

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

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Tammie Mosley
Clerk of Superior Court
Chatham County
Date: 7/27/2020 10:55 AM
Reviewer: DH

STATE OF GEORGIA,

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vs.

Indictment No. CR16-1037-J4

RODNEY TYRONE SMITH,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

After reading and considering Defendant's Motion for New Trial (as amended), the State's Response, reviewing all argument and evidence of record, and the applicable law, the Court **GRANTS** the Motion.

On June 8, 2016, Rodney Tyrone Smith ("Defendant") was indicted by a Chatham County Grand Jury on the offenses of Aggravated Assault (3 Counts), Aggravated Battery (2 Counts), Abuse of an Elder Person, Possession of a Firearm During the Commission of a Felony (3 Counts), Possession of Cocaine with intent to Distribute, and Possession of a Firearm by a Convicted Felon.

From April 3, 2018 through April 6, 2018, the case was tried before a Chatham County jury. At the conclusion of the jury trial, Defendant was found guilty on all counts. A sentencing hearing was conducted on April 19, 2018. For purposes of sentencing, Count 1 merged into Count 2 and Count 4 merged into Count 2. Pursuant to Georgia's recidivist statute, O.C.G.A. § 17-10-7 (c), the Defendant received ninety years to serve, and consecutively, five years to serve.

On May 1, 2018, Defendant, through trial counsel, filed a timely Motion for New Trial based on general grounds. On October 25, 2018, appellate counsel filed a Motion for New Trial, as Amended, which included an ineffective assistance of counsel claim based on the failure of trial counsel to present evidence shown by ShotSpotter. Defendant alleged the ShotSpotter evidence would have shown his innocence of the first assault. On March 27, 2019, appellate counsel filed a Motion for New Trial, Second

Amendment, based on a Brady violation for the failure of the State to provide ShotSpotter information available to the Savannah Police Department.

On January 2, 2019, Defendant filed a Motion for Discovery and Disclosure under Brady v. Maryland requesting the State of Georgia to provide to Defendant certain materials pursuant to O.C.G.A. § 17-16-1, *et seq.* and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). On January 9, 2019, Defendant filed a Subpoena for Production of Evidence served on the Savannah Police Department requesting the same information.

The State filed notices of supplemental discovery disclosure on February 6 and March 20, 2019, providing evidence the Savannah Police Department produced from its electronic connection with ShotSpotter.

On March 29, 2019, Defendant filed a Motion for Funds for Forensic Report and Expert Testimony requesting the Court to provide funding for the preparation of a Forensic Report from ShotSpotter, Inc., and for Expert Testimony as required at court proceedings in the above-referenced case. On April 8, 2019, the Court granted the requested funds.

On May 2, 2019, Defendant filed a discovery disclosure noting the provision, on April 30, 2019, of certain forensic reports produced for Defendant by ShotSpotter to the District Attorney:

- A) ShotSpotter Detailed Forensic Report for Flex ID (FID) 13830-13832;
- B) ShotSpotter Detailed Forensic Report for Flex ID (FID) 15235-15237.

On June 11, 2019, and June 24, 2019, the various motions identified above came before the Court for a hearing. The subject of the evidentiary hearings included the following claims of error:

- 7) Trial counsel provided ineffective assistance of counsel under the standard set in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984), by failing to present evidence shown by ShotSpotter, which illustrated a conflict in the State's theory¹ that the same person committed the separate assaults within the indictment.
- 9) The State of Georgia withheld exculpatory evidence from Defendant in the form of data produced by ShotSpotter technology, including ShotSpotter

¹ The State's theory was that the same individual, driving a Ford Mustang, shot Abraham Johnson, III, at 7 E. Victory Drive and, shortly after, committed an assault with a firearm at Chu's Convenience Store, located at 2 W. DeRenne Avenue, and then committed a third assault with a firearm, located at 108 Mills Run Lane.

Flex reports and audio of gunshots, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963).

Having had an evidentiary hearing on March 25, 2019, Defendant's Motion for New Trial (as amended) is now ripe before the Court.

RELEVANT FACTS

In the early morning hours of March 14, 2016, Rotaisha McCKinney loaned a gray newer model Ford Mustang convertible to Defendant. Defendant was dressed in a black shirt and camouflage shorts. Around 5:00 a.m., Angel Vargas saw Defendant driving a vehicle of the same description in the area of 219 W. 33rd Street in Savannah. After he saw Defendant, he heard gunshots. Vargas described Defendant as wearing a black shirt and camouflage shorts.

