INDEX OF APPENDICES

FIRST DIVISION
BARNES, P. J.,
MCMILLIAN and REESE, JJ.

June 19, 2018

In the Court of Appeals of Georgia

A18A0696. BLACKWELL v. THE STATE.

REESE, Judge.

A jury found Kenneth Blackwell guilty of aggravated child molestation, aggravated sexual battery, and statutory rape.[1] The trial court sentenced Blackwell to life plus 20 years' imprisonment. Blackwell appeals from the denial of his amended motion for new trial, arguing, inter alia, that his trial counsel was ineffective in failing to object to the improper admission of child hearsay evidence. For the reasons set forth, infra, we affirm.

Viewed in the light most favorable to the jury's verdict,[2] the evidence presented at trial showed the following facts. In 2006, when the victim, K. S. was about seven

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[1] See OCGA §§ 16-6-4 (a) (1), (c); 16-6-22.2 (b); 16-6-3 (a).

[2] See *Rankin v. State*, 278 Ga. 704, 705 (606 SE2d 269) (2004).

years old, Blackwell began dating K. S.'s mother. At the time, K. S. and her family lived in Ohio. According to K. S., Blackwell "started to touch" her around that time, using his fingers to touch her breasts and her vagina. Two or three years later, when K. S. was nine or ten years old, Blackwell began having sexual intercourse with her.

In 2010, when K. S. was ten or eleven years old, her family and Blackwell moved to Gwinnett County, where the sexual intercourse and fondling continued. In addition, Blackwell began to force her to perform oral sex on him. According to K. S., the sexual abuse happened "[a] lot," but she did not tell her mother because she thought her mother would not believe her.

Then, in July 2012, when K. S. was 13 years old, Blackwell impregnated her, and she had to undergo a second-trimester abortion. According to K. S., she did not tell her mother that Blackwell was the man who had impregnated her, and her mother did not ask her who it had been. Blackwell, however, told K. S.'s mother that she had been raped by someone in the neighborhood. It is undisputed that neither K. S.'s mother nor Blackwell called the police to report the alleged rape.

Following the abortion, Blackwell continued to have sexual intercourse and oral sex with K. S. repeatedly until early May 2014, when she was 15 years old. About two weeks after the last time Blackwell sexually assaulted her, K. S. ran away from home

and went to a friend's house seeking a place to spend the night. According to K. S., she ran away because she was afraid for her own safety and that of her little sister, who was five or six years old at the time.

The friend's mother testified that K. S. told her "about the things [Blackwell was] doing to her" and that she had told her mother about the abuse several times, but her mother did not believe her. The friend's mother testified that K. S. had "told [her that] ever since she was [nine years old, Blackwell] had been touching her and he ha[d] sex with her and . . . made her perform oral sex on him and that she [had become] pregnant by him . . . when she was . . . 13 or 14 – and that the child . . . was . . . aborted[.]" The friend's mother, who was a police officer, called K. S.'s mother, who arrived shortly thereafter, and the police.

The Gwinnett County police officer who responded to the call, Angelica Grissom, testified at trial that she spoke briefly with K. S. at the friend's home. K. S. told Grissom that Blackwell

> started touching her when she was about [seven] years old and that he actually started inserting his penis or penetrating her when she was about [ten]. [K. S.] initially told [Grissom] that in the summer of 2013 she had an abortion. [H]er mom [told Grissom, however,] that she paid for an abortion in the summer of 2012. [K. S.] stated [that Blackwell] would normally come into her bedroom late at night when her mom was asleep.

> She stated that many times she was actually asleep herself and [Blackwell would] wake her up. [K. S. stated that the sexual abuse] happened for several years. [T]heir last encounter was about two weeks prior to th[e] report being filed with the police [in May 2014].

Grissom also testified that she asked K. S.'s mother if she believed K. S.'s claims about Blackwell, and the mother responded that she did.[3]

Detective Kim Riddle with the Gwinnett County Police Department's Special Victims Unit conducted a forensic interview of K. S. in June 2014. According to Riddle, K. S. said that the sexual abuse in Gwinnett County started in 2010 when she was in 6th grade and about eleven years old and that it continued "until two or three weeks prior to the report," i.e., early May 2014. In fact, K. S. specifically told Riddle that she had performed oral sex on Blackwell about two weeks before she reported the abuse. The State played a redacted video recording of the nearly two-hour forensic

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[3] To the extent this testimony constituted inadmissible hearsay or improper bolstering, Blackwell's trial counsel did not object to this testimony at trial, nor did Blackwell raise the failure to object as an ineffective assistance claim or raise this issue on appeal. Thus, any error in the admission of this statement was waived. See OCGA § 24-1-103 (a) ("Error shall not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected and[ ] a timely objection or motion to strike appears of record[.]"); *McGlocklin v. State*, 292 Ga. App. 162, 163 (664 SE2d 552) (2008) (failure to raise ineffective assistance claim in trial court constitutes waiver); *Cobble v. State*, 268 Ga. App. 792, 794 (2) (603 SE2d 86) (2004) (arguments not enumerated as error in brief are waived).

interview for the jury. During the interview, K. S. detailed the years of sexual abuse by Blackwell, telling Riddle that it happened "whenever [Blackwell] wanted it."

In addition to this evidence, K. S.'s younger brother, D. S., testified that he learned about his sister's assault after she reported it. According to D. S., she told him "that the small period of time when [Blackwell] was living with [them] in [Ohio,] . . . [Blackwell] would start feeling her and . . . she couldn't tell anybody because he threatened to kill all of [them.] [After they moved to Georgia,] it started picking up more and more[,] and eventually she had an abortion."

The State indicted Blackwell, charging him with committing the acts of aggravated child molestation, aggravated sexual battery, and statutory rape against the victim. According to each count, Blackwell committed these acts sometime between October 1, 2010, and May 1, 2014.

After Blackwell was convicted on all three of the charged crimes, he filed a motion for new trial. Blackwell's trial counsel testified at the motion hearing that he did not file a motion in limine or object to the admission of K. S.'s out-of-court statements because he did not believe he had a legal basis to object, given K. S.'s age when she made the statements and the fact that she was available to testify at trial.

The trial court denied the motion for new trial, ruling that K. S.'s out-of-court statements to her friend's mother, her brother, Grissom, and Riddle (hereinafter, "the hearsay witnesses") were admissible under the child hearsay statute because she was under 16 years old at the time she made the statements. The court also ruled that the statements were admissible as prior consistent statements. Thus, the court concluded that counsel's failure to raise a meritless objection did not constitute deficient performance. Blackwell appeals.

