REMITTITUR

SUPREME COURT OF GEORGIA

Case No. S17A1495 Atlanta, January 29, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM BURKE v. THE STATE

This case came before this Court upon an appeal from the Superior Court Court of DeKalb County and it is considered and adjudged that the judgment is affirmed and that the remittitur be transmitted with the attached decision.

All the Justices concur.

Lower Court Case No.
13CR148810

Costs paid: $80.00

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta February 13, 2018

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said Court hereto affixed the day and year last above written.

(A)

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	CASE NO. 13-CR-1488-10
v.	)	
	)	
WILLIAM BURKE,	)	
	)	
Defendant.	)	
	)	

ORDER DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

On February 14, 2013, a DeKalb County Grand Jury indicted Mr. William Burke ("Defendant") for Malice Murder, Felony Murder, Aggravated Assault, and Possession of a Firearm During Commission of a Felony, stemming from the November 25, 2012, shooting death of Mr. Andrew Daly ("Victim"). A jury trial was conducted from September 29-October 3, 2014.[1] The Defendant was found guilty of Felony Murder, Aggravated Assault, and Possession of a Firearm During Commission of a Felony. However, the jury found the Defendant not guilty of Malice Murder. The Court sentenced the Defendant to serve life plus 5 years in prison. The Defendant timely filed a Motion for New Trial on or about November 3, 2014, and amended it on or about February 4, 2016, and June 20, 2016 (all of which will now collectively be referred to as the "Motion for New Trial"). The Court heard the Defendant's Motion for New Trial on June 29, 2016. The State was represented by Mr. Lenny Krick and the Defendant was represented by Ms. Frances Kuo. On September 27, 2016, the Defendant, by and

[1] The Defendant's first trial commencing on August 11, 2014, resulted in a mistrial.

through new counsel, Mr. Long D. Vo, filed a Third Amended Motion for New Trial.[2] On October 7, 2016, the State filed its Response to the Defendant's Third Amended Motion for New Trial. Upon this Court's review of the record, transcripts, argument, citation of authority, and having made credibility determinations, the Court finds as follows:

Sufficiency of the Evidence and the General Grounds [3]

In a light most favorable to the jury's verdict, the evidence adduced at trial showed that on November 25, 2011, the Defendant had been drinking and appeared to be agitated.[4] The Defendant lived in Ms. Eva Sotus' house and Ms. Sotus was out of town that day. The Defendant used to date Ms. Sotus and seemed jealous of the victim. With Ms. Sotus' permission, the victim came over to the house later in the day. According to the Defendant, the victim asked the Defendant to come downstairs so the Defendant came downstairs with a gun. The Defendant claimed that the victim was tapping some nun-chucks that were on a table and that this meant that the victim was going to take his life; the nun-chucks were never in the

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[2] The Third Amended Motion for New Trial does not request that a hearing be conducted concerning the substance of the claims raised therein. Additionally, the letter accompanying the Third Amended Motion for New Trial indicates that the Defendant is not seeking another evidentiary hearing at this time. In Mullins v. State, 224 Ga. App. 218 (1997), the Georgia Court of Appeals held that it was not error for a trial judge to deny a defendant's motion for new trial where there was no rule nisi order or other request for a hearing.

[3] This portion of the Court's order addresses Grounds 1-2 of the Motion for New Trial filed on or about November 3, 2014; and Ground 4 of the Amended Motion for New Trial filed on or about February 4, 2016.

[4] See Adams v. State, 255 Ga. 356 (1986) (on an appeal of a criminal conviction, the evidence is to be viewed in the light most favorable to the prosecution, not in the light most favorable to the defendant).

victim's hands. Next, the Defendant shot and killed the victim. There were no signs of a struggle or fight and the Defendant did not see a gun on the victim. The Defendant was bigger than the victim. At one point, the Defendant wrote and posted information indicating that all of Ms. Sotus' boyfriends should take heed.