Abraham Johnson, III (hereinafter, "Johnson"), who was sixty-seven at the time, had pulled into his driveway at 7 East Victory Drive in Savannah after he returned home from work. While Johnson was still in his car, he saw a newer model gray Ford Mustang stop in front of his house. Johnson was shot in the face twice. Subsequent to being shot, Johnson watched the Ford Mustang sit in front of his house for a few minutes before the vehicle drove away. He did not see the individual who shot him.

Shortly after Johnson was shot, Defendant was captured on video at Chu's Convenience Store on the corner of Derenne Avenue and Bull Street in Savannah.² The video showed Defendant driving a gray Ford Mustang and wearing a black shirt, camouflage shorts and a black hat. Inside the store, Defendant pointed a gun at Tyre Smith and the gun made a click. Khadijah Jenkins, an employee of Chu's Convenience Store who was working that day, and Alexis Proctor, a patron of Chu's Convenience Store, both witnessed Defendant point a gun at Smith. Proctor also saw Defendant exit the store, enter a gray newer model Ford Mustang convertible, and drive away from the store.

² At trial, the State entered into evidence a video which showed that Defendant entered the parking lot of Chu's Convenience Store at 5:08:53 a.m. According to testimony during the evidentiary hearing, a diagram produced by the State in pretrial discovery showed that ShotSpotter detected gunshots in the vicinity of 7 E. Victory Drive, where Johnson was shot, with the latest detected at 5:08:34 a.m.

A short time later, Defendant went to 108 Mills Run Lane. Defendant knocked on the front door and when Jamelle Sanders opened his door, Defendant pointed a gun at Sanders. Sanders heard a click sound, as if the gun did not have bullets in it.

The police arrested Defendant later that day at 107 Mills Run Drive, the residence directly across the street from where Sanders lived. When the police arrived, they noticed a gray newer model Ford Mustang convertible in the driveway. The vehicle matched the same description as: (1) the one loaned to Defendant by Rotaisha McKinney; (2) the one driven by Defendant as witnessed by Angel Vargas; (3) the one driven by the person who shot Abraham Johnson, III; and (4) the one then seen on video being driven by Defendant at Chu's Convenience Store. Defendant was also arrested wearing the same clothes he was described to have been wearing by Rotaisha McKinney and Angel Vargas, and the same clothes that he was seen wearing on video at Chu's Convenience Store.

Inside 107 Mills Run Lane, Detective Eric Blaser recovered a 9mm Glock and a bag of cocaine from a laundry basket. The police also found a scale, baggies and cash. Inside the gray Ford Mustang, Detective Kevin Fikes found spent 9mm shell casings and a small bag of cocaine in the back seat. The shell casings were tested and proven to have been fired from the Glock 9mm that was found in 107 Mills Run Road. Additionally, an expert from Georgia Bureau of Investigation concluded that the bullet fragments extracted from Johnson's face were fired from a Glock 9mm.

ARGUMENT AND CITATION OF AUTHORITY

The Court has attempted to address each of Defendant's various claims in his Motion for New Trial (as amended). Accordingly, any claim not specifically addressed herein is **DENIED**.

I. THE VERDICT WAS NOT CONTRARY TO THE EVIDENCE AND THE PRINCIPLES OF JUSTICE AND EQUITY, NOR WAS IT DECIDEDLY AND STRONGLY AGAINST THE WEIGHT OF EVIDENCE.

Defendant has failed to cite to any point in the transcript or any authority that would support any of the numerous insufficiency of the evidence claims. Due to Defendant's failure to include any citations or authority this Court deems any such claims abandoned.

Holmes v. State, 301 Ga. 143, 146, 800 S.E.2d 353, 355 (2017). The Court has reviewed the record and finds that in this case the evidence presented to the jury was more than sufficient to allow a rational trier of fact to find the Defendant guilty beyond a reasonable doubt of the offenses charged. Jackson v. Virginia, 443 U.S. 307 (1979). Although Defendant's view of the evidence was different from that of the State, such differences were a matter for the jury to resolve. "Conflicts in the testimony of the witnesses, including the State's witnesses, [are] a matter of credibility for the jury to resolve," Bell v. State, 226 Ga. App. 271, 272, 486 S.E.2d 422, 425 (1997). Likewise, the Court finds that the verdict is not decidedly and strongly against the weight of evidence admitted at trial. O.C.G.A. § 5-5-21.

II. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION I, PARAGRAPH XIV OF THE 1983 GEORGIA CONSTITUTION.

A convicted Defendant must satisfy a two-prong test in order for the Court to uphold the validity of a claim addressing ineffective assistance of counsel *at trial*.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). "There is a strong presumption that the performance of trial counsel falls within the wide range of reasonable professional assistance. The reasonableness of the conduct is viewed at the time of trial and under the circumstances of the case," Williams v. State, 277 Ga. 853, 857, 596 S.E.2d 597, 602 (2004) (citation and punctuation omitted). If an appellant fails to meet his burden of proving either prong of the Strickland test, the reviewing court need not examine the other prong. See Strickland, *supra*, 466 U.S. at 697; Fuller v. State, 277 Ga. 505, 591 S.E.2d 782 (2004).

As explained in Powell v. State, the Defendant's burden is significant:

To prove he has received ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that this deficiency prejudiced the defense. Thus, counsel's performance will not be found to be deficient if it falls within the range of 'reasonably effective assistance'. The defendant must overcome the strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct. As to deficient performance, errors in judgment and tactical errors do not constitute denial of effective assistance of counsel.

198 Ga. App. 509, 510, 402 S.E.2d 108, 109 (1991).

A new trial should not be granted on the basis of an ineffective assistance claim unless conduct by trial counsel so undermined the proper functioning of the adversarial process that the trial could not have produced a just result. Holland v. State, 250 Ga. App. 24, 25, 550 S.E.2d 433, 436 (2001). The Holland Court explained further:

Whether an attorney's trial tactics are reasonable 'is a question of law', not fact. The test for reasonable attorney performance has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial ... (W)e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

A. Defendant's trial counsel rendered ineffective assistance by failing to present evidence shown by ShotSpotter.

The State provided pretrial discovery in this case on August 24, 2016. The discovery contained a diagram produced from raw data taken from the City's ShotSpotter program. The diagram was created by Gianna Nelson, an analyst with the Savannah Police Department, who summarized the raw data generated on the date of the shooting. The diagram showed that the ShotSpotter program detected gunshots at 5:07:43 a.m. at 510 E. Victory Drive, Savannah, Georgia, 5:08:10 a.m. at 2601 Drayton Street, Savannah, Georgia, and at 5:08:34 a.m. at 15 E. Victory Drive, Savannah, Georgia.³

The diagram is important because the ShotSpotter evidence reveals a significant inconsistency in State's theory; that Defendant shot Johnson at 7 E. Victory Drive and

³ These locations are adjacent to 7 E. Victory drive where Abraham Johnson, III was shot.
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subsequently committed an assault at Chu's Convenience Store on West DeRenne Avenue in Savannah. In order for this theory to hold up the Defendant would have to have had sufficient time to travel from the Johnson shooting on Victory Drive to Chu's Convenience Store on West DeRenne Avenue. As shown on the diagram, ShotSpotter detected gunfire seemingly related to the Johnson shooting at 5:08:34 a.m. At trial, the State presented evidence from Chu's Convenience Store on West DeRenne Avenue that showed Defendant entering the store parking lot at 5:08:53 a.m.⁴ The State introduced a map which showed the distance between Johnson's house and Chu's Convenience Store is two miles with several traffic signals on the numerous intersections.⁵

Furthermore, the State presented Defendant's statement to the police in which he admitted to being at Chu's Convenience Store, but denied being at the East Victory Drive location. Defendant's admission that he was at Chu's (essentially at the same time that ShotSpotter indicated or recorded the shots fired at the East Victory Drive vicinity) was corroborated by the State's video evidence.

Moreover, Johnson testified that the shooter did not leave immediately or speedily after Johnson was shot:⁶

- A. What had happened when he shot me, he sat there. I couldn't figure it out. I guess (unintelligible) see if I would have gotten out. He probably would have killed me. And he sat for a few minutes to watch. Because after this my car done ran into everything. And he just sat there. And all of a sudden, he just slowly drove away. (T.80)

Based on the ShotSpotter evidence, as shown on the diagram, and in light of the evidence produced at trial by the State, it is reasonable for one to conclude that it would have been impossible for Defendant to both shot Johnson and been at Chu's Convenience Store at the times presented in the State's evidence.