> On appeal from a criminal conviction, we view the evidence in the light most favorable to the verdict and an appellant no longer enjoys the presumption of innocence. This Court determines whether the evidence is sufficient under the standard of *Jackson v. Virginia*,[4] and does not weigh the evidence or determine witness credibility. Any conflicts or inconsistencies in the evidence are for the jury to resolve. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, we must uphold the jury's verdict.[5]

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[4] 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

[5] *Walker v. State*, 329 Ga. App. 369, 370 (765 SE2d 599) (2014) (punctuation and additional footnote omitted).

"The standard of *Jackson v. Virginia*,[6] is met if the evidence is sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt of the crime charged."[7]

> In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the client that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different.[8] The criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. We accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.[9]

"Since an appellant claiming ineffective assistance of counsel must show both deficient performance and actual prejudice stemming from that deficiency, an insufficient showing on either of these prongs relieves the reviewing court of the need

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[6] 443 U. S. at 319 (III) (B).

[7] *Bautista v. State*, 305 Ga. App. 210, 211 (1) (699 SE2d 392) (2010).

[8] *Strickland v. Washington*, 466 U. S. 668, 690 (III) (A) (104 SCt 2052, 80 LE2d 674) (1984).

[9] *Robinson v. State*, 277 Ga. 75, 75-76 (586 SE2d 313) (2003) (citations and punctuation omitted).

to address the other prong."[10] With these guiding principles in mind, we turn now to Blackwell's specific claims of error.

1. As an initial matter, we conclude that K. S.'s testimony was sufficient to prove Blackwell's guilt beyond a reasonable doubt, i.e., that he committed at least one criminal act in the manner alleged in each count of the indictment – aggravated child molestation,[11] aggravated sexual battery,[12] and statutory rape[13] – between October 1, 2010, and May 1, 2014.

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[10] *Riggins v. State*, 279 Ga. 407, 409 (2) (614 SE2d 70) (2005) (citation and punctuation omitted).

[11] See OCGA § 16-6-4 (c) ("A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which . . . involves an act of sodomy."); see also OCGA § 16-6-4 (a) (1) (applicable definition of child molestation).

[12] See OCGA § 16-6-22.2 (b) ("A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ . . . of another person without the consent of that person."); see also OCGA § 16-6-22.2 (a) ("For the purposes of this Code section, the term "foreign object" means any article or instrument other than the sexual organ of a person.").

[13] See OCGA § 16-6-3 (a) ("A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.").

It is axiomatic that "[t]he testimony of a single witness is generally sufficient to establish a fact."[14] Here, K. S. testified at trial that Blackwell repeatedly sexually assaulted her by, among other things, having sexual intercourse and oral sex with her throughout the applicable period while her family was living in Gwinnett County. Moreover, K. S. specifically testified that Blackwell impregnated her in 2012 and, as a result, she had to undergo a second-trimester abortion when she was only 13 years old. K. S's testimony regarding the pregnancy and abortion was supported by her medical records, as well as Blackwell's admission that he accompanied her and her mother to the clinic where the procedure was performed.[15]

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[14] OCGA § 24-14-8; see *Hammontree v. State*, 283 Ga. App. 736, 737 (1) (642 SE2d 412) (2007) (In a child molestation case, "[t]he victim's testimony alone sufficed to establish the elements of the crime charged.") (citations omitted); *Lewis v. State*, 275 Ga. App. 41, 42 (1) (619 SE2d 699) (2005).

[15] See OCGA § 16-6-3 (a) (A conviction for statutory rape requires that the victim's testimony be supported by other evidence.); see also *In the Interest of B. L. S.*, 264 Ga. 643, 644 (2) (449 SE2d 823) (1994) (Evidence was sufficient to uphold conviction for delinquency based upon statutory rape because "[i]t was not necessary that the victim's testimony be corroborated in every particular[.]") (citation omitted); *Davis v. State*, 204 Ga. App. 657 (1) (420 SE2d 349) (1992) (It is not necessary for the State to present evidence to corroborate the victim's identification of the defendant as the person who committed the statutory rape. "The quantum of corroboration needed in a [statutory] rape case is not that which is in itself sufficient to convict the accused, but only that amount of independent evidence which tends to prove that the incident occurred as alleged.") (citation and punctuation omitted).

Therefore, we find that K. S.'s testimony, as supported by her medical records and Blackwell's admission, was sufficient to authorize the jury's verdict that Blackwell was guilty beyond a reasonable doubt of the crimes as charged.[16]

2. Blackwell argues that his trial counsel was ineffective for failing to object to K. S.'s testimony about sexual abuse that took place in Ohio because the trial court lacked subject matter jurisdiction over those crimes. Any objection would have been futile, however, as this evidence was admissible to show the prior difficulties between Blackwell and the victim under OCGA § 24-4-404 (b).[17]

"Unlike similar transactions, prior difficulties do not implicate independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected

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[16] See *Lewis*, 275 Ga. App. at 41-42 (1) (In a child molestation case, the underage victim's testimony that her stepfather fondled her and engaged in oral sex and sexual intercourse with her over a period of years was corroborated by a friend's testimony that she witnessed at least one instance of oral sex and other witnesses confirmed other sexually suggestive conduct between the defendant and victim.).

[17] See *Lopez v. State*, 332 Ga. App. 518, 520 (2) (773 SE2d 787) (2015).

by such nexus."[18] Thus, because the evidence was admissible in this case, Blackwell has failed to show deficient performance by counsel.[19]

3. Blackwell argues that his trial counsel was ineffective in failing to file a motion in limine to exclude the out-of-court statements K. S. made to the hearsay witnesses about any acts of sexual assault he committed against her prior to July 1, 2013. In a related argument, Blackwell contends that his trial counsel was ineffective in failing to object to that hearsay testimony at trial. According to Blackwell, the out-of-court statements were inadmissible under the Child Hearsay Statute because, at the time those acts were committed, the hearsay exception only applied to statements made by a child under the age of 14 years, and K. S. was 15 years old when she made her initial outcry.

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[18] *Lopez*, 332 Ga. App. at 520 (2) (The notice requirement of OCGA § 24-4-404 (b) does not apply to evidence of prior difficulties between the accused and the alleged victim.); see also OCGA § 24-4-414 (admissibility of evidence of prior acts of child molestation committed by the defendant); Uniform Superior Court Rule 31.1 (procedural rules for the admission of similar transaction evidence).

[19] See *Anglin v. State*, 302 Ga. 333, 343 (8) (806 SE2d 573) (2017) ("The failure to pursue a futile objection does not amount to ineffective assistance.") (citation and punctuation omitted).

As shown above, the indictment charged Blackwell with sexually assaulting the victim between October 2010 and May 2014. Thus, two different versions of Georgia's Child Hearsay Statute apply in this case.

(a) For the acts of sexual assault that Blackwell committed against K. W. between July 1, 2013, and May 1, 2014, OCGA § 24-8-820 applied.[20] Pursuant to that statute,

> [a] statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, . . . and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.

