EVIDENCE UPDATE

Prof. Paul Milich

STATE COURT JUDGES

Georgia Evidence Update

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He has taught as a visiting professor at the University of North Carolina and Emory law schools.

Prior to joining the faculty at Georgia State, Professor Milich graduated from Georgetown University Law School and practiced as a trial lawyer in Seattle, Washington.

Professor Milich has written numerous law review articles and has published a number of books including:

GEORGIA RULES OF EVIDENCE, and

COURTROOM HANDBOOK ON GEORGIA EVIDENCE, both published by Thomson/Reuters.

Professor Milich was the Reporter for the Georgia State Bar Evidence Study Committee which successfully drafted and promoted a new set of evidence rules for Georgia which went into effect January 1, 2013. He was honored by the State Bar in January 2012 with an award for Excellence in Legal Scholarship.

Do not review these materials prior to the program. During the program, you will be asked to use your "clickers" to respond to the questions (anonymously) before you look at the answers.

To program your "clicker" ...

Press "GO" or "Ch"
Your light should flash red/orange.
Press 41
Then press "GO" or "Ch" again.
Your light will briefly flash green if all OK.
If the light flashes red/orange again, start over.

EVIDENCE UPDATE

Question # 1

DUI case. The defendant driver refused to take a breath test. The defense moves to exclude any evidence of the defendant's refusal and any presumption from that refusal that he had consumed alcohol.

A refusal to take a blood test is still admissible in a criminal case. *Elliott*, above (concurrence).

The admissibility of a refusal to take a urine test has not been decided.

See, *Olevik*, at n. 10

A refusal to take a breath test is still admissible in civil cases and in administrative proceedings (license suspension).

OCGA § 24-4-417 provides that in a DUI case involving a refusal, a prior DUI is admissible if relevant to prove "knowledge, plan, or absence of mistake or accident."

The prior DUI was admitted to help explain the refusal in the case on trial. *State v. Frost*, 297 Ga. 296, 305 (2015).

But now that the refusal is inadmissible under *Elliott*, there is nothing to explain and any non-propensity relevance of the prior DUI under § 24-4-417 is gone.

Although courts have admitted a driver's refusal to take a field sobriety test (including HGN) in the past, *Bravo v. State*, 249 Ga. App. 433 (2001), in light of *Olevik* and *Elliott*, a refusal to take a field sobriety test most probably will be held inadmissible in a criminal DUI trial.

Breath testing: "Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself." *Olevik*.

HGN testing: Requires subject's cooperation in response to specific instructions. Ditto most other field sobriety tests.

"[L]ike other constitutional rights, a suspect may consent to take actions that Paragraph XVI would prevent the State from compelling."

Olevik, at 243.

Question # 2

DUI case. Driver is under arrest in back of the patrol car. The officer reads the driver the Implied Consent notice but not the driver's *Miranda* warnings. The driver consents to testing.

The defendant driver moves to exclude the breath tests on the grounds he was not read his *Miranda* warnings.

Which is the best answer?

1. Denied. *Miranda* warnings not required here.
2. Denied. The Implied Consent notice satisfies *Miranda*.
3. Granted. Must always give *Miranda* warnings at the time of arrest.
4. Granted. Must give *Miranda* warnings before asking for breath test if suspect is under arrest.

Answer: I

Regardless of whether the driver has been arrested, Georgia law does **not** require *Miranda* warnings before asking the driver to submit to a breath test.

State v. Turnquest, 305 Ga. 758 (2019).

Nor does federal law require *Miranda* warnings before a breath test.

Fofanah v. State, _ Ga. App. _ (2019 WL 3820274)

No change in the rule that once the driver is arrested, the officer must read the *Miranda* warnings before any questioning (other than basic booking questions).

Question # 3

DUI case, officer testifies that he said to the defendant driver before he was arrested:

"You're higher than a Georgia pine, aren't you?"

The officer would testify that the defendant did not reply but just remained silent.

The defense objects that the defendant's silence can never be used against him in a criminal case.

Which is the best answer?

1. Sustained. The defendant's silence can never be used against him in a criminal case.
2. Sustained. The defendant's silence in response to police questions should not be construed as an admission because he may have been exercising his right to remain silent.
3. Overruled. Driver's silence shows consciousness of guilt.
4. Overruled. Driver's silence was a tacit admission that he was, in fact, higher than a Georgia pine.

