

The Expert in German Criminal Trials

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German criminal trials are governed by the principle of official investigation. The State has the burden of proof in showing that the defendant committed a crime. It is the duty of the prosecution and the court to find the facts which may prove the defendant's guilt. The defendant is considered innocent until proven guilty. S/he does not have to play an active part in a criminal trial, i.e. s/he has the right to remain silent. The court (consisting of one to five judges depending on the sentence to be expected) has to investigate the facts, determines the question of guilt or innocence and does the sentencing.

There are three stages in German criminal trials. The first stage is called "preliminary". This is the prosecutor's sphere. It is important to note that despite the name the prosecutor has to investigate in both directions and is therefore considered to be neutral. The judge's role is only to grant permission for e.g. placing a telephone tap or issue a search warrant, but s/he does not play an active part at this stage. It is the prosecutor's duty to begin an investigation *ex officio* if there is a sufficient suspicion that a crime has been committed.

Upon finishing her or his investigations the prosecutor has to decide whether to uphold or to drop the charges. S/he has to answer the question whether a conviction is more probable than an acquittal. If the answer is "yes", that is the beginning of the second stage of the criminal law procedure: The In-between-stage. At this stage the criminal court examines the file in order to find out whether a conviction is more probable than an acquittal (the same question that the prosecutor had to answer at the first stage). If the court also arrives at a „yes“, the Main stage of the criminal law procedure will start, and a trial date will be fixed.

In German criminal trials only four kinds of evidence are allowed: witnesses, experts, visual inspections, and documents. The expert is appointed by the prosecutor's office (in stage one) or by the criminal law court (in stage two or three). It is the solitary duty of the prosecutor or of the court to look for a qualified expert for the question at stake and to appoint her or him. An appointment by the court cannot be challenged by the prosecutor or the defense lawyers.

As the German criminal trial is an oral trial, the experts have to deliver their reports orally and in person. Most of the time they will have submitted a preliminary report before the trial starts as a basis for their oral testimony. But the court is only allowed to use the oral testimony for its findings. After having given his or her report, the expert is questioned first by the court, then by the prosecution and finally by the defense. There is nothing like evidence-in-chief or cross-examination. Anyone, including the defendant, may ask all the questions that they have. The expert is not dismissed until all questions have been answered.

The German Federal Court (Bundesgerichtshof) distinguishes witnesses from experts as follows: "Evidence provided by witnesses consists of perceptions of past [...] facts and circumstances. This, however, was about providing the specialized knowledge that is necessary for assessing facts. This is typically an expert task." (BGH NJW 1993, 1796; translation A. Braun).

It is the court's duty to decide whether or not to follow the expert's conclusions. There is no obligation for the court to do so. It may appoint a second expert if it is not convinced by the first one's report. The prosecutor and the defense lawyers may also apply for a second expert, but it is up to the court to decide according to the relevant statutory provisions in the code of criminal procedure (*Strafprozessordnung*) whether or not to grant the application. In practice, it is very rarely granted. This decision can be used as an argument in an appeal, but that is seldom successful. There is only one expert in the vast majority of cases.