The record shows that the statute's notice and procedural requirements were met in this case. Thus, as Blackwell appears to concede in his brief, any out-of-court

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[20] See Ga. L. 2013, p. 222, §§ 13 (revising OCGA § 24-8-820), 21 ("This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.").

statements made by K. S. to the hearsay witnesses about acts of sexual abuse committed by Blackwell between July 1, 2013, and May 1, 2014, were admissible under OCGA § 24-8-820.

(b) For acts of sexual assault that were committed against K. S. before July 1, 2013, former OCGA § 24-3-16 applied.[21] That statute provided:

> A statement made by a child under the age of 14 years describing any sexual contact or physical abuse performed with or on the child by another . . . is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.[22]

Thus, Blackwell is correct that the hearsay witnesses' testimony recounting statements made by K. S. about acts of sexual abuse by Blackwell that occurred before July 1,

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[21] See OCGA § 24-8-820; see also *State v. Walker*, 342 Ga. App. 733, 733-734 (805 SE2d 262) (2017). The Georgia General Assembly substantially reenacted former OCGA § 24-3-16 (redesignating the statute as OCGA § 24-8-820) when it enacted the new Evidence Code. See Ga. L. 2011, p. 99, § 2. The new Evidence Code had an effective date of January 1, 2013. See Ga. L. 2011, p. 99, § 101. Thus, the former version of OCGA § 24-8-820 technically applied to acts committed in this case between January 1 and July 1, 2013. Given the "nearly identical" language in former OCGA § 24-3-16 and former OCGA § 24-8-820, see *Laster v. State*, 340 Ga. App. 96, 99 (1) n. 2 (796 SE2d 484) (2017), the instant analysis is the same under both statutes.

[22] See Ga. L. 1995, p. 937, § 1.

2013, were not admissible under OCGA § 24-3-16, because K. S. was 15 years old at the time she made the statements.

Pretermitting whether Blackwell's trial counsel's performance was deficient in failing to object to this evidence, however, we find that Blackwell has failed to show that there is a reasonable probability that the outcome of the trial would have been different if the evidence had been excluded.[23] Here, the hearsay witnesses' testimony recounting K. S.'s statements about sexual abuse that occurred prior to July 1, 2013, was merely cumulative of K. S.'s trial testimony and other evidence in this case, all of which was both admissible at trial and sufficient to sustain the jury's verdict.[24] As this Court has repeatedly held, the failure to object to hearsay evidence that is merely cumulative of other, properly admitted evidence is harmless and, thus, does not constitute ineffective assistance of counsel.[25] Consequently, Blackwell has failed to

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[23] See *Robinson*, 277 Ga. at 75-76.

[24] See Division 1, supra.

[25] See, e.g., *Thomas v. State*, 296 Ga. App. 170, 174 (2) (c) (674 SE2d 56) (2009); *Sullivan v. State*, 295 Ga. App. 145, 151-152 (4) (671 SE2d 180) (2008); *Currington v. State*, 270 Ga. App. 381, 387 (4) (606 SE2d 619) (2004); *Ingram v. State*, 262 Ga. App. 304, 305 (2) (585 SE2d 211) (2003).

meet his burden of demonstrating prejudice that arose from the improper admission of this evidence.[26]

4. Similarly, Blackwell contends that the judgment of conviction is void ab initio because it cannot be discerned whether the jury improperly considered evidence of the Ohio incidents in reaching its verdict.

Pretermitting whether such consideration would have been improper,[27] each count in the indictment accused Blackwell with committing the charged act "in the State of Georgia and County of Gwinnett, on and between the 1st day of October, 2010 and the 1st day of May, 2014[.]" In the jury charge, the trial court read the indictment to the jury and specifically instructed the jury that venue in Gwinnett County had to be proven by the State beyond a reasonable doubt as to each crime charged in the indictment. The court properly instructed the jury, and we must presume that the jury followed this instruction in the absence of evidence to the contrary.[28]

Judgment affirmed. Barnes, P. J., and McMillian, J., concur.

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[26] See *Brown v. State*, 332 Ga. App. 635, 638 (2) (774 SE2d 708) (2015) ("Failure to satisfy either prong of the *Strickland* standard is fatal to an ineffective assistance claim.") (citations omitted).

[27] See Division 2, supra.

[28] See *Brown v. State*, 300 Ga. 446, 449 (3) (796 SE2d 283) (2017).

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	
	*	
v.	*	INDICTMENT NO. 14-B-4420-10
	*	
KENNETH BLACKWELL,	*	
Defendant	*	

ORDER DENYING MOTION FOR NEW TRIAL

This matter came before the Court on Defendant's Amended Motion for New Trial. A hearing on this matter was conducted on May 25, 2017. The State of Georgia was represented by Assistant District Attorney Lee F. Tittsworth. The Defendant and his appellate counsel, Francis Kuo, were also present. During that hearing, appellate counsel Francis Kuo withdrew the claims in Amended Motion for New Trial, number six (6). With regard to the remaining allegations, the Court has considered the Motion, evidence presented at the hearing, argument of counsel, all matters of record and the applicable and controlling law. For the reasons discussed herein, the motion for new trial is **DENIED**.

1. The trial court admitted statements made by K.S. describing acts of sexual conduct. Those statements were made at a time when K.S. was 15 years old and described sexual abuse that occurred from 2006 until a few weeks before May 24, 2014.

All statements of abuse that occurred Sunderland Drive were admissible under the Child Hearsay Statute, O.C.G.A. § 24-8-820. The current version of the Child Hearsay Statute was applicable during that time period and K.S. was under that age of sixteen (16) years.

All statements, those pertaining to occurrences at Sunderland Drive and all prior residences, were admissible as Prior Consistent Statements, O.C.G.A. § O.C.G.A. 24-8-801(d)(1)(A).

The Court finds that trial counsel challenged the victim's credibility by making an implied charge of improper motivation. Trial counsel questioned K.S. about her desire to leave her mother's residence, K.S.'s success in leaving her mother, and whether K.S. recanted once she was successful in leaving her mother. The implied charge was that claiming that she was being molested in her mother's home by her mother's boyfriend would allow Kira to escape the home and live with her Aunt Ivy.

As such, the State was permitted to introduce statements that pre-dated K.S.'s motivation to leave her mother. The State showed that K.S.'s true motivation to leave her mother's residence was her mother's violence against her younger brother. The State showed numerous statements made by K.S. that pre-dated that motivation.

Furthermore, it would have been improper for the Court to forbid such testimony regarding out-of-court statements in the absence of an objection. O.C.G.A. § 24-8-802 provides that if no objection to hearsay is made, the evidence is legal and admissible. While these statements were non-hearsay under O.C.G.A. § 24-8-801(d)(1)(a), the Court could not have committed plain error by admitting the purported hearsay evidence. Accordingly, defense's allegations in his Amended Motion for New Trial, numbers two (2) and four (4) are **DENIED**.

