APPENDIX CONTENTS

SUPREME COURT OF GEORGIA
Case No. S20C1071

September 28, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MICHAEL LANIER WATKINS v. THE STATE.

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

All the Justices concur, except McMillian, J., disqualified.

Court of Appeals Case No. A19A1853

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

Court of Appeals
of the State of Georgia

ATLANTA, March 19, 2020

The Court of Appeals hereby passes the following order

A19A1853. MICHAEL LANIER WATKINS v. THE STATE.

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, March 19, 2020.

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.*

FIFTH DIVISION
MCFADDEN, C. J.,
MCMILLIAN, P. J., and SENIOR APPELLATE JUDGE PHIPPS

January 30, 2020

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A19A1853. WATKINS v. THE STATE.

PHIPPS, Senior Appellate Judge.

After a bench trial, Michael Lanier Watkins was convicted of involuntary manslaughter via the commission of an unlawful act, as a lesser-included offense of felony murder.[1] He appeals from the denial of his motion for new trial, arguing that the evidence was insufficient to support his conviction and that he received ineffective assistance of counsel. For the following reasons, we affirm.

"On appeal from a bench trial, we view the evidence in favor of the factfinder's conclusion, giving due regard to the trial court's opportunity to judge witness credibility. We no longer presume the defendant is innocent, but only determine if the

[1] Watkins was acquitted of malice murder and aggravated assault.

evidence is sufficient to sustain the conviction[]." (Citations and punctuation omitted.) *Landine v. State*, 295 Ga. App. 761, 761 (673 SE2d 124) (2009).

Viewed in this light, the evidence at trial established that at around 1:00 a.m. on June 18, 2013, an officer with the Elbert County sheriff's department responded to Coldwater Creek in reference to a call that a person had drowned. When the officer arrived, he made contact with Michael Watkins, the ex-husband of the victim. Watkins advised the officer that for the past several days, the victim had been drinking heavily and using prescription drugs, including Ambien. Watkins reported that at around 12:00 a. m. that morning, the victim wanted to go swimming. The victim had asked to go to the "watershed," but Watkins insisted on going to Coldwater Creek. Watkins testified that when they arrived at the boat ramp, the victim told him that she was only going to swim to the buoy and back. However, after she swam approximately fifty feet from the shore, she went under water and never surfaced again.

Watkins told officers that he attempted to call 911 for assistance, but that his phone displayed "No Service." He testified that he then went to a nearby home to get help, but no one answered the door. He further testified that he then drove to a nearby residence and had the homeowner call 911. Watkins told the officers that he then

returned to the creek, went into the water and attempted to "snag" the victim with a cane, hoping to rescue her. Although Watkins claimed to have a paralyzing phobia of water and only entered up to his ankles when he attempted to retrieve the victim, Watkins' pants were wet up to his waist.

Watkins stated that the victim was an excellent swimmer. Despite this, her body was found 21 feet from shore in 3 feet of water. The post-mortem toxicology report indicated the presence of tramadol, Ambien, diazepam and nordiazepam. Her etyl alcohol level was 0.348 grams per 100 mL, which had to be diluted because the initial sample was higher than the highest calibrator. The pathologist who conducted the victim's autopsy concluded that the victim did not show evidence of a recent injury, but instead died of drowning complicated by "acute [multiple] drug and alcohol intoxication. A pharmacologist who testified as an expert at trial noted that because of the "extraordinarily high" levels of alcohol and prescription drugs in her system, the victim should not have been ambulatory and was "very, very sedated." The pharmacologist testified that anyone with these levels of drugs and alcohol in their system would "be almost impossible to rouse[.]"

Evidence of prior difficulties was introduced at trial, including evidence that several months before her drowning, the victim was shot in the back with a small

caliber firearm in an incident where the perpetrator was never identified, but Watkins was the only other person present. Six days after the victim's death, Watkins attempted to probate a will written by the victim in 2004 which would have made him the beneficiary of all of her property.

Subsequent to being arrested, Watkins confessed to an inmate in the Elbert County Jail that he had held the victim under water at the end of the boat ramp until she drowned.

Watkins was charged with malice murder, felony murder, and aggravated assault. After the bench trial, the trial court found him not guilty of malice murder or aggravated assault. It did, however, find him guilty of involuntary manslaughter as a lesser-included offense of felony murder.