Answer: 2 - sustained

Georgia's old rule that a defendant's silence or failure to come forward is categorically inadmissible in a criminal case has been overruled.

State v. Orr, 305 Ga. 729 (2019).

Finding no basis for such a categorical rule of exclusion in the 2013 Evidence Code, the Court held that such evidence could be admitted **if** it satisfies the hearsay rules and a Rule 403 balancing test.

"For evidence to qualify as a criminal defendant's adoptive admission under Rule 801(d)(2)(B), the trial court must find that two criteria were met: first, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and second, that there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement." *State v. Orr*, 305 Ga. 729, 740 (2019).

"Beyond the constitutional issues that can be raised, the fact that police are present when an accusatory statement is made may constitute a critical circumstance that eliminates the naturalness of a response."

2 McCormick on Evidence, § 262 (7th ed. 2013)

The constitutional issue with using a defendant's pre-arrest silence has split the federal circuits and divided the Supreme Court. See, *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174 (U.S. 2013) (divided Court: 3-2-4)

State v. Orr only addressed the evidentiary issues.

Question # 4

Assault case. The accused testifies and claims self defense. On cross ...

"You didn't tell any of the police at the scene that you were acting in self defense, did you?"

Defense objects that evidence of the accused's failure to come forward is inadmissible.

Which is the best answer?

1. Sustained. Evidence of the accused's failure to come forward is inadmissible.
2. Sustained. Fifth Amendment.
3. Both 1 & 2.
4. Overruled. Relevant evidence that usually would survive a Rule 403 balancing test.

Answer: 4

Evidence of the accused's failure to come forward is admissible if it survives a Rule 403 balancing test.

State v. Orr, 305 Ga. 729 (2019).

Here, probative value = combo of logical force and proponent's need for the evidence.

Logical force – strong - a person who was only defending himself would want the police to know that sooner rather than later.

Need – strong - without the evidence, jury might infer accused told police right away, artificially bolstering the defense

Unfair prejudice?

Admission by Silence vs. Failure to Come Forward

Admission by Silence is a hearsay rule (801(d)(2)(B)) that requires a finding "that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond." *State v. Orr*, 305 Ga. 729, 740 (2019).

But if the circumstances suggest a more probable alternative reason for silence, (silence is golden in the presence of police questioning), then the accused's silence, as a matter of the hearsay rule, is inadmissible. §§ 24-1-104(a), 801(d)(2)(B).

Admission by Silence vs. Failure to Come Forward

Failure to come forward has nothing to do with the hearsay rule. Nonverbal conduct is never "hearsay" unless that conduct was intended as an assertion (intended to communicate). Most conduct, like failing to talk to the police, is not intended to communicate anything and is not hearsay. The only issue is relevance and Rule 403 balancing.

Admission by Silence vs. Failure to Come Forward

"You're higher than a Georgia pine, aren't you?"
(Silence)

Offered as an admission by the accused that he was high.

vs.

Didn't tell the police at the scene it was self defense.

Offered to cast doubt on whether the defense was true.

Question # 5

In a breach of contract case, defendant stored certain important documents in his office files and computer hard drive. When he sold the business, the defendant did not take copies with him. The new owner disposed of both the hard copy and electronic versions of the documents.

Plaintiff moves for
a finding of spoliation
of evidence and
sanctions.

The judge finds that litigation was reasonably foreseeable and defendant acted negligently (though not in bad faith) in handling the documents.

What next?

Which is the best answer?

1. Plaintiff should add a tort claim for spoliation.
2. The court should strike the defendant's Answer to the breach of contract claim.
3. The court should give the plaintiff a presumption that the documents would have supported plaintiff's claim.
4. Judge should do nothing except admit the facts at trial concerning the loss of the documents.

Answer: 4

There is no tort for spoliation of evidence in Georgia.

Owens v. American Refuse Systems, Inc. 244 Ga. App. 780 (2000).

In considering sanctions, the trial court should consider

(1) whether the opposing party was prejudiced as a result of the destruction of evidence,
(2) whether the prejudice can be cured,
(3) the practical importance of the evidence,
(4) whether the party who destroyed the evidence was acting in good or bad faith, and
(5) the potential for abuse if the spoliator is allowed to present expert or other testimony based on the now unavailable evidence.