2. The trial court admitted the business records of Summit Medical Health Center. These records were (1) made at or near the time of the described acts, events, opinions, and diagnoses, (2) made by a person with personal knowledge and a business duty to report, (3) kept in the course of regularly conducted business activity, and (4) it was the regular practice of Summit Medical Health Center to make the record. This was certified by a records custodian. State's Exhibit 1 was properly admitted under the "Business Records Exception" of the hearsay rule, O.C.G.A. § 24-8-803(6). Accordingly, defense allegations in his Amended Motion for New Trial, number seven (7) is **DENIED**.

3. The trial court heard testimony from Francine Stith, Ed Kirchner, and John Stolzberg regarding allegations that Barbra Bibbs was excluded from the courtroom. Weighing the credibility of those witnesses, the Court finds the

testimony of Ed Kirchner and John Stolzberg to be credible. The Court further finds the testimony of Francine Stith, defendant's mother, to be incredible. Bailiff Stolzberg testified that he has been instructed to let everyone in to the courtroom for proceedings and that he follows those instructions. The Court finds that the Bailiffs Stolzeberg and Kirchner did not bar Barbra Bibbs from the courtroom.

Even had Ms. Bibbs been excluded from the courtroom, the matter was never brought to the Court's attention. The failure to object to the alleged closure of the courtroom waives Blackmon's right to assert it as error. Delgado v. State, 2987, Ga. Ap. 273, 279-280. Accordingly, defense allegations in his Second Amended Motion for New Trial, number eight (8) is **DENIED**.

4. During the trial, the Court admitted evidence of prior difficulties between K.S. and Blackwell. The indictment returned by the Gwinnett Grand Jury alleges that the crimes occurred "in the State of Georgia and County of Gwinnett." During the final charge to the jury, the Court charged that the jury was required to find that venue was proper in Gwinnett County beyond a reasonable doubt. The Court has no doubt that the jury followed the law charged to them. The Court did not commit error by admitting the prior difficulties and the admission of those acts do not undermine the Court's confidence in the jury's verdict. Accordingly, defense

allegations in his Second Amended Motion for New Trial, numbers ten (10) and eleven (11) are **DENIED**.

5. The Court also admitted evidence of a prior conviction of the defendant for impeachment purposes. At the time of trial, the Court found that the probative value of the crime outweighed its prejudicial effect. To the extent that the Court omitted the word "substantially," the Court did then and does now find that the crimes involved deception and the probative value of those crimes substantially outweighed their prejudicial effect.

At the hearing on the Motion for New Trial, the State showed that the crimes presented did not actually eclipse the ten (10) year barrier imposed by O.C.G.A. 24-6-609(b). The Court now finds that the only finding required was that the prior convictions probative value outweighed its prejudicial effect. Accordingly, defense allegation in his Third Amended Motion for New Trial, number thirteen (13) is **DENIED**.

6. In the remaining allegations, the defendant claimed that he received ineffective assistance of counsel.

Under Strickland v. Washington, 466 U.S. 668, (1984), a two-part test exists for determining whether a Defendant's trial counsel was ineffective. The first

prong of the test is whether the attorney's representation in specified instances fell below an objective standard of reasonableness. This is a high standard for the Defendant to meet as there is a strong presumption that trial counsel's conduct falls within the wide range for reasonable professional performance and that any challenged action might be considered sound trial strategy. Jackson v. State, 230 Ga. App. 292 (1998).

The second prong of the test is whether, but for trial counsel's unprofessional conduct, there is a reasonable probability that the outcome of the trial would have been different. The Defendant must show how counsel's alleged ineffectiveness harmed his case. To simply state that he was convicted is not enough to meet this standard. The Defendant must prove that there is a reasonable probability that the outcome of his trial would have been different had the trial counsel done what the Appellant asserts that he should have done.

There is a long-standing rule in Georgia that a Defendant is not entitled to errorless counsel, but counsel reasonably likely to render reasonably effective assistance. Slade v. State, 270 Ga. 305 (1998). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689-690. It is also important to remember that the Defendant is entitled to

a fair trial, not a perfect one, as there are no perfect trials. Green v. State, 218 Ga. App. 648 (1995).

Additionally, counsel's performance is not to be judged in hindsight, particularly in matters of trial strategy or tactics. Slade v. State, 270 Ga. at 307 (citing Williams v. State, 214 Ga. App. 106 (1994)). "The decisions on which witnesses to call, whether and how to conduct cross examinations, what jurors to accept or strike, what trial motions should be made, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with his client." Cheesman v. State, 230 Ga. App. 525 (1998).

"In every criminal case, there is a strong presumption that trial counsel provided effective representation for the Appellant." Flanigan v. State, 269 Ga. 160, 162 (1998). See also Dewberry v. State, 271 Ga. 624, 625 (1999) and Smith v. Gaither, 274 Ga. 39 (2001) ("We must uphold that finding on appeal unless it is clearly erroneous."). The appellate courts review a trial court's findings regarding ineffective assistance of counsel under a clearly erroneous standard. Hunter v. State, 281 Ga. 526 (2007); Benjamin v. State, 322 Ga. App. 8 (2013).

It should be remembered that Georgia Courts have not allowed a Defendant to complain about representation of counsel when it was the Defendant's lack of cooperation that contributed to the deficiency alleged in their trial counsel's

preparation. Reynolds v. State, 231 Ga. App. 33 (1998)(citing Jefferson v. State, 209 Ga. App. 859 (1993)).

Finally, the opinion of counsel, including appellate counsel, as to what they would have done differently is not appropriate evidence or argument in an allegation of ineffective assistance. Jefferson v. Zant, 263 Ga. 316, 318 (1993) (The opinion of other attorneys regarding trial counsel's performance is irrelevant to a determination of ineffective assistance). Even trial counsel's opinion in hindsight is irrelevant regarding whether the defendant received ineffective assistance of counsel. Simpson v. State, 298 Ga. 314, 318 (2016). "If a *reasonable lawyer* might have done what the actual lawyer did - whether for the same reasons given by the actual lawyer or different reasons entirely - the actual lawyer cannot be said to have performed in an objectively unreasonable way." Shaw v. State 292 Ga. 871, 875 (2013).

Trial counsel testified at the motion for new trial hearing. During his testimony trial counsel established that he is an experienced trial attorney, having tried ten or more serious violent felonies and four or more sexual offenses.