Considering all of the facts summarized above and proven beyond a reasonable doubt by the State at trial, the State adequately disproved the Defendant's justification defense which clearly authorized the jury to find the Defendant guilty of the crimes for which he was convicted. Jackson v. Virginia, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The determination of whether the State met its burden to disprove the Defendant's self-defense claim was for the jury to decide. Crayton v. State, 298 Ga. 792 (2016). Whether a defendant justifiably used deadly force is a jury question. See Timley v. State, 268 Ga. 611 (1997) (in reaching their decision that the defendant was not justified in using deadly force, the jury properly weighed the evidence and determined the credibility of all the witnesses who testified, including the defendant himself); Sifuentes v. State, 293 Ga. 441 (2013) (while the defendant maintained that he acted in defense of himself and his brother, it was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence). It was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence. Vega v. State, 285 Ga. 32 (2009). O.C.G.A. § 24-14-8 provides that the testimony of a single witness is generally sufficient to establish a fact and O.C.G.A. § 24-6-620 provides that the credibility of a witness shall be determined by the trier of fact. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

O.C.G.A. § 24-14-6. As long as there is some evidence, even though contradicted, to support each necessary element of the State's case, the appellate courts will uphold the jury's verdict. Huntley v. State, 331 Ga. App. 42 (2015). The presence or lack of criminal intent is for the jury to decide based on the facts and circumstances proven at trial. Thomas v. State, 320 Ga. App. 101 (2013). The trier of fact may find the requisite criminal intent upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. O.C.G.A. § 16-2-6.

An independent examination of the record also shows no basis for this Court to exercise its discretion to sit in as the "thirteenth juror" and grant the Defendant a new trial under the auspices of O.C.G.A. §§ 5-5-20, 5-5-21, and/or 5-5-25. See Alvelo v. State, 288 Ga. 437 (2011) (although the discretion of a trial judge to award a new trial on the general grounds is not boundless — it is a discretion that should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates heavily against the verdict). The Defendants' case is not an exceptional case in which the evidence preponderates heavily against the weight of the evidence. See Madaris v. State, 207 Ga. App. 145 (1993) (the trial judge alone has the authority to grant a new trial on the ground that the verdict is strongly and decidedly against the weight of evidence). The verdict rendered by the jury was not contrary to the evidence and the principles of justice and equity, as well.

Further facts will be addressed as necessary to more fully explain this Court's decision.

The Trial Court Error Claims [5]

The Court did not err in denying the Defendant's motion to dismiss pursuant to O.C.G.A. § 16-3-24.2. After conducting a full hearing and having made factual and credibility findings, the Court determined that the Defendant did not prove by a preponderance of the evidence that shooting the victim was necessary to prevent his death or to prevent the victim's unlawful entry/attack on his habitation. See State v. Bunn, 288 Ga. 20 (2010).

The Court did not err in denying the Defendant's Motion to Suppress Statements because after conducting a full hearing and listening to a tape of the custodial interview, the Court determined that the Defendant's Mirandized statements were made freely and voluntarily without the slightest hope of benefit or remotest fear of injury. The Defendant's statements were also the product of rational intellect and free will and the Defendant never made an unequivocal request for counsel. See Screws v. State, 245 Ga. App. 664 (2000) (the voluntariness of a custodial statement is determined based upon the totality of the circumstances and the burden is on the State to show the voluntariness of a custodial statement by a preponderance of the evidence).

[5] This portion of the Court's order addresses Ground 3 of the Motion for New Trial filed on or about November 3, 2014; Grounds 2, 3, 5, 6, 7, and 9 of the Amended Motion for New Trial filed on or about February 4, 2016; Grounds 10, 11, and 12 of the Second Amended Motion for New Trial filed on or about June 20, 2016; and Grounds 16-17 of the Third Amended Motion for New Trial filed on September 27, 2016.

