In these cases, the fact that the statement was made in the course of an official investigation is a significant factor indicating the trustworthiness of the statement, an assertion that no doubt confounds defense attorneys. In \textit{Jones v. State},\textsuperscript{245} the victim of an armed robbery and an aggravated assault left the country and thus was unavailable to testify at trial. Nevertheless, the trial court permitted a police investigator to testify about statements made by the victim.\textsuperscript{246} On appeal the court of appeals held that these statements were sufficiently trustworthy because the victim did not recant or change his statements, the statements were given in the course of an official investigation, and the statements were corroborated by others, including, apparently, defendant himself.\textsuperscript{247}

In \textit{Baker v. State},\textsuperscript{248} the hearsay statement at issue was made by a victim of a prior crime allegedly committed by defendant. Both the charged offense and the prior crime involved allegations of sexual activities with minors. However, the victim of the prior offense could not be located; thus, a police officer who interviewed the prior victim was

\begin{itemize}
\item \textsuperscript{239} \textit{Id.} (quoting \textit{Ward v. State}, 271 Ga. 648, 650, 520 S.E.2d 205, 208 (1999)).
\item \textsuperscript{240} \textit{Id.} at 655-57, 521 S.E.2d at 826.
\item \textsuperscript{241} \textit{Id.}, 521 S.E.2d at 827.
\item \textsuperscript{242} 240 Ga. App. 740, 524 S.E.2d 786 (1999).
\item \textsuperscript{243} \textit{Id.} at 743, 524 S.E.2d at 789.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} 240 Ga. App. 723, 524 S.E.2d 773 (1999).
\item \textsuperscript{246} \textit{Id.} at 724, 524 S.E.2d at 775.
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} 241 Ga. App. 666, 527 S.E.2d 266 (1999).
\end{itemize}
allowed to testify about statements she made to him. With regard to the trustworthiness of the statement, the trial court concluded, and the court of appeals agreed, that defendant's admissions during the investigation of the prior offense and his admissions at trial for the charged offense sufficiently corroborated the victim's statements and, thus, the trustworthiness of the victim's statement was not in dispute.

Although the trend is to expand the boundaries of the necessity exception, the court of appeals concluded the trial court went too far in *Ledford v. State.* In *Ledford* a jury found defendant guilty of intentional inhalation of paint fumes. To prove defendant's guilt, the prosecution had to prove that the paint contained one or more proscribed chemicals—in this case, toluene. The trial court permitted the State to prove this simply by introducing the paint can allegedly used by defendant and the label that identified toluene as one of its ingredients. Although defendant did not object to the introduction of the label, the court of appeals nevertheless reversed defendant's conviction, concluding that the label was hearsay and that hearsay, even though not objected to, has no probative value; thus, the label could not be used to uphold defendant's conviction. The majority rejected the dissent's assertion that the label was admissible pursuant to the necessity exception. First, the majority noted no reason existed to think that a witness was unavailable to establish the contents of the paint can. The State simply needed to call to the stand a crime lab technician; the "fact that it would be easier to introduce the can does not rise to the level of showing 'necessity' pursuant to the necessity exception to the hearsay rule." Similarly, the court did not think that the mere fact that a label stated the ingredients of the can was sufficiently reliable to satisfy the trustworthiness requirement of the necessity exception. Again, the court acknowledged that the prosecutor's burden would be substantially lightened if it could simply introduce the can, but convenience and expediency were not relevant to the necessity exception test.

249. *Id.* at 666, 527 S.E.2d at 267-68.
250. *Id.*, 527 S.E.2d at 268.
252. *Id.* at 238, 520 S.E.2d at 226.
253. *Id.* at 239, 520 S.E.2d at 227.
254. *Id.*
255. *Id.* at 240, 520 S.E.2d at 227.
256. *Id.*, 520 S.E.2d at 227-28.
257. *Id.*, 520 S.E.2d at 227.
In dissent, Judge Pope, who was joined by Chief Judge Johnson, turned to foreign authorities to find support for "an exception to the hearsay rule when considering labels which are required by law to show the contents of the container." Based on these cases, Judge Pope concluded that

[a] necessity for an exception to the hearsay rule is established by the fact that an array of witnesses would be necessary to qualitatively analyze the container's contents and to establish production control and packaging in order to introduce the evidence. Particularized guarantees of trustworthiness for the information contained on these labels are established by the federal law requiring labels, the ubiquitous use of product labels in our society, and the common reliance on these labels. Thus the elements of the necessity exception to the hearsay rule are present, and the can and its label should be allowed into evidence.