See, *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539 (1996)

Striking a Complaint or Answer is reserved for the most severe spoliation done in bad faith causing incurable prejudice to the opponent's case.

Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 343 (2018); *Wilkins v. City of Conyers*, 347 Ga. App. 469, 473 (2018).

Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 343 (2018)

"The loss of relevant evidence due to mere negligence—including negligence in determining when the duty to preserve evidence arose—normally should result in lesser sanctions, if any at all."

"Indeed, the fact that lost evidence is often equally or even more important to the case of the party that controlled it is why fact-finders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence was lost intentionally to deprive the other party of its use in litigation"

Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 346 (2018)

See also, *Bagnell v. Ford Motor Co.*, 297 Ga. App. 835, 840 (2009) (no abuse of discretion where trial court declined to impose spoliation sanctions after concluding in part that the plaintiff's failure to preserve the van involved in the wreck "resulted from negligence, rather than bad faith")

Question # 6

Bob is being sued for fraud. He also faces criminal charges arising out of the same conduct. Bob admitted to an investigator that he lied to the buyers.

In his civil trial, Bob makes a blanket assertion of his rights against self-incrimination and refuses to answer any questions.

Which is the best answer?

1. Bob cannot make a blanket assertion of his rights but must listen to each question and either assert his privilege or answer each question.
2. Bob can assert a blanket privilege since he has been criminally charged for the same conduct.
3. Bob waived any privilege when he made a statement to the investigator admitting the fraud.
4. The privilege is not available in a civil proceeding.

Answer: I

Cannot assert a blanket privilege in a civil proceeding. The witness must "take the question" and then decide whether to answer or assert the privilege.

U-Haul Co. of Ariz. v. Rutland, 348 Ga. App. 738 (2019)

Out-of-court statements by a witness are never a waiver of the right against self-incrimination (though the statements may be admissible as a party admission or under a hearsay exception)

U-Haul Co. of Ariz. v. Rutland, 348 Ga. App. 738 (2019)

A person may invoke a privilege against self-incrimination in a civil proceeding ... but it comes at a cost.

Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551 (1976)

"You told the investigator that you lied, isn't that true?"

"I assert my privilege against self-incrimination."

"And this wasn't the only person to whom you admitted that you lied, was it?"

"I assert my privilege against self-incrimination."

"You told the investigator that you lied, isn't that true?"

"I assert my privilege against self-incrimination."

"And this wasn't the only person to whom you admitted that you lied, was it?"

"I assert my privilege against self-incrimination."

The jury can draw the adverse inferences that the answers to both questions would have been "Yes".

Brewer v. Brewer, 278 Ga. 517 (1982)

Question # 7

Breach of contract claim. Plaintiff's witness is qualified as an expert in casualty insurance and claims analysis. He would testify that defendant insurer acted in bad faith in investigating and declining coverage on plaintiff's claim.

Insurance company objects, citing the ultimate issue rule.

Which is the best answer?

1. Overruled. The "ultimate issue rule" was abolished in the 2013 Evidence Code.
2. Overruled. The witness's opinion is helpful to the jurors.
3. Both 1 & 2.
4. Sustained. Opinions phrased in legal terms are not helpful to the jury.

Answer: 3

OCGA § 24-7-704(a) abolished the "ultimate issue rule." All that is required is that the expert's opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." (OCGA § 24-7-702(b))

The bar in OCGA § 24-7-704(b) against an expert testifying to the mental state of a person is limited to criminal cases.

Bannon v. GEICO General Insurance Company, 743 Fed.Appx. 311 (11th Cir. 2018) (no abuse of discretion for court to admit opinion by plaintiffs' expert that GEICO acted in bad faith)

See also, *Grier v. State*, 305 Ga. 882, 885 (2019) (even though lay witness did not see defendant shoot victim, his opinion that he did was "rationally based on [his] perception and helpful to understanding [his] testimony.")

Question # 8

Assault case. Direct exam of officer ...

"One witness told you there were three shots, the defendant told you there was only one. Based on your investigation, which was right?"

"There were three shots fired."