1. Watkins argues that the evidence at trial was insufficient to authorize the trial court, as fact finder, to conclude that he was guilty of involuntary manslaughter during the commission of an unlawful act because there was no proof that Watkins' actions were the proximate cause of the victim's death and because he did not commit an unlawful act. We find no error.

A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he "causes the death of another human being without any

intention to do so by the commission of an unlawful act other than a felony." OCGA § 16-5-3 (a). "The essential elements of the offense of involuntary manslaughter in the commission of an unlawful act are 'first, intent to commit the unlawful act; and secondly, the killing of a human being without having so intended but as the *proximate result* of such intended unlawful act.'" (Citation and punctuation omitted; emphasis in original.) *Scraders v. State*, 263 Ga. App. 754 (589 SE2d 315) (2003).

Count 2 of the indictment, alleging felony murder, incorporated by reference aggravated assault, as alleged in Count 3 of the indictment. Count 3 accused Watkins with aggravated assault because he "did unlawfully make an assault upon the person of Meredith Leigh Watkins with water, an instrument which when used offensively against a person is likely to result in serious bodily injury, *by placing* said person in a creek while said person was so intoxicated that she was incapable of swimming[.]" (Emphasis supplied.)

The trial court found Watkins to be guilty of the lesser-included offense of "felony involuntary manslaughter [for] causing a death by misdemeanor reckless conduct." "Reckless conduct is an unlawful act in this State and constitutes a misdemeanor offense." *Bohannon*, 230 Ga. App. 320 (1) (b) (498 SE2d 316) (1998). A person commits the offense of reckless conduct when that person "causes bodily

harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the person, and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation[.]" OCGA § 16-5-60. See *Banks v. State*, 329 Ga. App. 174, 176 (2) (764 SE2d 187) (2014) ("If a death occurs as the result of reckless conduct, a defendant is guilty of involuntary manslaughter") (punctuation and footnote omitted); *Bohannon v. State*, 230 Ga. App. at 830 (2) (b) (the evidence supported the conviction of involuntary manslaughter based upon reckless conduct when the mother consciously disregarded the safety of a baby by placing the infant in bed with two intoxicated adults that had been previously warned about the dangers of drinking while caring for an infant).

Although Watkins argues that the evidence was insufficient to sustain his conviction because there was no evidence to show that his actions were the proximate cause of the victim's death or rose to the level of reckless conduct, the evidence does not support this conclusion. Contrary to Watkins' arguments, the indictment does not allege that he simply allowed the intoxicated victim to go for a swim. Rather, the indictment alleges that Watkins placed the victim in the creek while she was so intoxicated that she was incapable of swimming. By doing so, Watkins endangered

the bodily safety of the victim by consciously disregarding a substantial and unjustifiable risk that his act would endanger her safety, and this disregard constituted a gross deviation from the standard of care which a reasonable person would exercise. See OCGA § 16-5-60; *Turnipseed v. State*, 186 Ga. App. 278, 279-280 (2) (367 SE2d 259) (1988) (physical precedent only) (evidence was sufficient to establish that defendant engaged in reckless conduct by keeping unsecured pitbulls that he had been warned were dangerous, thus supporting his conviction for felony involuntary manslaughter based on the underlying misdemeanor of reckless conduct). Therefore, the evidence supports the factfinder's conclusion that by placing the victim in the creek despite the fact that the alcohol and drug levels in her system meant she would have been unresponsive, he committed an unlawful act other than a felony which proximately caused the victim's death.

2. Watkins next argues that his trial counsel rendered ineffective assistance for arguing for the lesser-included offense of involuntary manslaughter without his informed consent. We find no reversible error.

> To prevail on his claim of ineffective assistance of counsel, Watkins must show that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that there is a reasonable

> likelihood that, but for counsel's errors, the outcome of the trial would have been different. While the test imposed by *Strickland* is not impossible to meet, the burden is a heavy one. For [Watkins] to satisfy the first requirement of *Strickland*, he has to overcome the strong presumption that his trial counsel's performance was within the wide range of reasonable professional conduct, and that counsel's decisions were the result of reasonable professional judgment. The reasonableness of counsel's conduct must be evaluated from counsel's perspective at the time of trial and under the particular circumstances of the case, and decisions regarding trial tactics and strategy may form the basis for an ineffectiveness claim only if they were so patently unreasonable that no competent attorney would have followed such a course.

(Citations and punctuation omitted.) *Blackwell v. State*, 302 Ga. 820, 824 (3) (809 SE2d 727) (2018), citing *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LE2d 674) (1984).

