**EVIDENCE ESSENTIALS PODCAST**

**STATE v. ORR- PRE-ARREST SILENCE**

* 1. You asked for episodes dealing with evidence issues
  2. “Evidence Essentials”
  3. Garon Muller helping us with these evidence episodes
  4. Pre-arrest silence- [*Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991182734&pubNum=0000711&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)).
  5. Under ***Mallory***, a bright-line rule was created than a prosecutor’s comment on pre-arrest silence was improper as it was more prejudicial than probative.
  6. The Evidence Code, which took effect on January 1, 2013, precludes courts from promulgating or perpetuating judge-made exclusionary rules of evidence like the one created in [*Mallory*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991182734&pubNum=0000711&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)), and instead generally requires trial courts to determine the admissibility of evidence based on the facts of the specific case and the rules set forth in the Evidence Code, including [OCGA § 24-4-403](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000468&cite=GAST24-4-403&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)) (Probative vs. Prejudicial impact)
  7. This ruling should have far-reaching outcomes, as the Supreme Court has stated that case-made law prior to the implementation of the 2013 Evidence code is abrogated.
     1. Remember- Where rules in the 2013 Evidence Code are materially identical to Federal Rules of Evidence, courts look to federal appellate law, and in particular the decisions of the United States Supreme Court and the Eleventh Circuit, to interpret them, instead of following state court precedent issued under the old Evidence Code.

**THE FACTS OF STATE V. ORR**

1. Orr was accused of brutally beating his wife. At trial, Orr testified that the victim was addicted to drugs and would physically attack him when she got angry.
2. Orr testified that on the night of the event for which he was charged, he was on the phone with his sister when the victim hit him in the head with an ash tray. Defendant Orr responded by hitting the victim once with a closed fist.
3. To rebut this defense, the prosecutor repeatedly asked witnesses about Orr’s failure to call the police to report the abuse and injuries allegedly inflicted on him by the victim.
4. In closing, the prosecutor commented that Orr had never told the police or anyone else this version of the facts.
5. Defense Counsel objected and moved for mistrial but the Trial Court denied the motion without explanation.
6. Orr was convicted and appealed. The Appellate Court found that ***Mallory*** was still the law until abrogated by the Supreme Court.

**THE HOLDING OF THE SUPREME COURT**

1. [*Mallory*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991182734&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation))’s categorical exclusionary rule is best characterized as judicial lawmaking: a rule excluding a certain type of evidence based on the Court’s view of good policy, operating only prospectively (like most legislation and unlike normal judicial decisions)
2. ***Mallory*** was abrogated by the implementation of the 2013 Evidence Code.
3. The Court then determined the admissibility of Orr’s pre-arrest silence through the lens of the 2013 Evidence Code.
   1. As an aside, this ruling is a great guide to determine the admissibility of any evidence. The Court goes through the step by step process that we should consider when determining the admissibility of statement evidence.
   2. The Court starts with **Rule 401** and then moves toward more specific evidentiary rules.
4. Specifically, the Court considered whether Orr’s failure to come forward was an Admission by a Party Opponent under **Rule 801**.
5. First, the Court considered whether this was an **adoptive admission** under 801(d)(2)(b)
   1. the trial court must find that two criteria were met:
      1. first, the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and
      2. second, that there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.
6. Next, the Court considered whether this was the party’s own statement under 801(d)(2)(A).
   1. but to be such a “statement,” we recall, [Rule 801 (a) (2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER801&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)) requires “[n]onverbal conduct” to be “intended to be an assertion.”
7. The party seeking to introduce evidence under [Rule 801 (d) (2) (A)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER801&originatingDoc=I8d4a2680701211e99eec849a2791c613&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)) must identify the specific nonverbal conduct of the opposing party and the fact or facts that it was allegedly intended to assert. Vaguely pointing out that the defendant “failed to come forward” after a crime will not suffice.
8. Finally, the Court reminds us that **Rule 403** is the last consideration for a Trial Court to exclude otherwise relevant and admissible evidence that is more prejudicial than probative.
   1. The Court also reminds us that this rule is to be used only in extraordinary factual scenarios.

**THE FALLOUT SINCE ORR**

1. ***Venturino v. State***, 830 S.E.2d 110 (Ga. 2019)- **Autopsy photos**
   1. ***Brown***-Old Rule- “A photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy.”
   2. Supreme Court held the **Brown** evaluated the admissibility of autopsy photographs based on general principles of relevance and prejudice—considerations that are now specifically controlled by the new Evidence Code. Thus, that holding was abrogated by the new Evidence Code.
2. Other Pre-Arrest Silence Cases since ***Orr*** was decided.
   1. ***Scott v. State***, 831 S.E.2d 813 (Ga. 2019).
   2. ***Walker v. State***, 832 S.E.2d 420 (Ga. 2019).
   3. ***Rowland v. State***, 306 Ga. 59 (2019).
   4. ***Spell v. State***, 305 Ga. 822 (2019).
   5. ***Williams v. State***, 305 Ga. 776 (2019).
   6. ***Gonzalez v. State***, A19A1452, 2019 WL 4686634 (Ga. Ct. App. Sept. 25, 2019)

**CONCLUSION**

1. So, where does that leave the Trial Court regarding pre-arrest silence?
   1. The Trial Court should treat pre-arrest silence like any other statement evidence and should go through the normal evidentiary progression in determining admissibility.
      1. Rule 401,
      2. then specific hearsay rules,
      3. then Rule 403.
   2. The Court should consider the evidence through the lens of an admission by the Defendant, whether the silence is an adoptive admission or a nonverbal statement.
   3. If the Court finds that the pre-arrest silence falls squarely within a Hearsay exclusion, i.e. an adoptive admission or nonverbal statement, the Court must then conduct a 403-balancing test.