"So the defendant lied, didn't he?"

"Yep. He lied alright."

The defense objects.

Which is the best answer?

1. The first question is okay, the second is not.
2. Both questions are fine.
3. Both questions are objectionable.
4. Both questions are questionable.

Answer: I

Although counsel may ask a witness to apply her knowledge to the factual issues in the case (as in, which of two conflicting versions of the facts does your investigation support?) it is improper to ask a witness if another witness is lying.

Davis. v. State, _ Ga. _, 829 S.E.2d 321 (2019)

Question # 9

Domestic violence case. Defense witness testifies that the alleged victim recanted her allegations against the accused on the phone to her last week. Cross ...

"You made up this phone call, didn't you?"

"No. I swear it."

"You are lying under oath at this very moment, aren't you?"

"No."

"And you didn't tell me or the police your lie about this supposed phone call, you saved your lie for trial, didn't you?"

Defense objects to this line of questioning.

Which is the best answer?

1. Sustained. Argumentative.
2. Sustained. Badgering the witness.
3. Both 1 & 2.
4. Overruled. This is cross.

Answer: 4

Patterson v. State, _ Ga. App. _, 829 S.E.2d 796, 803 (2019) (when "the purpose is to impeach or discredit the witness, great latitude should be allowed by the court in cross examinations." (cite omitted))

Question # 10

Assault. Prosecutor asks police officer where the gun was found in the accused's home. The detective states he has no idea.

Prosecutor hands the detective a report by another officer "to refresh his recollection." The detective looks at the report and then answers: "The kitchen."

Defense objects.

Which is the best answer?

1. Sustained. No foundation that the detective was testifying from personal knowledge.
2. Sustained. Implicit hearsay.
3. Both 1 & 2.
4. Overruled. The witness may testify based on his refreshed recollection.

Answer: 3

OCGA § 24-6-602 requires that a lay witness testify based on personal knowledge.

When a witness testifies based on a third person's personal knowledge, not his own, that is hearsay.

Kirby v. State, 304 Ga. 472, 478 (2018).

Even if a hearsay statement falls under an exception, the statement still must satisfy Rule 602 and be based on the hearsay declarant's personal knowledge.

Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985).

E.g., Immediately after watching plaintiff slip and fall in the grocery store, a bystander exclaimed: "That spill has been on the floor for over an hour!"

(The bystander was never identified and did not testify)

Refreshing Recollection vs. Past Recollection Recorded

May use anything to attempt to refresh a witness's recollection.

U.S. v. Faulkner, 538 F.2d 724 (6th Cir. 1976) (anything, not just writings, may be used to refresh)

U.S. v. Scott, 701 F.2d 1340 (11th Cir. 1983) (item used to refresh need not be admissible in evidence).

Green v. State, 242 Ga. 261, 265 (1978)
("A witness may use any source to refresh his memory, so long as he testifies from his memory thus refreshed His memory may be refreshed by any kind of stimulus, 'a song, or a face, or a newspaper item'")

O.C.G.A. § 24-6-612:

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness

Past Recollection Recorded

O.C.G.A. § 24-8-803(5)

-"insufficient recollection to enable the witness to testify fully and accurately"

- "made or adopted by the witness when the matter was fresh"

- "may be read into evidence" but does not go out with the jury over objection

	Refreshing Recollection § 24-6-612(a)	Past Recollection Recorded § 24-8-803(5)
Must be based on witness's personal knowledge	No	Yes
Contents may be disclosed to jury	No (unless opponent desires)	Yes
Goes out with jury	No	No

Question # 11

Civil case. Mother took her 3 year old daughter to the doctor for a routine checkup. The doctor noticed abrasions in the area of the child's private parts and asked the child if anyone had touched her there. The child replied: "Yes, my uncle." (the defendant)

The mother would testify to what her daughter said to the doctor. The child is unavailable at trial.

The defense objects to this as hearsay.

Which is the best answer?

1. Overruled. Admissible under OCGA § 24-8-803(4) (statements for purposes of medical diagnosis or treatment).
2. Sustained. Inadmissible under OCGA § 24-8-803(4).
3. Both 1 & 2.
4. Sustained. Violates Defendant's Sixth Amendment right to confrontation.