Watkins contends that the right to insist that counsel refrain from admitting guilt was recently pronounced in a new rule of constitutional law in *McCoy v. Louisiana,* __ U. S. __ (138 S. Ct. 1500, 200 LE2d 821) (2018). In *McCoy*, the Supreme Court held that in a capital murder case, a defense attorney who overrides a defendant's insistence that counsel refrain from admitting the defendant's guilt violates the defendant's sixth amendment rights. *McCoy*, 138 S. Ct. at 1508-1509 (II)

(A). However, we reject this argument because "the rule pronounced in *McCoy* appears to apply only to capital cases, and [Watkins'] case is not a capital case." *In re Brown*, 2019 U.S. App. Lexis 14798 at *2 (11th Cir., decided May 17, 2019).

"An attorney's decision about which defense to present is a question of trial strategy. . . [T]he failure to consult fully with the accused about whether to pursue an all-or-nothing defense or request a jury charge on a lesser included offense should be rigorously scrutinized, but that such failure does not constitute ineffective assistance of counsel in every case as a matter of law." *Blackwell*, 302 Ga. at 825 (3). In the instant case, defense counsel testified at the motion for new trial that he consulted with Watkins regarding trial strategy and counsel's intent to request the trial court to consider the lesser-included offense of involuntary manslaughter as part of trial strategy. Despite Watkins' assertion to the contrary, his trial counsel testified that Watkins understood and agreed with this approach. "It is the function of the trial court at the hearing on the motion for new trial to determine witness credibility and to resolve any conflicts in the testimony." *Mobley v. State*, 264 Ga. 854, 856 (452 SE2d 500) (1995).

The trial court did not err in concluding that Watkins's trial counsel did not render ineffective assistance of counsel.

Judgment affirmed. McFadden, C. J., and McMillian, P. J., concur.

IN THE SUPERIOR COURT OF ELBERT COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	
-vs-	*	CASE NO. 16ER158H
	*	
MICHAEL LANIER WATKINS,	*	
DEFENDANT.	*	

ORDER DENYING MOTION FOR NEW TRIAL

The above styled case having come before this Court on a Motion for New Trial by Michael Lanier Watkins (hereafter, the "Defendant"), by and through counsel, and a hearing conducted on the same on February 25, 2019, this Court, after hearing and considering all evidence, testimony, as well as considering any conflicts in the evidence, the credibility of witnesses, the weight of the evidence, and other relevant matters presented to or made known to this Court, and after considering the argument of counsel, the Court issues the following ruling:

FACTUAL BASIS

The Defendant was tried before judge alone and found guilty of the offense of Involuntary Manslaughter as a lesser included offense of Count 2, Felony Murder.

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed that on Tuesday, June 18, 2013, the Elbert County Sheriff's office responded yo Cold Water Creek in Elbert County, Georgia, in reference to a drowning victim. Upon arrival at Cold Water Creek, law enforcement met with Michael Watkins, the ex-husband of the victim. Michael Watkins advised that for the past several days Meredith Watkins, the victim, had been drinking heavily and using prescription drugs. Michael Watkins reported that around 12:00 a.m. that morning, Meredith Watkins wanted to go swimming. Meredith Watkins wanted to

go to the water shed, but Michael Watkins insisted on going to Cold Water Creek. Upon arrival, at the boat ramp, Meredith Watkins allegedly told Michael Watkins that she was only going to swim out to the buoy and back. After Meredith Watkins swam only approximately fifty feet from the shore, she went under water and never surfaced again.

Michael Watkins stated that he attempted to contact the Elbert County 911 for assistance, however he claimed his phone displayed No Service. Michael Watkins claimed he went to a nearby home and attempted to get assistance, but no one would answer. He then drove to Johnny Smiths residence and had him call 911. The Defendant traveled back to Cold Water Creek, entered the creek, and attempted to snag Meredith Watkins with a cane, claiming that he decided that perhaps he could rescue her. The Defendant claimed he was terrified of water and could not bring himself to enter the creek, however witnesses testified he was wet up to waist, and that one sleeve was wet to the shoulder.

The body of Meredith Watkins was found 21 feet from shore in 3 feet of water. She was face down with her arms crossed over her chest. Her glasses were still on her face. The area to her body from the shore is consistently a depth of only 3 feet.