Accordingly, the Court finds that trial counsel's handling of the ShotSpotter evidence, and the timeline it establishes, was deficient. The deficiencies include failure to

⁴ There was never a suggestion that the time stamp of the video was inaccurate. At trial, the State introduced a business record certificate for an unedited video from Chu's Convenience Store. Additionally, Defendant's trial counsel elicited testimony from the Chu's Convenience Store representative that the time and date on the video was accurate, showing Monday, March 14, 2016, at 5:08.

⁵ Chu's Convenience Store is located at 2 W. DeRenne Avenue.

⁶ Johnson also testified that he did not see the individual who shot him.

present the diagram and evidence of the ShotSpotter information to the jury and failure to argue the conflict in the State's theory that Defendant shot at Johnson on Victory Drive.⁷ Each of the points above could have been used by Defendant's trial counsel to illustrate a conflict in the State's theory and present an alibi defense. Given the critical nature of the ShotSpotter data, as shown in the diagram prepared by the Savannah Police Department, a reasonably effective trial lawyer would have taken proper steps to insure that the diagram would have been presented to the jury to show Defendant's innocence of the assaults on Johnson. Accordingly, the record demonstrates that despite the critical nature of the ShotSpotter data in the diagram, there was an apparent lack of consideration that was ultimately detrimental to Defendant.

Having found that Defendant's counsel was deficient, the Court must now determine if Defendant was prejudiced. "When considering the prejudice prong for multiple claims of ineffective assistance of counsel, [the court] look[s] to whether 'the cumulative effect of counsel's [alleged] errors,' leads to a reasonable probability that the outcome of the trial would have been different," Schofield v. Holsey, 281 Ga. 809, 812, 642 S.E.2d 56 (2007).

The Court finds that but not for the trial counsel's deficient performance there is a reasonable likelihood that the outcome of the trial would have been different. Here, the trial counsel was deficient in multiple ways by failing to present the diagram provided by the State, failing to elicit testimony about the specific timeline of the assaults, failing to illustrate the conflict in the State's theory, and failing to present a possible alibi (that he was at Chu's Convenience Store at about the same time as the Johnson shooting). The evidence that gunfire was detected at East Victory Drive at 5:08:34 was critical given the State's presentation of evidence that Defendant was also at Chu's Convenience Store at 5:08:53. Trial counsel failed to argue to the jury that the State's timeline was flawed or that the States own evidence proved the impossibility of its theory on the Johnson Shooting. There was no mention of the nineteen seconds separating the assaults on Johnson and the Defendant's appearance at Chu's Convenience Store combined with

⁷ The State did not elicit testimony about the specific timeline of the assaults during the trial, which would have revealed the inability of Defendant to have committed the shooting at 7 E. Victory Drive, as he appeared on video two miles away at Chu's Convenience Store.

the two-mile distance between the locations of the two assaults. Defendant's potential alibi (that he was at Chu's at the time of the Johnson shooting) was supported by Defendant's admission that he was at Chu's Convenience Store, the State's evidence of Defendant on video at the store, and the two eye-witness identifications of Defendant as being at the store. The alibi was additionally supported by Johnson's testimony that the shooter "sat for a few minutes" after Johnson was shot. For these reasons, the trial counsel failed to argue Defendant was not the individual who shot Johnson. See Moss v. State, 298 Ga. 613, 619, 783 S.E.2d 652, 658 (2016).

As stated by the Supreme Court in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. 668 at 686(II). Here, the Court finds that the trial counsel's conduct undermined the proper functioning of the adversarial process, and the Court concludes that Defendant was prejudiced.