Answer: 2

Although the child's statement that someone touched her would be admissible under Rule 803(4), her identification of her uncle as the perpetrator is likely inadmissible under the two part test set forth in *State v. Almanza*, 304 Ga. 553 (2018).

A statement qualifies for the Rule 803(4) exception if:

(1) the declarant's motive in making the statement is consistent with the purpose of promoting treatment or diagnosis; and,

(2) the content of the statement is such as is reasonably relied upon by health care professionals in diagnosis and treatment.

State v. Almanza, 304 Ga. 553 (2018)

"Where the child is the declarant, it must be shown that the child [understood] the medical significance of being truthful, i.e., the role of the medical health professional in trying to help or heal her, which triggers the motivation for being truthful. ... One obvious way to do this is for the physician to make clear to the victim that the identity of the abuser is important to diagnosis or treatment and the victim manifests such an understanding."

State v. Almanza, 304 Ga. 553, 562 (2018)

"But it may also be the case that a child's age may make it exceedingly difficult to establish that the child understood the importance of telling the truth to receive proper treatment for their injuries; in such cases, the testimony may lack the necessary guarantee of trustworthiness for admissibility under the rule."

State v. Almanza, 304 Ga. 553, 562 (2018)

(2) the content of the statement is such as is reasonably relied upon by health care professionals in diagnosis and treatment.

Ordinarily, the identity of the person who caused the patient's injuries are irrelevant to treatment. *Advisory Committee Note*, Fed. Rule 803(4)

But if the abuser is a family member, the doctor may wish to take extra steps to safeguard the child from further danger.

U.S. v. Peneaux, 432 F.3d 882, 893 (8th Cir. 2005)

In deciding whether the two requirements of *State v. Almanza* are met, the court may consider any non-privileged evidence and decides what is more likely than not true.

OCGA § 24-1-104(a)

Under Rule 803(4), statements for purposes of medical diagnosis, a third person's statement to the doctor on behalf of the patient is admissible if made to facilitate the treatment of the patient.

"Nothing in the text of Rule 803(4) prohibits a parent or family member from conveying the information for diagnosis or treatment of the victim."

State v. Almanza, 304 Ga. 553, n.10 (2018).

Question # 12

Domestic violence case. Defendant's son testifies that his mother got hurt when she fell down the stairs. On cross, the prosecution asks the son if it is true that the accused has beaten him up several times.

Defense objects.

Which is the best answer?

1. Sustained. Inadmissible character evidence.
2. Overruled if notice given under Rule 404(b).
3. Overruled but must accept the witness's answer.
4. Overruled and if the witness denies it, State may offer extrinsic evidence to support.

Answer: 4

Rule 404(b) does admit other crimes or acts evidence for impeachment but the prosecution must follow the pre-trial notice requirements of Rule 404(b). *U.S. v. Bradley*, 644 F.3d 1213, 1273 (11th Cir. 2011) ("... unless pretrial notice is excused by the court upon good cause shown ...")

However ....

When the impeachment is based on the witness's bias (or prejudice), then OCGA § 24-6-622 controls.

"The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury."

Virger v. State, 305 Ga. 281, 295 (2019)

OCGA § 24-6-622 has no pre-trial notice requirement.

When impeaching a witness based on the witness's bias, extrinsic evidence **is** admissible to support the impeachment if the witness denies the underlying facts.

OCGA § 24-6-608(b)

In order to ask a question on cross that assumes certain facts, counsel must have a good faith basis to believe ...

- those facts are true,
- the witness would know them from personal knowledge, and
- the facts are admissible in evidence

See, U.S. v. Mosquera, 886 F.3d 1032, 1047 (11th Cir. 2018)

Question # 13

Assault & battery. Defense offers testimony of a witness that less than a minute after she heard a scream, the defendant ran into the room and exclaimed: "He came at me with a knife. I had to stop him."

The defendant will not testify.

The State objects.

Which is the best answer?

1. Sustained. Self-serving statement.
2. Sustained. Inadmissible hearsay.
3. Sustained. Violates the prosecution's Sixth Amendment right to confrontation.
4. Overruled. Excited utterance. Rule 803(2)

Answer: 4

The 2013 Evidence Code does not recognize or make room for the old "self-serving statement rule."