Defendant alleges that he received ineffective assistance of counsel because trial counsel failed to object to out-of-court statements of K.S. admitted through the testimony of Halekia Helm, D.S., Angelica Grissom, and Kim Riddle. As

stated in section one (1) of this Order, such testimony was admissible as a prior consistent statement and highly relevant to the matter before the jury. The failure of trial counsel to make a meritless objection cannot be used to show that trial counsel's performance fell below an objective standard of reasonableness. Hayes v. State, 262 Ga. 881 (1993). Furthermore, trial counsel stated that he made a strategic decision to allow the out-of-court statements in to evidence, as he could exploit the inconsistencies and allege anything overly consistent to be evidence that K.S. had been coached to make these allegations. Accordingly, defense allegations in his Amended Motion for New Trial, numbers one (1) and three (3) are **DENIED**.

Defendant alleges that he received ineffective assistance of counsel because trial counsel failed to move in limine to bar the testimony of Anique Whitmore on relevance grounds. The Court finds that the testimony of Ms. Whitmore helped the jury understand the scientific research on delayed disclosure, relationship of K.S. with Blackwell, the grooming process, the demeanor of K.S., forensic interviews, and K.S.'s memory. The Court finds that testimony to be highly relevant to issues before the jury. The failure of trial counsel to make a meritless objection cannot be used to show that trial counsel's performance fell below an objective standard of

reasonableness. Id. Accordingly, defense allegations in his Amended Motion for New Trial, number five (5) is **DENIED**.

Defendant alleges that he received ineffective assistance of counsel because trial counsel failed to move in limine to exclude evidence of Blacwell's sexual contact with K.S. occurring in Ohio. As discussed in section four (4) of this Order, evidence of the prior difficulties between K.S. and Blackwell was properly admitted. The failure of trial counsel to make a meritless objection cannot be used to show that trial counsel's performance fell below an objective standard of reasonableness. Id. Accordingly, defense allegations in his Second Amended Motion for New Trial, number nine (9) is **DENIED**.

Defendant alleges that he received ineffective assistance of counsel because trial counsel failed to object to the trial court's ruling admitting Blackwell's prior conviction for impeachment purposes. As discussed in section five (5) of this Order, evidence of defendant's prior convictions were substantially more probative than prejudicial as they involved acts of deception. Trial counsel did object to the admission of any and all of Blackwell's prior convictions for impeachment purposes. Even had trial counsel failed to object, the failure of trial counsel to make a meritless objection cannot be used to show that trial counsel's performance fell below an objective standard of reasonableness. Id. Furthermore, trial counsel

testified that he questioned Blackwell concerning his prior convictions in an effort to "remove the sting" from the prosecution's presentation. Trial counsel was able to introduce the convictions using his own terminology, rather than ceding the presentation to the prosecutor, who used language more harmful to his client. This act of trial strategy and tactics was not unreasonable. Accordingly, defense allegations in his Third Amended Motion for New Trial, number 12 is **DENIED**.

Having denied allegations one (1) through five (5) and seven (7) through thirteen (13), and allegation six (6) having been withdrawn, the entirety Defendant's Motion for New Trial is **DENIED**.

SO ORDERED this 12 day of June, 2017.

Laura Tate, JUDGE
Superior Court of Gwinnett County
By designation

PREPARED BY:

Lee F. Tittsworth
Assistant District Attorney
Gwinnett Judicial Circuit

Court of Appeals of the State of Georgia

ATLANTA, July 12, 2018

The Court of Appeals hereby passes the following order:

A18A0696. KENNETH BLACKWELL v. THE STATE.

Upon consideration of the Motion for Reconsideration filed in the above-styled case on behalf of the Appellant, the motion is hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, 07/12/2018
I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen, *Clerk.*

SUPREME COURT OF GEORGIA
Case No. S18C1635

Atlanta, April 01, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KENNETH BLACKWELL v. THE STATE

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur.

Court of Appeals Case No. A18A0696

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I 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.

, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

STATE OF GEORGIA,

-vs-

KENNETH BLACKWELL,

Defendant.

CRIMINAL CASE
FILE NO. 14-B-4420-10

CERTIFIED COPY

Continued Transcript of the Jury Trial
held before the Honorable Warren P. Davis
at the Gwinnett Justice and Administration Center
on the 1st, 2nd, 3rd, and 4th days of August 2015.

VOLUME 2 OF 3

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I-N-D-E-X

EXAMINATION

And the State and the defense ready with their opening?

MS. HENRICH: Yes, Your Honor.

MR. STROZIER: Yes, Judge.

THE COURT: You may proceed.

MS. HENRICH: Whenever he wanted it. That's what she said. And she's 15. Whenever this man wanted it, he got it. And that's what we're here about. I know we had a last long day and a half spending time together, picking a jury. Okay. But what we're here about is about the actions of this man and what he did to Kira Spisak, a child.

Now, we are talking about a lot of different things in this case. We're going to talk about what he did to her. Okay. Now, you're going to hear from Kira. You're going to hear from her brother Davon. And you're going to hear about some members of their family and about what happened.

Before we get too much further down the road, take notes and listen. This is not YouTube. You can't get an instant replay necessarily all the time on what people had said. There's no stop and rewind button necessarily. So what I'm trying to say is pay attention the first time. Okay. And I would ask that you do so.

Now, we're going to hear from Kira. Now, Kira is

about 17 now. She's going to tell you about what happened to her. Okay. Let's talk about the family here. We have Kira Spisak; her mom Faith; her younger brother, Davon Spisak; and their other two siblings, another sibling named Asia and another littler sibling named Elijah. Okay.

Kira's mother is Faith. Faith began a relationship with this man, with Kenneth Blackwell. They were in Ohio at this time. You're going to hear from Kira that when she's about 7 years old, she had contact with the defendant, they were living together at that time, that he would begin to touch her body. She's going to describe that to you. It happened outside the Burger King. Or it happened after they had gone to Burger King -- they had gone. He starts talking to her about how he's going to make sure she knows what it feels like when somebody touches her to help prepare her for that. This is when she's about 7. He starts touching her body, her chest and other parts of her body. Then goes further than that.

You know, when I asked about sexually explicit language, this is not polite. Okay. Let me be real with you. There's nothing about this that is going to be polite. Okay. This is not a polite conversation. But it is what happened. Okay. This defendant started taking sex toys, started putting it in the vagina of Kira, who is

about 7 or 8 years old. It goes past that point. They're still in Ohio at this point. It goes past that point.

Now, at some point, they move down here to Gwinnett County. Okay. Now, first it was Faith and Asia and Kira and Elijah and Davon. They come down to Gwinnett County and they start living down here. The defendant comes a little bit later. Okay. But they move down here. They get an apartment. First stay in a hotel. They stay in a place called Bradford apartments and then eventually go to stay in a place called Los Colinas, which is an apartment building here in Gwinnett County. They stay there. Eventually the defendant joins them. He is staying in the apartment with them.