B. Defendant's trial counsel was not ineffective for failing to challenge the admissibility of Defendant's statement.

Defendant claims that his trial counsel was ineffective for not challenging the admission of his statement to the police after his Constitutional Rights were invoked. "To establish ineffective assistance of counsel on the basis of counsel's failure to file a timely motion to suppress, [the Defendant] must make a strong showing that had the motion been considered, the damaging evidence would have been suppressed." Brown v. State, 311 Ga. App. 405, 407, 715 S.E.2d 802, 804 (2011). On April 3, 2016, the Court held a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). At the hearing the State entered a copy of a Constitutional Rights form that was presented to Defendant. The State also entered a video which showed Defendant conversing with officers. After Defendant invoked his right to remain silent, Defendant told an officer that he "needed" to speak with Detective Richard Wiggins ("Wiggins"). Defendant was reminded that he had invoked his rights. Defendant again said that he needed to speak with Wiggins. The Court finds Defendant waived his Constitutional Rights after telling officers that he "needed" to speak

with Detective Wiggins.⁸ Accordingly, Defendant cannot show that had his trial counsel challenged the admissibility of the statement, the statement would have been suppressed. Therefore, Defendant has failed to meet the burden, and the Court concludes that Defendant's trial counsel was not ineffective for failing to challenge the admissibility of Defendant's statement to police.

C. Defendant's trial counsel was not ineffective for failing to object to the Court's instructions on the offense of violation of the Georgia Controlled Substances Act.

Defendant claims that his trial counsel was ineffective for failing to object to the Court's instructions on the offense of violation of the Georgia Controlled Substances Act. In this case, Defendant was charged in Count 10 of the Indictment with Possession of Cocaine with the Intent to Distribute. Defendant argues the Court's instruction on the offense of a violation of the Georgia Controlled Substances Act was erroneous because it included a reference to simple possession of cocaine as a violation of the Georgia Controlled Substances Act, and thus could have misled the jury into convicting Defendant on possession with intent to distribute on evidence of simple possession. Defendant's trial counsel did not object to the instruction at trial, and now Defendant contends that his trial counsel was ineffective for failing to object to the instruction. As discussed further hereunder, Defendant cannot show that the jury instruction prejudiced his case, and therefore, Defendant cannot succeed on his ineffective assistance claim. See Gomillion v. State, 236 Ga.App. 14, 18 (3) (c), 512 S.E.2d 640 (1999) ("Failure to object to a court's charge [] ... is not ineffective assistance where the appellant does not show how this prejudiced his case.")

III. THE STATE OF GEORGIA DID NOT WITHHOLD EXCULPATORY EVIDENCE FROM THE DEFENDANT.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court established that the prosecution has a constitutional duty to disclose certain information to the defense. The duty applies to "material" information". In United States v. Bagley,

⁸ The Supreme Court of Georgia has found that incriminating statements made to police, after the invocation of his rights, which are made as a result of the Defendant initiating a conversation, are admissible. State v. Brown, 287 Ga. 473, 474, 697 S.E.2d 192, 194 (2010).

473 U.S. 667 (1985) the United States Supreme Court explained the standard for materiality in Brady challenges. The court held:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

473 U.S. at 682. As explained by the Georgia Supreme Court in Walker v. Johnson, 282 Ga. 168, 646 S.E.2d 44 (2007):

To succeed on his Brady claim, [the Defendant is] required to show: (1) the State possessed evidence favorable to his defense; (2) he did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.

282 Ga. at 169, 646 S.E.2d at 46; Danforth v. Chapman, 297 Ga. 29, 30, 771 S.E.2d 886, 887 (2015)

The Court applies Brady as follows:

1. The State Possessed Evidence Favorable to Defendant's Defense.

In this case, the State was in possession of gunshot audio and two certain forensic reports produced by ShotSpotter to the State which were not provided to Defendant before trial. Specifically, the State was in possession of ShotSpotter Detailed Forensic Report for Flex ID (FID) 13830-13832 and ShotSpotter Detailed Forensic Report for Flex ID (FID) 15235-15237.

2. Defendant Possessed the Favorable Evidence.

The question this Court must wrestle with is whether Defendant possessed the favorable evidence even though he was not provided the two reports and audio of the gunshots. The State provided pretrial discovery in this case on August 24, 2016. As has been established, Defendant was provided with a diagram created by an analyst with Savannah Police Department, which reflected the ShotSpotter information concerning location and times of gunfire detected by the system. There are only two points of information that were not present in the discovery that the State sent to Defendant in its discovery disclosures: (1) the longitude and latitude of the alerts, and (2) the actual

recordings of the gunshots. While the longitude and latitude of the alerts were not provided numerically on the diagram provided in discovery, the addresses corresponding to the longitudes and latitudes are present and reflected on the diagram. Here, the Court finds Defendant possessed the favorable evidence given that Defendant's trial counsel was provided with the diagram in pretrial discovery.