See, *State v. Hodges*, 291 Ga. 413 (2012) (Nahmias concurrence); *Walker v. State*, 306 Ga. 44, n.3 (2019).

One concern when evaluating hearsay statements by the accused under the excited utterance exception is whether the accused, by the time he made the statement, had pushed aside his initial excitement and was now thinking about what he should say to stay out of trouble.

See, e.g., *Jenkins v. State*, 303 Ga. 314 (2018) (before making exonerating statement to police, accused had told others he didn't want to go to jail)

In this case, however, accused made the statement to bystanders (not the police) less than a minute after the event.

Issue for trial judge is whether the foundation for the exception is met "by a preponderance of the evidence."
OCGA § 24-1-104(a).

Question # 14

In a complex breach of contract trial, the plaintiff used a timeline chart to assist her expert's testimony and again in closing argument to the jury.

Plaintiff has offered the chart into evidence as a demonstrative exhibit and asks that it be sent out with the jury during deliberations.

Defense objects to the exhibit going out.

Which is the best answer?

1. The chart is not evidence and does not go out with the jury.
2. The chart is admitted into evidence but does not go out with the jury.
3. The chart is admitted into evidence and does go out with the jury.
4. Overruled. *Res gestae!*

Answer: I

Several pre-2013 Code cases allowed demonstrative exhibits to go out with the jury at the court's discretion. Although there are no new Georgia cases on this exact issue, the Georgia Supreme Court has declared that old case law regarding demonstrative exhibits no longer applies and the 2013 Evidence Code (based on the Federal Rules) will control.

Rickman v. State, 304 Ga. 61 (2018)

Federal courts do not let demonstrative exhibits go out with the jury.

Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 708 (7th Cir. 2013) ("In sum, 'demonstrative exhibits,' ... are not admitted as substantive evidence under the Federal Rules of Evidence. Therefore, this indicates to all parties that, absent their consent, those exhibits will not go to the jury during deliberations.")

U.S. v. Buck, 324 F.3d 786, 790-91 (5th Cir. 2003) ("[D]emonstrative aids [are] governed by Rules 401 and 611. . . . It was proper for the diagram to be shown to the jury, to assist in its understanding of testimony and documents that had been produced, but the diagram should not have been admitted as an exhibit or taken to the jury room. Moreover, where a chart or summary is introduced solely as a pedagogical device, the jury should be instructed that it is not to be considered as evidence but only as an aid in evaluating the evidence.")

See also, U.S. v. Ferguson, 212 F.App'x 873, 876 (11th Cir. 2006)

Demonstrative exhibits are subject to a balancing under Rule 403.

Rickman v. State, 304 Ga. 61 (2018)

- The exhibit must be substantially similar to the real evidence.
- The exhibit must be helpful to the jury.
- The jury should be instructed that the exhibit is not evidence but only an aid in evaluating the evidence.

Compare ... A Rule 1006 summary does go out with the jury.

U.S. v. Bray, 139 F.3d 1104, 1110 (6th Cir. 1998) ("Once a Rule 1006 summary is admitted, it may go to the jury room, like any other exhibit.")

See also, Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154, 1159 (11th Cir. 2004) (once admitted, a Rule 1006 summary is substantive evidence).

See, OCGA § 24-10-1006.

Question # 15

Should a trial judge, when asked to exclude evidence under a Rule 403 balancing, put her findings on the record?

Which is the best answer?

1. Yes, in every instance.
2. Yes, unless the motion is perfunctory or not even close.
3. Not unless a party specifically requests it.
4. No. Why give the appellate courts ammunition?

Answer: 2

Neither the U.S. Supreme Ct. nor the 11th Circuit have held that the findings must be on the record but the trend in the federal circuits is to strongly urge, and sometimes require, findings when balancing is required (as with Rule 404(b) evidence) or when the issue is close and likely to be scrutinized on appeal.

See, e.g., *U.S. v. Bailey*, 840 F.3d 99, 117 (3d Cir. 2016) ("When determining whether evidence violates Rule 403, district courts must balance the probative value of the evidence against its prejudicial effect, clarifying its reasoning on-the-record.")

U.S. v. Santagata, 924 F.2d 391, 394 (1st Cir. 1991) ("[A]lthough it is certainly good practice for the trier to make on-the-record findings as to the probative value/prejudicial effect balance, such findings are not always necessary.")