You're going to hear about how again it started up again. Started touching on her. And at this point, he starts having sex with her. When I say sex, I mean vaginal-penile penetration. He starts having sex with her. She's going to describe how. And this happened a lot. Okay. This is not a one time occurrence. This happened a lot. Again, whenever he wanted it. Okay. He would come into her bedroom sometimes. He did it different ways. It didn't happen all the same way all the same time. But she does talk about how he would come into the bedroom and bring her on the floor -- the bedroom that she shared with Asia -- bring her on the floor and start

MS. HENRICH: Yes, Your Honor. The State would call Kira Spisak to the stand.

(Whereupon, there was a brief pause for witness retrieval.)

KIRA SPISAK,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HENRICH:

Q. And you can lower your hand now. Kira, I ask that you pull yourself up to the microphone.

Okay. I want you to spell and state your name?

A. My name is K-I-R-A, S-P-I-S-A-K, pronounced Kira Spisak.

Q. Spisak. Okay. Kira, how old are you?

A. 17 now.

Q. 17 now. And when is your date of birth?

A. February 7th, 1999.

MS. HENRICH: May I approach, Your Honor?

THE COURT: You may.

MS. HENRICH: Hand you a cup of water.

THE WITNESS: Thank you.

BY MS. HENRICH:

Q. Now, Kira, I want to talk about some people that you know. Start off with some easy questions. Okay. Who is Davon

Spisak?

A. My brother.

Q. And how old is Davon?

A. He is 15.

Q. 15. So younger than you?

A. Yes, ma'am.

Q. Do you have any other brothers and sisters?

A. I have a brother named Elijah and a sister named Asia.

Q. And who is your mother?

A. Faith Spisak.

Q. Of the children that you just mentioned, is Faith Spisak the mother to all those children?

A. Yes, ma'am.

Q. Who's the oldest out of all those children?

A. I am.

Q. How old is Asia?

A. She is 7 or 8 now.

Q. What about Elijah?

A. 5 or 6.

Q. I want to talk about somebody else. Do you know anybody named Kenneth Blackwell?

A. Yes, ma'am.

Q. Do you see Mr. Blackwell present in court?

A. Yes, ma'am.

Q. Can you please identify what he is wearing for the Court?

A. A black suit with a blue shirt and a red and blue tie.

MS. HENRICH: Let the record reflect that the witness has identified the defendant.

BY MS. HENRICH:

Q. Kira, in regards to Mr. Blackwell, how did you even know him?

A. He dated my mother.

Q. And when did they start dating?

A. Around the time I was 6 or 7-ish.

Q. 6 or 7-ish?

A. Yes, ma'am.

Q. Again, I'm going to ask that you use your big girl voice. Okay. Talk into the microphone, okay, if you need to, okay, so everybody can hear you.

So about when you're 6 or 7. Started dating. Where were you physically living at that time?

A. In Ohio.

Q. In Ohio. Generally what part of the Ohio?

A. Somewhere near Cleveland.

Q. Near Cleveland. Is your family originally from the Ohio area?

A. Yes, sir.

Q. So they started dating. Now, at that time, was Asia or Elijah in the picture?

A. No, ma'am.

Q. Was Asia born later?

A. Yes, ma'am.

Q. Who is Asia's father?

A. My stepdad.

Q. Now, time period at 6 or 7 at the point in time, okay, in Ohio, did there come a point in time where the defendant resided with you?

A. Yes, ma'am.

Q. Was that in Ohio?

A. Yes, sir.

MR. STROZIER: Your Honor, she's using leading questions.

THE COURT: Okay. And sustained.

MS. HENRICH: Okay. I'm trying to get to a point, but we're getting there.

THE COURT: I understand.

BY MS. HENRICH:

Q. What kind of residence did you live in in Ohio?

A. An apartment.

Q. An apartment. Okay. At the time he was living there, who was all living in the apartment?

A. My mother and my brother.

Q. Now, what was your relationship with Mr. Blackwell like at that point?

A. Can I have clarification?

Q. Okay. Let me ask you this way: Did you get along with him?

A. We didn't really speak --

Q. Okay.

A. -- during that first year of residing together.

Q. Okay. Now, living with him -- I want to ask you this question: Did there come a point in time when something happened physical?

A. Yes, ma'am.

Q. What happened?

A. When I was around 7, he started to touch me.

Q. Okay. Now, are we still in Ohio?

A. Yes, ma'am.

Q. And how did that happen?

A. Clarification, please?

Q. Okay. Well, let me ask you a better question. How did he physically do that to your body? What did he do with his body?

A. He used his fingers to touch my body.

Q. What part of your body?

A. My breast and under my waist.

Q. Under your waist?

A. Yes, ma'am.
Q. What part of your body are you talking about?
A. Vagina.
Q. Roughly how old were you when that happened?
A. 7.
Q. When that happened, how did your body feel?
A. Clarification, please.
Q. How did his touching make your body feel?
A. It made me feel uncomfortable, but I don't remember my body having a reaction to it.
Q. Okay. Now, did there come a point in time where --
MR. STROZIER: Your Honor, no leading questions.
THE COURT: You're rephrasing; correct?
MS. HENRICH: Yes, I was actually.
THE COURT: Thank you.
BY MS. HENRICH:
Q. How many times did that happen in Ohio?
A. It occurred for a year, so a lot.
Q. A lot. Okay. Now, other than the touching that you described, what else happened?
A. Also sex.
Q. Okay. Okay. Be clear. What state are we still in?
A. In Ohio.
Q. And you say sex. What do you mean?
A. Like penis in vagina.

Q. Okay. How old were you at the time?

A. Around 9 or 10.

Q. Okay. Now, you described a penis in your vagina. What, if anything, else did he place into your body?

A. Also toys.

Q. Okay. What do you mean when you say toys?

A. Like dildos.

Q. Okay. Okay. Now, living in Ohio. Okay. Was there a point in time when you moved to Gwinnett County?

MR. STROZIER: Another leading question, Judge. I've let a few of them go but ..

THE COURT: I'm going to overrule that. You may answer the question.

THE WITNESS: Can you restate the question?

BY MS. HENRICH:

Q. Did there come a point in time when you moved to Gwinnett County?

A. Yes, ma'am.

Q. When was that, roughly?

A. My 5th grade year.

Q. Where did you move to? Do you remember?

A. I moved to an apartment called Bradford.

Q. Okay. And who all moved?

A. In the beginning, me, my brother, and my little sister.

THE COURT: Please be seated.

The State ready to proceed with its closing argument?

MS. HENRICH: Yes, Your Honor.

THE COURT: You may proceed.

MS. HENRICH: Whenever he wanted it. That's what she said. That's what she said on her interview. That's what she said in court. Pretty much started talking about it happened all the time. Whenever he wanted it. Whenever this man wanted to take advantage of that child. That's what this case has been about. Okay.