Judge Pope makes a compelling argument that product labels should be admissible to prove the contents of the product under some circumstances. However, the majority stated that if the General Assembly wishes to create an exception for product labels, then it should do so.

For those who think that the necessity exception to the rule against hearsay may well swallow the rule, the court of appeals decision in Tyson v. State will be interesting. In Tyson the trial court permitted a police officer to testify about a conversation he had with the mother of a victim of an alleged child molestation. The officer testified that although the victim denied that she had been molested, he thought the victim's mother was influencing the victim. Accordingly, the officer talked to the mother alone and, he said, she told him that she wanted her daughter to deny the molestation because if her father found out that the mother had left the child alone with defendant, then the father "would have sent her back to jail." On appeal the court found that the officer's testimony satisfied the trustworthiness requirement of the necessity exception because the statements of the mother, who had since died, were against her interests and thus fell within the hearsay exception for declarations against interests by one since deceased.
Similarly, in *Daker v. State*\(^{265}\) the trial court, relying on the necessity exception, admitted the out of court statement of a deceased witness. Defendant contended that the statement was not sufficiently trustworthy and that the State should not have been allowed to inform the jury that the witness had died. With regard to the latter objection, defendant argued that if the jury was informed of the witness' death, it necessarily would infer that he was responsible for that death. Accordingly, defendant offered to stipulate as to the unavailability of the witness.\(^{266}\) The court of appeals did not reach defendant's second objection because it concluded that the statement “was admissible under the long recognized 'spontaneous declaration' exception to the hearsay rule.”\(^{267}\)

The question is whether it is necessary to invoke the necessity exception when the statement is admissible pursuant to a well-recognized hearsay exception, or perhaps more to the point, whether the ubiquitous availability of the necessity exception is leading courts to admit routinely hearsay evidence without thorough analysis of those statements.

Finally, defendants continued to meet with less success than prosecutors in the admission of testimony pursuant to the necessity exception. In *Drane v. State*,\(^{268}\) the court held that a codefendant's statement to a cellmate that he committed the charged offense was not sufficiently reliable to meet the trustworthiness requirement of the necessity exception.\(^{269}\)

**D. Prior Out of Court Statements**

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. In *Gibbons v. State*,\(^{270}\) the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross examination.\(^{271}\) In *Cuzzort v. State*,\(^{272}\) the supreme court, in apparent frustration over the difficulty of securing convictions in child molestation cases prior to the enactment of the Child Hearsay Statute,\(^{273}\) held that a prior consistent statement is admissible as substantive evidence.


\(^{266}\) Id. at 851, 533 S.E.2d at 398.

\(^{267}\) Id.

\(^{268}\) 271 Ga. 849, 523 S.E.2d 301 (1999), cert. applied for.

\(^{269}\) Id. at 852, 523 S.E.2d at 304.

\(^{270}\) 248 Ga. 858, 286 S.E.2d 717 (1982).

\(^{271}\) Id. at 863, 286 S.E.2d at 722.


\(^{273}\) O.C.G.A. § 24-3-16 (1995).
against an accused if the witness is present at the trial and subject to cross examination.\textsuperscript{274} The court specifically noted that the "statement was not limited in value to impeachment but was substantive evidence of the matter asserted."\textsuperscript{275}

As reported in the surveys for the previous two years, the supreme court dramatically weakened \textit{Cuzzort} in \textit{Woodard v. State}.\textsuperscript{276} The court held that prior consistent statements are not generally admissible, but rather can be admitted only when the veracity of the witness who made the statement has been placed at issue.\textsuperscript{277} The court's pronouncement was clear: "Unless a witness's veracity has affirmatively been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury."\textsuperscript{278} The court in \textit{Woodard} did not expressly address the issue of whether a prior consistent statement is admissible as substantive evidence, but it seems implicit in its holding that it is not. If the statement can only be offered to bolster a witness whose credibility has been questioned, it seems necessarily to follow that the evidence is not admissible as substantive evidence.

In last year's survey, the author suggested that the court of appeals had been slow in its recognition of \textit{Woodard}. If cases decided during the current survey period are any indication, it can be argued that the court of appeals is determined to find a way around \textit{Woodard}.