Dixon v. State, 350 Ga. App. 211 (2019) ("... we have never held that the trial court is required to *explicitly* analyze the balancing test on the record.")

Appellate court <u>will</u> consider findings made in ruling on a motion for new trial in evaluating whether the trial court properly applied Rule 403.

Dixon, above.

Question # 16

Breach of warranty. Plaintiff seeks to recover damages to its generator caused by the breach. Owner testifies that he spoke with a repairperson who estimated $12,000 to repair the unit.

Defendant objects that the estimate is hearsay.

Which is the best answer?

1. Sustained. Proof of repair costs must be based on actual costs.
2. Sustained. The estimate is hearsay.
3. Overruled. The estimate is not hearsay.
4. Both 2 & 3.

Answer: 2

An owner's testimony as to what he was told would be the cost of repair is inadmissible hearsay.

Wynn v. State, 344 Ga.App. 554 (2018)

The repairperson's testimony as to the cost of repair would be admissible.

Morrison Homes of Florida, Inc. v. Wade, 266 Ga.App. 598 (2004)

The actual amount an owner paid for repairs is not hearsay.

Barnes v. State, 239 Ga.App. 495 (1999). *See also, Motes v. State*, _Ga. App._ (2019 WL 3954748)

Likewise, a price tag is not hearsay.

Bell v. State, 262 Ga. App. 788 (2003)

A binding written estimate (a firm offer) would not be hearsay but a "verbal act."

See, *Stubbs v. Dubois*, 306 Ga. App. 171, 173 (2010) (offer to settle not hearsay but a verbal act)

As an alternative to the cost of repair, a party may prove the lost value of an item due to damage or destruction.

Cost (new) + evidence of the depreciated condition of the item at the time of the loss.

In re J.T., 285 Ga.App. 465 (2007)

"A lay witness may give opinion testimony as to such value, subject to stating the factual predicate on which the opinion is based or otherwise showing that he or she had the opportunity to form a reliable opinion."

Wynn v. State, 344 Ga. App. 554, 556 (2018).

OCGA § 24-7-701(b).

FMV can be proved with data from market reports.

For example, Kelly Blue Book or similar, popularly familiar websites for auto pricing, are admissible hearsay under OCGA § 24-8-803(17)

The court can take judicial notice that sites like Kelly Blue Book are relied upon by the general public.

More specialized sites would require a witness who deals in that area and can attest to the site's reliability.

Loraine v. Markel Amer. Ins., 241 FRD 534, 553 (D. Md. 2007)

With respect to items of a common nature, a plaintiff "need not offer any opinion evidence as to value ... so long as the evidence contains facts upon which the [factfinder] may legitimately exercise [its] own knowledge and ideas".

Padilla v. Padilla, 282 Ga. 273 (2007)

"The general rule for the measure of damages involving real property is the diminution of the fair market value of the property and/or the cost of repair or restoration. ... Repair or restoration costs can be used even though they exceed the diminution in value of the property, but they are limited when restoration to the condition at the time of destruction would be an absurd undertaking."

Mayfield v. State, 307 Ga.App. 630 (2011)

Question # 17

To prove that he was in Tifton at a certain time on a certain day, the defendant offers a receipt from an automated parking lot kiosk.

Admissible?

Which is the best answer?

1. Yes, with testimony by defendant verifying the receipt.
2. Yes, with proper foundation for the business record exception.
3. No, hearsay without exception.
4. No, defendant could have dug this out of a Tifton trashcan.

Answer: I

Machine generated data and reports are not hearsay.

U.S. v. Lamons, 532 F.3d 1251, 1264, n.23 (11th Cir. 2008) ("To be sure, there can be no statements which are wholly machine-generated in the strictest sense; all machines were designed and built by humans. But certain statements involve so little intervention by humans in their generation as to leave no doubt that they are wholly machine-generated for all practical purposes.")

See also, *Dunn v. State*, 292 Ga. App. 667 (2008)

O.C.G.A. § 24-9-901(a):

"The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Question # 18

Domestic violence case. Police respond to 911 call that husband is threatening wife (the caller) with a gun. Officer would testify that when police arrived, a neighbor was standing outside the subject house. Asked what was happening, the neighbor told police the husband fled out the back door a few minutes before, waving a gun.