We're going to talk a little bit about the law, basically, the beginning part of my closing argument. I have what is called the opening part of the closing, if that makes sense. And usually during the opening part of the closing, what I typically talk about mainly is the law that you can consider. The Judge is actually going to instruct you upon the law. But I want to go over some parts of law with you that I want you to consider when you consider the law and the facts together in this case.

Let's talk about what is this case about. It's about a betrayal of trust by the defendant. He betrayed her trust. Called himself a dad to her; right? He betrayed that to her. It's also a crime of opportunity. He would isolate this child, drive her around, take advantage of her. And that's what she said and that's what her brother

corroborated. That is what this case is about.

Let's talk about some of the facts in this case. Around 2010 to May 2014, that's the time frame we're talking about. Facts are Kira's date of birth is July -- what did she say -- 2nd, 1999. She's 17 now. This started when she was about 7. It started in Ohio. Absolutely no evidence that she's married to the defendant. I'm telling you this because on one of the charges, that's actually one of the things that I have to prove to you. We have no evidence of that.

Began in Ohio. Now, the defendant is Faith's boyfriend. That's mom. Okay. He lived with them in Ohio. Touching. Then inserting his fingers into her vagina. It then proceeds to oral sex. It then proceeds to vaginal sex.

Kira's family moved down to Georgia. They live in Bradford. They move to Los Colinas. And then they move to the Sunderland Drive house. Now, if she is making all this up now -- two thousand and, what, sixteen -- what is today? August the 4th? August 5th, 2016. If she's making that all up now, why wouldn't she have said it happened at the Bradford apartment? She was very clear that it did not. Okay. She's clear on her details. She told you that. He joins them. He moves in. He moved in with them into the Los Colinas apartment. He's also did

IN THE SUPERIOR COURT FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
	)	CRIMINAL ACTION
-vs-	)	FILE NO. 14-B-4420-10
	)	
	)	
KENNETH BLACKWELL,	)	CERTIFIED COPY
	)	
Defendant.	)	

Transcript of the Motion for New Trial before the Honorable Laura Tate presiding by designation for the Honorable Warren P. Davis, held at the Gwinnett Justice and Administration Center on the 25th day of May, 2017.

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business record exception.

Moving to Point 8, you have the testimony of the defendant's mother in this case, who's keenly interested in the outcome of the case, versus bailiffs, who have no ties to the defendant, no reason to slant their testimony one way or the other. Notably, you didn't hear from Ms. Bibbs, the person who was actually alleged to have been excluded. The bailiffs told you, though, that they had no discretion of who they allow into the courtroom, that it is purely up Your Honor and that they had been instructed to allow everyone in.

I would argue that this is a waiver case, and I have two cases to support that. The first is ***Delgado v. State***. It is D-E-L-G-A-D-O, 287 Ga. App. 273. And I previously provided a copy to Ms. Kuo.

Judge, if I could just have blanket permission to approach?

THE COURT: You may.

MR. TITTSWORTH: In ***Delgado v. State***, we go to page 7 of the printout that I have handed Your Honor. It is pages 279 to 280 in the official report. Delgado complains that the court exceeded the scope of the statute -- this is involving a child-witness testifying and people being excluded -- by excluding his parents. Delgado failed to object to the partial closure of the

courtroom or to the exclusion of the parents. In ***Hunt*** the Court held that the defendant's failure to object at trial to the closure of the courtroom waived his right to assert as error on appeal. ***Hunt*** is apposite and controlling.

So, Your Honor, because that was not brought to your attention, it is waived for appellate purposes. And then, actually touches on the plain error doctrine, which I would incorporate this, also, to the arguments in other sections where the defense is alleging plain error. According to the Supreme Court, the doctrine applies only to capital cases and to criminal cases in which the trial judge allegedly intimates an opinion of the defendant's guilt, in violation of O.C.G.A. 17-8-57. So that's the limits to the plain error doctrine.

It's considered not properly raised and ruled upon by a court when an alleged error is so erroneous as to result in a likelihood of grave miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceedings. And the Court, in this, declined to extend the plain error doctrine to the complaint of a partial violation of excluding witnesses.

I think the testimony in this case is not compelling. And I think, Your Honor -- I would ask Your Honor to find the bailiffs to be the credible witnesses in this and not the defendant's mother.

I'll also cite, on the same point, to ***Craven v. State***. ***Craven v. State***, C-R-A-V-E-N, 292 Ga. App. 592. It is Point 1 of the opinion, so beginning on the first page, and it's page 2 of what I've handed Your Honor. This is where court officials purportedly prevented some of the family members from entering the courtroom during voir dire. It is specifically addressing bailiffs.

It is claiming in Point 1(a) that a bailiff denied them entrance. The State called three bailiffs as witnesses, all of whom testified they did not bar anyone from entering the courtroom. That's what we have in this case. ***Craven*** did not bring the issue to the trial Court's attention at the time, so the Court finds that because it wasn't bought to the attention when the defense counsel learned of it, that would foreclose the trial Court's ability to rectify the matter with a new jury pool -- this occurs during voir dire -- or in any other way.

So pretermitting whether any impropriety existed under the circumstances described, because the trial Court in this case actually finds the bailiffs to be the credible witnesses. They concluded that the defendant has waived the right to complain about this issue by his failure to raise it.

Moving to Allegations 9, 10, and 11, Ms. Kuo focused on the portion of the indictment that alleges a date

range. What she missed was that the indictment specifically alleges that the offense had to occur in Gwinnett County, Georgia. While it is kind of boilerplate language to the people who have been in this courtroom every day, a jury, having heard that language for the first time, that's not boilerplate to them. And Your Honor further charged them specifically on venue at page 428. So I don't think that there's any reason to believe that the jury's verdict was representing something that happened in Ohio and not what happened in Georgia. Your Honor charged on it. It's in the indictment.

He was not on trial for those. They're prior difficulties that were admitted to show the state of the feelings between the parties. While no charge was given on that, no charge was requested by the defense either. So it is not error for the Court to fail to give the charge on prior difficulties and similar transactions in the absence of a request.

THE COURT: Does there have to be a prior hearing on that --

MR. TITTSWORTH: Not --

THE COURT: -- to even entertain prior difficulties?

MR. TITTSWORTH: Not for prior difficulties. For prior bad acts under 404(b) and the prior sexual offenses under 414, there would need to be a prior hearing.

However, under the prior difficulties to show the state of feelings between the victim and the defendant, there's no hearing required.

THE COURT: Okay. And what about ineffectiveness of counsel for failing to request that charge on the prior difficulty.