For example, in \textit{Donaldson v. State},\textsuperscript{279} defendant contended that the trial court erred in permitting a nurse to testify with regard to statements allegedly made by defendant's victim. The court of appeals, without even mentioning \textit{Woodard}, rejected defendant's appeal.\textsuperscript{280} It simply cited \textit{Cuzzort} for the proposition that a prior consistent statement is admissible as substantive evidence if the veracity of a witness is at issue, the witness is present at trial, and the witness is subject to cross examination.\textsuperscript{281} Defendant, obviously relying on \textit{Woodard}, argued that the veracity of the victim's testimony was not at issue and that, therefore, the statement was not admissible.\textsuperscript{282} In one sentence, the court of appeals rejected this contention, concluding that defendant's not

\textsuperscript{274} 254 Ga. at 745, 334 S.E.2d at 664.
\textsuperscript{275} \textit{Id.}, 334 S.E.2d at 662.
\textsuperscript{276} 269 Ga. 317, 496 S.E.2d 896 (1998).
\textsuperscript{277} \textit{Id.} at 320, 496 S.E.2d at 899.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} 244 Ga. App. 89, 534 S.E.2d 839 (2000).
\textsuperscript{280} \textit{Id.} at 90, 534 S.E.2d at 841.
\textsuperscript{281} \textit{Id.}
\textsuperscript{282} \textit{Id.} at 91, 534 S.E.2d at 842.
guilty plea placed the veracity of the victim and her version of events at
issue.\(^{283}\)

In \textit{Carter v. State},\(^{284}\) the court of appeals acknowledged the existence
of \textit{Woodard}, but its reasoning may be more exasperating to criminal
defense lawyers than the reasoning in \textit{Donaldson}. In \textit{Carter} the trial
court admitted a tape recorded statement made by a police informant.
On appeal defendant contended that the informant's veracity was not in
issue and, indeed, his counsel did not even cross examine the inform-
ant.\(^{285}\) The court of appeals rejected this argument.\(^{286}\) Quoting a
concurring opinion from \textit{Cuzzort}, the court noted that the veracity of a
witness may be placed in issue either "expressly or impliedly."\(^ {287}\) The
court concluded that defendant's theory of the case and his version of
events was contrary to the informant's testimony, and this put the
informant's veracity at issue.\(^ {288}\) Therefore, the court held that the trial
court properly admitted the prior consistent statement.\(^ {289}\) This, it
seems, is difficult to reconcile with \textit{Woodard}'s pronouncement that prior
consistent statements are not admissible unless the witness' "veracity
has affirmatively been placed in issue."

Toward the end of the survey period, the court of appeals accorded
\textit{Woodard} a little more respect. In \textit{Phillips v. State},\(^ {290}\) defendant
contended that the trial court improperly admitted evidence of out of
court statements made by two alleged victims.\(^ {291}\) Focusing on \textit{Wood-
ard}'s requirement that the veracity of the witness must be at issue, the
court of appeals agreed and reversed.\(^ {292}\)

Importantly, \textit{Woodard} held that only if affirmative charges of recent
fabrication, improper influence, or improper motive are raised during
cross-examination is a witness's veracity placed in issue so as to permit
the introduction of a prior consistent statement. Even then, the prior
consistent statement may be admitted as nonhearsay only if it was
made before the motive or influence came into existence or before the

\begin{itemize}
\item \(^{283}\) \textit{Id.}, 534 S.E.2d at 841.
\item \(^{284}\) 238 Ga. App. 708, 520 S.E.2d 15 (1999).
\item \(^{285}\) \textit{Id.} at 709-10, 520 S.E.2d at 16.
\item \(^{286}\) \textit{Id.}, 520 S.E.2d at 16-17.
\item \(^{287}\) \textit{Id.} at 710, 520 S.E.2d at 16 (quoting \textit{Cuzzort v. State}, 254 Ga. at 746, 334 S.E.2d
at 663 (Bell, J., concurring specially)).
\item \(^{288}\) \textit{Id.}
\item \(^{289}\) \textit{Id.}, 520 S.E.2d at 16-17.
\item \(^{290}\) 241 Ga. App. 764, 527 S.E.2d 604 (2000).
\item \(^{291}\) \textit{Id.} at 766, 527 S.E.2d at 606.
\item \(^{292}\) \textit{Id.} at 766, 768, 527 S.E.2d at 607, 608.
\end{itemize}
time of the alleged recent fabrication. Otherwise, it is pure hearsay, which cannot be admitted merely to bolster the witness' credibility.293

Clearly, Phillips is not consistent with Carter and Donaldson. In Phillips the court held that Woodard established that veracity is challenged only through cross examination.294 Carter and Donaldson, on the other hand, would seem to hold that anything short of a guilty plea places a prosecution's witness' veracity at issue.