The neighbor is unavailable for trial.

Defense objects on both Confrontation Clause and hearsay grounds.

Which is the best answer?

1. Confrontation objection overruled. Hearsay admissible as a present sense impression. Rule 803(1).
2. Confrontation objection overruled. Hearsay admissible as an excited utterance. Rule 803(2).
3. Confrontation objection sustained.
4. Confrontation objection overruled. But hearsay objection sustained.

Answer: 2

Statements were nontestimonial.

"[S]tatements were nontestimonial in that they were not intended to establish or prove a past fact; rather, they were intended to describe current circumstances that required immediate police action, that is, securing a crime scene and determining whether an armed ... [perpetrator] might still be in the vicinity."

McCord v. State, 305 Ga. 318, 323 (2019)

Present sense impression, Rule 803(1), is not a good fit here. Statement must be made "while the declarant was perceiving the event or condition or immediately thereafter."

Advisory Committee Report Fed Rule 803(1)

"Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable."

Excited Utterance, Rule 803(2), allows for a lapse of time commensurate with the declarant's state of stress or excitement caused by the startling event.

U.S. v. Belfast, 611 F.3d 783, 817 (11th Cir. 2010). See also, *McCord v. State*, 305 Ga. 318, 323 (2019)

Question # 19

Assault case. The State asks the court to take judicial notice (to establish venue) that the high school where the events occurred is within the County limits.

Defense objects.

Which is the best answer?

1. Overruled IF the judge knows this from personal knowledge.
2. Overruled IF its widely known in the community or confirmed with a map.
3. Sustained. The court may not take judicial notice of facts to prove venue.
4. Sustained. The State needs to present live testimony.

Answer: 2

A court may not take judicial notice based only on the judge's personal knowledge. *Interest of S.M.*, 169 Ga. App. 364 (1983).

The fact must be "generally known" in the community the court serves or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

O.C.G.A. § 24-2-201(b)

Courts may take judicial notice of the geographical boundaries of a county and whether specific locations fall within those boundaries.

In re: D.D., 287 Ga. App. 572, n.1, 651 S.E.2d 817 (2007) (court could take judicial notice of geographical boundaries of city)

In re: A.C., 263 Ga. App. 44, 587 S.E.2d 210 (2003) (court could take judicial notice that Upson-Lee High School is located in Upson County).

See, e.g., United States v. Perea-Rey, 680 F.3d 1179, 1182, n.1 (9th Cir. 2012) ("We take judicial notice of a Google map and satellite image as a 'source whose accuracy cannot reasonably be questioned,' at least for the purpose of determining the general location of the home.")

May the court take judicial notice ...

that Panthers Field at Georgia State Stadium is located in Fulton County

May the court take judicial notice ...

that Panthers Field at Georgia State Stadium is located in Fulton County

Yes, though courts outside metro Atlanta area may need a map to confirm this fact.

May the court take judicial notice ...

that the *Atlanta Braves* have a great pitching staff

May the court take judicial notice ...

that the *Atlanta Braves* have a great pitching staff.

No. Evaluative opinions are not proper subjects for judicial notice.

U.S. v. Pabian, 704 F.2d 1533 (11th Cir. 1983)

May the court take judicial notice ...

that the Kelly Blue Book website is a reliable and popular source for used car pricing.

May the court take judicial notice ...

that the Kelly Blue Book website is a reliable and popular source for used car pricing.

Yes. *Jaycee Atlanta Devlpmnt. v. Providence Bank*, 330 Ga. App. 322 (2014)(FDIC website)
OCGA § 24-8-803(17)(hearsay exception)

May the court take judicial notice ...

that certain documents have been filed with the court?

May the court take judicial notice ...

that certain documents have been filed with the court?

Yes, though a party still may object that the documents are forgeries or contain inadmissible hearsay.

Nationsbank v. Tucker, 231 Ga. App. 622 (1998).

May the court take judicial notice ...

that drinking corn whiskey can cause intoxication

May the court take judicial notice ...

that drinking corn whiskey can cause intoxication

Yes.

Fears v. State, 125 Ga. 740 (1906).

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