3. The State Did Not Suppress the Favorable Evidence.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87. Although Defendant was not provided copies of the two Flex Reports or the audio of the gunshots, his trial counsel was in possession of the diagram, which contained the same data and information that was depicted in the diagram. Although the reports and gunshots would have provided additional evidence of the gunshots detected in the East Victory Drive vicinity, Defendant was not deprived of the time and location of the gunshots detected by ShotSpotter, which as discussed above, was critical to his defense. Moreover, although the audio recordings of the gunshots were not produced to Defendant, they contained no exculpatory information. Under these circumstances the Court finds that the ShotSpotter evidence was not suppressed by the State.

4. A Reasonable Probability Exists that the Outcome of the Trial Would Not Have Been Different.

Under the final prong of the analysis the Court must determine if there is a reasonable probability that had Defendant been provided with the two forensic reports and the audio the outcome of the trial would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682. In this analysis the Court cannot ignore an analysis of the effectiveness of the Defendant's trial counsel. As explained above, the Court finds that the Defendant's trial counsel was ineffective and deficient in his representation of Defendant, specifically in his handling of the diagram. As Defendant's trial counsel testified during the June 11, 2019 post-trial hearing, Defendant's counsel failed to notice the time issue, as exhibited in the diagram, in his trial preparation:

Q. Does that -- did you recognize that diagram indicated those shots were fired at the same time that the incident at Chu's was beginning?

A. Actually I did not at the time...

(MT. June 11, 2019, 53-54).

Q. But you did not -- it's safe to say you did not really notice the -- the fact that the Shot Spotter indicated or recorded the shots were fired at the same time as the video at Chu's was started with the defendant entering the parking lot?

A. No, I did not.

(MT. June 11, 2019, 81).

This testimony revealed that Defendant's trial counsel did not notice that the evidence on the diagram indicated the shots fired on Johnson were essentially at the same time as the incident at Chu's Convenience Store. Consequently, the Court concludes that there is a reasonable probability that the outcome of the trial would not have been different if the two forensic reports and audio had been provided to Defendant.

IV. THE COURT PROPERLY ADMITTED EVIDENCE OF A PRIOR AGGRAVATED ASSAULT, FAMILY VIOLENCE, PURSUANT TO O.C.G.A. § 24-4-404(b).

Defendant seeks to relitigate the admission of evidence related to an April 12, 2009 incident in which Defendant committed aggravated assault with a firearm, terroristic threats, and cruelty to children. The State gave notice of its intent to offer evidence of other crimes or acts of Defendant under Rule 404(b) on August 24, 2016.⁹ Oral argument was heard on January 3, 2017. In light of the proffer made by the State at the hearing, and after considering the objections to the proffer by Defendant, the Court found that the April 12, 2009 incident was allowed.¹⁰ Specifically, the Court found the evidence of the

⁹ The State also sought to introduce evidence of two other incidents: a May 6, 2007 incident, in which the Defendant was charged with terroristic threats and possession of a firearm in committing a crime, and a January 4, 2007 incident, in which Defendant was charged with possession of a controlled substance, misdemeanor marijuana, and kidnapping.

¹⁰ The May 6, 2007 and January 4, 2007 incidents were not allowed because the evidence was not relevant for the purposes proposed by the State, and the probative value the evidence may have had with respect to the crimes charged under the Indictment was substantially outweighed by undue prejudice to Defendant.

April 12, 2009 incident admissible pursuant to O.C.G.A. § 24-4-404(b) for the purposes of proving motive, identity, and intent. Additionally, the Court provided a limiting instruction to the jury, both at the time the other act evidence was introduced and in the final charge to the jury, concerning the appropriate purposes for and the limitations upon the evidence. Having reviewed Defendant's arguments in his amended motion, the Court stands by its ruling on the other acts evidence.

V. THE COURT PROPERLY ADMITTED EVIDENCE OF A STATEMENT MADE BY THE DEFENDANT.

As addressed above, the Court finds it was proper to admit evidence of the statements made by Defendant to Detective Wiggins after Defendant invoked his right to remain silent. Defendant waived his Constitutional Rights after telling officers that he "needed" to speak with Detective Wiggins. Defendant was reminded that he had invoked his right to remain silent; however, Defendant clearly requested to speak with Detective Wiggins. Defendant initiated a conversation with Detective Wiggins subsequent to invoking his rights, and therefore, his statement was admissible.¹¹

VI. THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON A VIOLATION OF THE GEORGIA CONTROLLED SUBSTANCES ACT BY GIVING THE PROVISIONS OF BOTH O.C.G.A. § 16-13-30(a) AND (b).