E. Statements Made for Medical Diagnosis

The court of appeals decision in Barone v. Law295 may expand significantly the use of certified copies of medical records. On the other hand, the decision may raise more questions than it answers. In Barone the trial court refused to allow defendant to use certified copies of plaintiff's medical records to contradict her trial testimony that she had never had prior back, neck, or leg pain. The medical records contained medical histories apparently obtained from plaintiff that established an extensive history of back, neck, and leg pain. On appeal defendant contended that the records were admissible for both impeachment and substantive purposes.296 The court of appeals agreed that the records potentially were admissible and, thus, reversed.297

The court first noted that plaintiff's statements to her medical providers were not hearsay because they were made for purposes of medical diagnosis for treatment and described her medical history.298 Because plaintiff's statements were not hearsay, they were admissible pursuant to O.C.G.A. section 24-9-82, which provides that a "witness may be impeached by disproving the facts testified to by him."299 In addition, citing Gibbons v. State,300 the court noted that the statements may have been admissible as prior inconsistent statements.301

To this point, the court of appeals reasoning broke no new ground. However, the trial court held that plaintiff's alleged statements in the medical records were not admissible because somebody other than

293. Id. at 766, 527 S.E.2d at 607.
294. Id.
296. Id. at 103, 527 S.E.2d at 899.
297. Id. at 105, 527 S.E.2d at 901.
298. Id. at 104, 527 S.E.2d at 900.
299. Id. at 105, 527 S.E.2d at 900 (quoting O.C.G.A. § 24-9-82 (1995)).
300. 248 Ga. 858, 286 S.E.2d 717 (1982). Gibbons and Cuzzort are used almost exclusively in criminal cases. It is rare for a court to cite either in a civil case.
301. 242 Ga. App. at 105, 527 S.E.2d at 901.
plaintiff actually recorded the statements in the records.\textsuperscript{302} Although not entirely clear from the decision, it would appear that the trial court’s point was not that plaintiff’s statements were hearsay, but rather that the documents themselves were, in effect, statements by medical providers with regard to what plaintiff allegedly told them. The court of appeals treatment of this issue is significant. The court did not directly address the question of whether the “statements” of the medical providers were hearsay. Rather, it held that such records could be used even though the medical providers are not present at trial if the trial court is able “to reasonably infer from the face of the records that the witness was the actual source of the statements at issue.”\textsuperscript{303} As examples of situations that would warrant such an inference, the court listed “first person” accounts, records specifically quoting the patient or records that “clearly indicate on the face of the records that the only source of the medical history was the witness, as when the information reveals something only the witness would know and which could not come from a third party.”\textsuperscript{304} If the medical records did not make clear that plaintiff was the source of the statements, then defendant would have to produce additional evidence, presumably the medical provider, to establish that plaintiff was, in fact, the source of the information.

In a footnote, the court said that it was not necessary for defendant to call as a witness the custodian of the records, or the medical provider who actually recorded plaintiff’s statement because the documents had been certified pursuant to O.C.G.A. section 24-7-8, which provides that certified copies of medical records “need not be identified at the trial and may be used in any manner in which records identified at the trial by the custodian could be used.”\textsuperscript{305} This footnote should not be taken as a suggestion that O.C.G.A. section 24-7-8 eliminates any hearsay issues. It is well established that this code section simply provides an alternative means of authenticating medical records; it does not address hearsay issues.\textsuperscript{306}

It would appear that Barone holds that a witness’ statements recorded by a third party in a document are admissible if the trial court can reasonably infer that plaintiff was the source of the information recorded. The fact that the document is, in effect, the statement of a third party with regard to what the witness said is immaterial. If so,
Barone should make it easier to use documents purporting to record statements made by a witness.