The Court did not err in admitting evidence that the Defendant was drinking prior to the incident date, including arguments that the Defendant had with others about how drinking impacted his relationships. Even though an argument could be made about how this testimony may have incidentally placed the Defendant's character into evidence, it was needed to show intent, negate accident, and prove motive – relevant and material issues in the case. See Hernandez v. State, 304 Ga. App. 435 (2010) (testimony that one has drunk alcohol does not place one's character in issue); Brown v. State, 324 Ga. App. 718 (2013) (whether to admit evidence is a matter resting in the trial court's sound discretion, and evidence that is relevant and material to an issue in the case is not rendered inadmissible because it incidentally places the defendant's character in issue). This evidence was needed because the Defendant had a habit of drinking, acting up, and then apologizing for his behavior. Fearing for the victim's welfare, this evidence also showed why Ms. Sotus warned the victim not to go to her house. A limiting instruction on the permissible use of this evidence was provided to the jury, as well.

The Court properly exercised its discretion by admitting certain photographs of the Defendant's bedroom over the Defendant's relevance and prejudice objections. The photos served to show the layout of the bedroom along with the exit door; this was relevant as to whether the victim had a way out of the house. A close-up picture of an unsent Facebook message on the Defendant's bedroom computer was relevant to show the Defendant's state of mind around the time of the shooting.

The Court did not err in admitting State's Exhibit #24 and #63. State's Exhibit #24 was properly admitted to show that the Defendant was making threats. The record also shows that

State's Exhibit #63 was never admitted into evidence, so the Defendant's claim in that regard leaves nothing for this Court to decide.

The Court did not err in failing to ask counsel whether they had any exceptions to the jury charges. In a criminal case, the judge is not required to ask counsel whether they have any charge objections before the jury returns its verdict and a trial court's failure to inquire of counsel whether there are exceptions to the charge does not amount to reversible error. See Garrett v. State, 184 Ga. App. 593 (1987); Crenshaw v. State, 237 Ga. App. 511 (1999). Additionally, trial counsel testified that she would not have objected to any of the given jury charges.

The Court did not err in admitting the deceased victim's statements under O.C.G.A. § 24-8-807 because the victim's statements met all of the prongs required under the statute. See Sneiderman v. State, 336 Ga. App. 153 (2016) (non-testimonial hearsay evidence may be admitted under the necessity exception set forth in O.C.G.A. § 24-8-807).

The Court has also reviewed all of the above complained of evidentiary rulings for plain error. See Gates v. State, 298 Ga. 324 (2016). The Court finds that the requirements espoused in State v. Kelly, 290 Ga. 29 (2011), for determining plain error are lacking.

Furthermore, the crime of voluntary manslaughter is committed when one kills solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. O.C.G.A. § 16-5-2 (a). The provocation

necessary to support a charge of voluntary manslaughter is markedly different from that which will support a self-defense claim. The distinguishing characteristic between the two claims is whether the accused was so influenced and excited that he reacted passionately rather than simply in an attempt to defend himself. Only where this is shown will a charge on voluntary manslaughter be warranted. Allen v. State, 290 Ga. 743 (2012).

A review of the evidence presented not even a pretense of passion, much less that the Defendant acted solely as the result of a passion that was "sudden" and "irresistible." See Harris v. State, 2016 Ga. Lexis 580 (S16A1188, September 12, 2016). See also Bell v. State, 280 Ga. 562 (2006).

Moreover, the Malice Murder charge and the Felony Murder charge are predicated on the same facts. If the jury did not accept the lesser included charge of Voluntary Manslaughter under the Malice Murder charge, it stands to reason that they would not have as well for the Felony Murder charge.

The Ineffective Assistance Claims [6]

In order to prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must show that trial counsel's performance was deficient **and** that the deficient performance so prejudiced the defendant that there is a reasonable likelihood that, but for

[6] This portion of the Court's order addresses Grounds 1 and 8 of the Amended Motion for New Trial filed on or about February 4, 2016; and Grounds 13, 14, and 15 of the Second Amended Motion for New Trial filed on or about June 20, 2016.