Defendant contends the Court committed error by instructing the jury on a violation of the Georgia Controlled Substances Act by giving the provisions of both O.C.G.A. § 16-13-30(a) and (b), in reference to Count 10 of the Indictment charging Possession with the Intent to Distribute. In defining the alleged offense to the jury, the Court instructed:

The offense charged in this indictment – an offense charged in this indictment is a violation of the Georgia Controlled Substances Act which provides that it is unlawful for any person to A) possess or have under one's control or B) possess with intent to distribute any quantity of cocaine which is a controlled substance. Distribute means to deliver a controlled substance other than by administer or dispensing it. Intent to distribute means intent to unlawfully deliver or sell.

¹¹ See Footnote 8.

Defendant argues the Court's instruction was erroneous because it included a reference to simple possession of cocaine as a violation of the Georgia Controlled Substances Act, and thus could have misled the jury into convicting Defendant on possession with intent to distribute on evidence of simple possession.¹²

"While instructing the jury that a crime can be committed in a manner different from that charged in the indictment can constitute reversible error, a reversal is not mandated where . . . the charge as a whole limits the jury's consideration to the specific manner of committing the crime alleged in the indictment." McNorrell v. State, 338 Ga.App. 466, 789 S.E.2d 823 (2016), citing Machado v. State, 300 Ga.App. 459, 462, 685 S.E.2d 428 (2009).

Here, the Court read the indictment to the jury, instructed the jury that the State had the burden of proving every material allegation of the indictment beyond a reasonable doubt, further instructed the jury that it could find the Defendant guilty if it found beyond a reasonable doubt that he committed the offenses alleged in the indictment, and provided the indictment to the jury during its deliberations. When considered as a whole, these instructions limited the jury's consideration to the specific manner of committing the crime as alleged in Count 10 of the Indictment. Accordingly, the Court did not err in the Court's instruction on Count 10.

VII. THE COURT DID NOT ERR IN SENTENCING THE DEFENDANT SEPARATELY ON COUNT 2, AGGRAVATED BATTERY AGAINST ABRAHAM JOHNSON, AND COUNT 3, AGGRAVATED BATTERY AGAINST ABRAHAM JOHNSON.

Defendant argues that the Court committed error in sentencing Defendant separately on Count 2, Aggravated Battery against Abraham Johnson, and Count 3, Aggravated Battery against Abraham Johnson. Defendant contends that the two counts of aggravated battery should have merged for the purposes of sentencing because the counts stemmed from a single act against a single victim.

Under OCGA § 16-5-24(a), "[a] person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her

¹² Defendant's Motion for New Trial, As Amended, filed on October 25, 2018, p. 4.

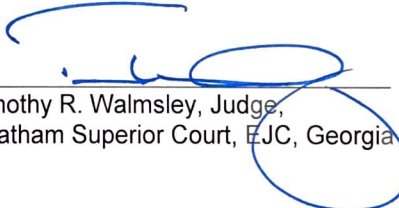
of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.”

Here, Defendant was charged of two separate counts of aggravated battery based on two separate acts of shooting the victim: Count 2 alleged that Defendant caused bodily harm to Abraham Johnson “by seriously disfiguring his right ear”; and Count 3 alleged Defendant caused bodily harm to Abraham Johnson “by seriously disfiguring his nose.” At trial, the State presented evidence that two separate and specific injuries occurred from two separate acts. Accordingly, the Court finds that it was proper to sentence the Defendant separately on the two aggravated battery convictions. See Ledford v. State, 289 Ga. 70, 71, 709 S.E.2d 239, 245 (2011) (separate convictions of aggravated battery predicated on separate blows to the victim’s body that caused separate injuries to the victim’s lung, head, face and larynx did not merge with each other).

CONCLUSION

For the reasons set forth above, the Court **GRANTS** Defendant’s Motion for New Trial (as amended).

SO ORDERED, this 27th day of July, 2020.



Timothy R. Walmsley, Judge,
Chatham Superior Court, EJC, Georgia

cc: David Lock, Esq.
Kristjan Whiteway, Asst. Dist. Atty.