F. Declarations Against Penal Interest

In Stanford v. State,307 the supreme court acknowledged that “[i]t has long been said that ‘Georgia does not recognize a declaration against one’s penal interest as an exception to the rule prohibiting the admission of hearsay evidence.’”308 Or so we all thought. In Stanford the supreme court explained that this seemingly clear language does not mean what it very clearly seems to mean. Rather, “what that means is that Georgia does not recognize a third party’s admission against penal interest, when that admission exculpates the defendant.”309 In other words, a criminal defendant cannot introduce evidence of an out of court statement by a third party that that party committed the offense for which defendant is on trial. However, the court held a statement by a defendant against his penal interest is admissible as an admission of a party opponent.310

G. Identification

In White v. State,311 defendants raised a Sixth Amendment challenge to testimony by a police investigator that two witnesses identified defendants in pretrial photographic lineups.312 As discussed in a previous survey, the court of appeals has in the past strongly criticized Georgia Supreme Court precedent that allows law enforcement officers to testify that criminal defendants were identified in lineups.313 In Neal v. State314 and Wade v. State,315 the court of appeals concluded

308. Id. at 269, 528 S.E.2d at 248 (quoting Turner v. State, 267 Ga. 149, 154, 476 S.E.2d 252, 258 n.3 (1996)).
309. Id. at 270, 528 S.E.2d at 249.
310. Id. Unfortunately for the court of appeals, the supreme court’s decision came several months after the court of appeals decision in Kendrick v. State, 240 Ga. App. 530, 523 S.E.2d 414 (1999), in which the court of appeals, “mindful [that] the Supreme Court of Georgia has stated that Georgia does not recognize a hearsay exception under O.C.G.A. § 24-3-8 for statements against penal interest,” engaged in admirable gyrations to hold that defendant’s prior guilty plea was an “admission against penal interest,” under O.C.G.A. § 24-3-31, the exception for admissions by party opponents. Id. at 532 n.1, 523 S.E.2d at 416. Two of the three judges in Kendrick concurred in the judgment only. Id. at 533, 523 S.E.2d at 416.
312. Id. at 55, ____ S.E.2d at ____.
that such testimony was hearsay and its admission deprived defendants of their right to cross examine the alleged eyewitnesses. However, the court noted that the Georgia Supreme Court, in *Haralson v. State*,316 held that testimony of this nature is not inadmissible hearsay.317 In *Wade* the court of appeals analyzed the underpinnings of *Haralson* and expressed reservations about its holding.318 In *Neal* the court of appeals suggests that "[i]t may be time for the Supreme Court to reconsider *Haralson* or at least limit its application to cases in which the identifying witness is available for cross examination."319

During the current survey period, however, the court of appeals was not as concerned with this practice. In *White* defendants contended that the trial court improperly allowed a police investigator to testify that two alleged eyewitnesses identified them as the perpetrators in a photographic lineup.320 The court of appeals disagreed, noting simply that a "law enforcement officer is permitted to testify to a vocal fact of identification witnessed by himself without its being subject to a hearsay objection."321 In addition, the court noted that the officer's testimony is not hearsay because it is offered not to prove the truth of the matter, but rather to establish the fact that an identification was made and thus explain conduct.322 This rings hollow. Clearly, the prosecution was not interested in showing that an identification was made in order to explain conduct; it wanted to show that a witness told a police officer that defendant committed the offense. In a footnote, the court cited the principle that the admission of hearsay evidence does not implicate the confrontation clause if the statement falls within a firmly rooted hearsay exception.323 The court did not explain what firmly established exception to the hearsay rule permitted police officers to testify to out of court statements identifying defendants as perpetrators.

### H. Child Hearsay Statute

The Child Hearsay Statute allows the admission of a child's out of court statement describing sexual conduct or physical abuse if the child is available to testify and if "the court finds that the circumstances of