MR. TITTSWORTH: That is not something that is alleged in this. However, Your Honor -- and I can -- I actually dealt with this issue last week, and I think I've taken the case off of my iPad. There is a case directly on point, and I'm happy to submit it to Your Honor --

THE COURT: Please do. Thank you.

MR. TITTSWORTH: -- that says that failing to request a similar transactions is not going to be held to be ineffective assistance of counsel or plain error.

And that takes us to Point 12, the 2003 forgery. First of all, I would point Your Honor to page 317 of the transcript. On page 317, the Court found the probative value of the crime involving deception -- the probative value of that outweighed the prejudicial effect.

THE COURT: So you're saying the Court did make the appropriate finding?

MR. TITTSWORTH: You did make the appropriate finding.

And, you know, the cases sometimes ask for there to

or not trial counsel raised an express or implied charge of recent fabrication, alleged improper motive, and alleged improper influence on cross-examination? It talks about the timing of the statements. But it also -- if you look at the statute closely, it talks about the fact that the prior consistent statement has to logically rebut and attack on the witness's credibility. So if he's talking about something that happened, you know, with respect to leaving the house and everything, I mean, the fact that Kira said that Mr. Blackwell touched her on her vagina and had sex with her and --

THE COURT: You just went dead, but can you hear? I can hear you fine.

MS. KUO: Yes.

The fact that, you know, all of the acts that were alleged in the indictment, the fact that she said that to all of those people doesn't logically rebut the fact that she left her mom's house and that's when they went into foster care. I mean, so, you know, there has to be a probative connection. It's just not a matter of whether or not it's prior, and it's not just a matter of whether it is consistent. It's -- I mean, the whole point of putting a prior consistent statement in in the first place is it's an attack -- it's to rehabilitate the alleged witness after there's been an attack. So in order to

argument about, you know, the finding that you did make, he said that you made the appropriate finding. Well, if you look at 24-6-609(b), it specifically states the finding that you're supposed to make. And you did not make -- you know, you didn't make that substantially, and that's what we're arguing.

And to the extent that, you know, the State is now arguing that, you know, the ten-year finding is not required or that, you know, this wasn't really more than ten years, I mean, that's something he's making now, and he didn't make -- they didn't their argument below, so it's waived. He cannot make that argument now.

And then, I think, just in respect to, you know, his argument about the venue, what the indictment said, the indictment said: Gwinnett County venue. You know, we're not arguing lack of venue with respect to the crimes that occurred in Gwinnett County. We're arguing that the trial Court lacked subject matter jurisdiction to try and convict Mr. Blackwell for this evidence that occurred in Ohio, that came in, no holds barred, without limitation, without any particular instruction.

I mean, he said something about, you know, well, it comes in to show the state of feelings between the parties. Well, you know, when that evidence came in, Your Honor didn't give the jury a limiting instruction like you

did, maybe, with respect to the videotape, you know, how they're supposed to consider something on the videotape or, you know, like the type of instruction you might give in an other crimes, wrongs evidence case.

You know, this -- it's just -- I mean, it's sort of like this is kind of like a last-minute argument. It's not something that, you know -- this is not 404(b) evidence. Course of conduct does not apply. This is not prior difficulty evidence. This is not state of feelings. This is evidence the State solely relied upon to show that Mr. Blackwell was guilty of the crimes charged because it happened in Ohio when she seven, when she was eight, when she was nine. It happened many times over the course of the year. And she told all of these people about it.

So, Your Honor, this -- a lot of evidence in this case -- that should not have come in. It's admissible on a number of grounds. The trial Court lacked subject matter jurisdiction, the jury -- their verdict, to the extent that they considered all of this evidence including what happened in Ohio, without limitation, without any type of instruction how to consider that evidence -- it just renders the verdict void ab initio because we do not know -- we do not know what -- which evidence the jury relied upon to reach its verdict.

Thank you.

THE COURT: And before you sit down, are you arguing that a limiting instruction would have cured that?

MS. KUO: Well, I'm -- well, the objection wasn't made in the first place. So I'm saying that, I mean, you have to look at the case the way it started from the get-go. So this prosecutor that tried the case, I mean, you know -- she was relying on that evidence to show that Mr. Blackwell was guilty. I'm not -- I don't know if it would have cured it, but -- because it would have had to occur -- you know, all of that probably would have had to occur prior to the point in time that it came to trial. There had to be like -- I mean, you know, maybe in another case -- in another case, maybe the State could have said, well, we're going to introduce as evidence prior difficulties, you know, you know, and made that fact known.

You know, it's true, yes, there's no requirement for the State to notify the defendant, you know, that it's introducing its prior difficulties evidence. But at the end of the day, it has to come up at some point in trial because they're going to ask you to charge the jury on it. So, I mean, there has to be some sort of notice to the Court and the defendant that is the purpose of that evidence. But here, it came in, no holds barred, substantive evidence for the jury to consider based on the

indictment. Because that's why they alleged that date. If they weren't relying on the Ohio evidence, they wouldn't have alleged it that started in October, 2010.

THE COURT: Okay. So the error is in the failure to give the accurate charge of prior difficulties.

MS. KUO: Well, not -- I don't have a -- an argument -- I don't have -- I'm not raising an enumeration with respect to failure to give a charge. I'm just saying that, as a matter of fact, that, you know -- that it just came in substantively.

THE COURT: Okay.

MS. KUO: That wasn't their theory of the case at trial, that it was prior difficulties evidence. Because had have been -- they would have asked for charges on that. They're just -- they're making that argument now on appeal.

THE COURT: Okay. Thank you.

Any response?

MR. TITTSWORTH: Only it's a recent fabrication. Page 147 is clear they go after the victim for fabricating. They go after fact -- the victim for wanting to leave the house of the mother, which occurs after the abuse in this scenario.

That is all. Thank you.

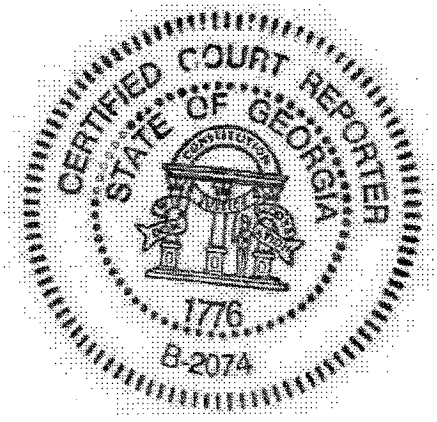
THE COURT: Okay. Anything further?

C-E-R-T-I-F-I-C-A-T-E

STATE OF GEORGIA:

COUNTY OF GWINNETT:

I hereby certify that the foregoing transcript was taken down as stated in the caption, and the colloquies, questions and answers were reduced to typewriting under my direction; that the foregoing pages 1 through 119 represent a true and correct record of the evidence given.



Christine A. Clark

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