counsel's errors, the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (emphasis added). See also Goodwin v. Cruz-Padillo, 265 Ga. 614 (1995) (failure to satisfy either prong of the Strickland standard is fatal to an ineffective assistance claim). A criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. Johnson v. State, 287 Ga. 767 (2010). Moreover, matters of trial tactics, even if they appear in hindsight to be questionable, are grounds to find counsel ineffective only if the tactical decision is so patently unreasonable that no competent attorney would have chosen it. See Dyer v. State, 295 Ga. App. 495 (2009). Although another lawyer may have conducted the defense in a different manner and taken another course of action, the fact that a defendant and his present counsel disagree with the decisions made by trial counsel does not require a finding that a defendant's original representation was inadequate. Cauley v. State, 203 Ga. App. 299 (1992). Hindsight has no place in an assessment of the performance of trial counsel, and when evaluating deficient performance, the proper inquiry is focused on what the lawyer did or did not do, not what he thought or did not think. Hartsfield v. State, 294 Ga. 883 (2014).

First, the Court starts with the premise that the Defendant's trial counsel, Ms. Letitia B. Delan, Esq., is a very experienced criminal defense attorney who has tried close to fifty felony cases. At the Motion for New Trial hearing, trial counsel testified that: (1) she spent a lot of time with the Defendant preparing for trial; (2) she interviewed a lot of witnesses in preparation for trial; (3) she reviewed all discovery before trial; (4) she and her investigator investigated the Defendant's case before trial; (5) she filed various motions; and (6) she went to the crime scene on multiple occasions. Second, the Court notes that the Defendant's first trial resulted in a

mistrial and the jury in the second trial found the Defendant not guilty of Malice Murder. This fact strongly supports the conclusion that trial counsel rendered reasonably effective assistance at trial. Powell v. State, 272 Ga. App. 628 (2005).

Contrary to the Defendant's assertion, the Defendant has the burden of proving self-defense by a preponderance of the evidence at an immunity hearing under O.C.G.A. § 16-3-24.2. See Bunn, 288 Ga. 20, 701 S.E.2d 138 (2010). Therefore, trial counsel was not ineffective for failing to argue that the State had the burden of proof at the immunity hearing. See generally Bradley v. State, 292 Ga. 607 (2013) (the failure to make a meritless objection cannot amount to ineffective assistance).

The Defendant maintains that his trial counsel was ineffective for failing to object to: (1) evidence of the Defendant's drinking; (2) certain pictures of the Defendant's bedroom tendered and admitted into evidence; and (3) State's Exhibits #24 and #63. However, this Court's review of the record shows that trial counsel did indeed lodge objections to the introduction of all the complained of evidence. Consequently, there is nothing for this Court to review in this regard.

Trial counsel was not ineffective for failing to call Mr. Jon Liebman to testify at the second trial because his testimony was cumulative of what another witness testified to at the second trial. Moreover, trial counsel testified that she would have called Mr. Liebman if she needed him. This amounts to trial strategy and there was no prejudice to the Defendant because the testimony was cumulative. See Strickland, supra.

Because the trial court provided the jury with a limiting instruction on the permissible use of O.C.G.A. 24-4-404 (b) evidence during the jury charge, trial counsel was not ineffective for failing to ask for a limiting instruction before the introduction of this evidence under Strickland, supra.

The Defendant lastly argues that trial counsel was ineffective in failing to ask for an involuntary manslaughter charge predicated on reckless conduct as a lesser included offense pursuant to O.C.G.A. § 16-5-3 (a). However, the intentional use of a gun, the deadly force of which is known to all is simply inconsistent with the lack of intent to kill which is a prerequisite in involuntary manslaughter. Harris v. State, 272 Ga. 455 (2000). Therefore, counsel was not ineffective under either prong of Strickland, supra.

Based on the foregoing, it is ORDERED that the Defendant's Motion for New Trial is hereby DENIED on each and every ground raised by the Defendant.

This 10 day of October, 2016.

The Honorable Tangela M. Barrie
Chief Judge, Superior Court of DeKalb County
Stone Mountain Judicial Circuit

For distribution:
Lenny Krick-ADA (prepared proposed Order)
Long D. Vo-GPDC-Appellate Division

Order was edited by the Court

Additional material from this filing is available in the Clerk's Office.