317. *Id.* at 408, 216 S.E.2d at 305.
318. 208 Ga. App. at 701, 216 S.E.2d at 400.
319. 211 Ga. App. at 830, 440 S.E.2d at 719.
320. 244 Ga. App. at 55, ___ S.E.2d at __.
322. *Id.* at 54-55, ___ S.E.2d at __.
323. *Id.* at 55 n.1, ___ S.E.2d at __.
the statement provide sufficient indicia of reliability. In Roberson v. State, the prosecution sought to rely on the reliability requirement of the Child Hearsay Statute to justify the admission of patently inadmissible testimony bolstering the credibility of the alleged victim. In Roberson the prosecution questioned the mother of the victim about matters relating to the credibility and veracity of the victim. The prosecution acknowledged that it was doing just that but contended that the testimony was admissible because the Child Hearsay Statute required the prosecution to prove the reliability of the child's statement. Calling the State's conduct improper, the court of appeals soundly rejected the prosecution's argument that the Child Hearsay Statute warrants the introduction of bolstering evidence before the jury. Although the Child Hearsay Statute requires that the court determine the reliability of the child's statement, this does not open the door for the prosecution to put before the jury otherwise inadmissible evidence. Rather, if the evidence tending to prove the reliability of the statement is otherwise inadmissible, then the court should consider the evidence in a preliminary hearing outside the presence of the jury. In this regard, the court of appeals was particularly irate that the prosecution opposed defendant's request for such a preliminary hearing. Thus, as the court of appeals said, the prosecution "attempted to elicit credibility evidence before the jury instead of in a separate hearing pursuant to O.C.G.A. § 24-3-16, and this occurred as a direct result of the State's opposition to a separate hearing." While it is true, the court acknowledged, that a separate hearing is not always necessary, it is clear that "when evidentiary rules conflict with the provisions of the Child Hearsay Statute, a separate hearing may be necessary to avoid the presentation of inadmissible matter to the jury." If the evidence the State wishes to use to prove the reliability of a statement is otherwise inadmissible, "that testimony must be received outside the presence of the jury."

324. O.C.G.A. § 22-3-16 (1982).
326. Id. at 227, 526 S.E.2d at 430.
327. Id. at 228, 526 S.E.2d at 431.
328. Id.
329. Id. at 229, 526 S.E.2d at 432.
330. Id. at 226, 526 S.E.2d at 430.
331. Id. at 227, 526 S.E.2d at 430.
332. Id. at 228, 526 S.E.2d at 431.
I. Res Gestae

In prior survey articles, the author has joined those who criticize "that near-insoluble enigma of our law, which we call res gestae." The admission of hearsay evidence because it is part of the res gestae has no rhyme or reason, and cases decided during the current survey seemed to bear that out.

In *Boler v. State*, the court of appeals confirmed the admission of a Georgia State Patrol officer's testimony that two unidentified partygoers said that defendant fired a handgun during a high school graduation party. Yet, in *Lindsey v. State*, the supreme court reversed defendant's conviction because the trial court permitted a witness to testify that he heard "a member of the crowd . . . yell at him to tell the police that [defendant] was the shooter."

In addition to allowing the admission of hearsay evidence, the res gestae doctrine can be used to admit evidence of other transactions, evidence that normally would not be admissible as similar transaction evidence. In *Downs v. State*, defendant was the victim, and probably deservedly so, of this res gestae doctrine double whammy. In *Downs* defendant allegedly pushed his wife from a moving car. At his trial, the court permitted a witness to testify to statements made by the wife while she tended to the wife's injuries by the side of the road. The witness testified that the wife said she and defendant had been fighting, and she discussed previous incidents of abuse by defendant. The court reasoned the statement was not inadmissible hearsay because it was part of the res gestae. With regard to defendant's argument that the admission of testimony about prior incidents of abuse improperly placed his character in issue, the court noted that because the wife's account of those statements was part of the res gestae of the act at issue, evidence of the prior abuse was properly admitted.

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335. Id. at 90, 522 S.E.2d at 677.
337. Id. at 659, 522 S.E.2d at 461.
339. Id. at 741, 524 S.E.2d at 787.
340. Id., 524 S.E.2d at 788.
341. Id. at 742, 524 S.E.2d at 788. See also Gilbert v. State, 241 Ga. App. 57, 526 S.E.2d 88 (1999) (holding that out of court statements by a Taco Bell employee identifying the vehicle allegedly used by defendants in a robbery of the restaurant were admissible as part of the res gestae).
Ironically, the res gestae doctrine does not appear to be as available to civil litigants as it is to the prosecution in criminal cases. In *Seed v. Smith & Woods Management Corp.*,342 a slip and fall case, plaintiff attempted to establish defendant's notice of the substance that caused his fall by testifying to statements made by an unidentified couple to the store manager that there were spills on the floor that needed to be cleaned up.343 "'Evidence imputing superior knowledge only at the suggestion of a statement allegedly made by a mystery person is completely unreliable. It is the very essence of hearsay.'"344 This reasoning is difficult to refute. However, it is fair to ask why a statement by an unidentified witness is admissible in a criminal matter but not in a civil trial.

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343. *Id.* at 396, 530 S.E.2d at 30-31.