Her toxicology indicated the presence of tramadol, 0.14 mg/L, zolpidem (Ambien), 0.19 mg/L, diazepam and nordiazepam (both lower than the lowest calibrator of 100mcg/L). Her ethyl alcohol was 0.348 grams per 100 mL, which had to be diluted because the initial sample was higher than the highest calibrator. There was no indication of recent injury in the autopsy.

The pathologist concluded Meredith Watkins died of drowning complicated by acute multiple drug and alcohol intoxication.

Meredith Watkins was shot in the back with a small caliber firearm several months (October 2012) before her drowning in an incident for which the

perpetrator was never identified, but Michael Watkins was the only other person present. Their residence contained many small caliber weapons. Six days after Meredith's death, Michael Watkins attempted to probate a will written by Meredith Watkins in 2004 making Michael Watkins the beneficiary of all of her property, including 5 acres of real property.

Subsequent to being arrested, Michael Watkins confessed to an inmate in the Elbert County Jail. The information provided by the jail house informant is consistent with the scene and with information regarding Meredith that only the Defendant would know.

Counsel for the Defendant argued that the evidence was insufficient to support a conviction for murder, and that if the Defendant were guilty of anything, it was Involuntary Manslaughter predicated on the conduct set forth in the Aggravated Assault count.

This Court found the Defendant guilty of Involuntary Manslaughter.

The Defendant then filed the current action, a Motion for New Trial, enumerating errors by this Court. The Defendant's enumerations of error are Sufficiency of the Evidence, error in finding the Defendant guilty of the lesser included offense of Involuntary Manslaughter (though trial counsel urged this outcome), and urges this Court to act as the 13th juror, in a case in which there was not jury.

Each of the Defendant's enumerations of error are addressed individually below.

ANALYSIS

1. SUFFICIENCY OF THE EVIDENCE (enumerations 1 & 2)

The Defendant asserts that the evidence was insufficient. The evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the Appellant was guilty of the crimes of which he was

convicted.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court of the United States held that when a defendant challenges the sufficiency of the evidence supporting his criminal conviction, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Furthermore, the Georgia Supreme Court held in Miller v. State, 273 Ga. 831, 832, 546 S.E.2d 524, (2001) that as long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the verdict will be upheld.

The Court, having presided over the trial of this case, and acting as fact finder, concluded there was sufficient evidence to support a conviction for the offense of Involuntary Manslaughter as a lesser included offense of Count 2, Felony Murder (predicated on Aggravated Assault, which was alleged as follows:

> And the Grand jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse **MICHAEL WATKINS** with the offense of **AGGRAVATED ASSAULT** (O.C.G.A. 16-5-21) for that said accused in Elbert County, Georgia, on or about the 18th day of June, 2013, did unlawfully make an assault upon the person of Meredith Leigh Watkins with water, an instrument which when used offensively against a person is likely to result in serious bodily injury, by placing said person in a creek while said person was so intoxicated that she was incapable of swimming, contrary to the laws of said State, the good order, peace and dignity thereof.

A person commits the offense of involuntary manslaughter in the commission

of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. O.C.G.A. § 16-5-3. A person commits the offense of Reckless Conduct when that person causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person, and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor. O.C.G.A. § 16-5-60.

As alleged, by the Defendant placing the person of Meredith Watkins in a creek while said person was so intoxicated that she was incapable of swimming, the Defendant endangered the bodily safety of Meredith Watkins by consciously disregarding a substantial and unjustifiable risk that his act would endanger the safety of Meredith Watkins, and the disregard constituted a gross deviation from the standard of care which a reasonable person would exercise. Therefore, he committed an unlawful act, other than a felony, which caused the death of Meredith Watkins.

As such, this enumeration is without merit, and must be denied.

2. THE LESSER INCLUDED OFFENSE AND INEFFECTIVE ASSISTANCE OF COUNSEL (enumerations 3 & 4)

The Defendant contends that Involuntary Manslaughter is not a lesser included offense of murder as alleged in this charging document, and that it was therefore error for the Court to find the Defendant guilty of Involuntary Manslaughter.

"An indictment cannot be materially amended after the grand jury has returned the indictment into court; any subsequent amendment by the trial court or prosecution that materially affects the indictment is void and cannot serve as the basis for a conviction." Driggers v. State, 295 Ga. App. 711, 717-718 (4) (b) (673

SE2d 95) (2009). See Ingram v. State, 211 Ga. App. 252, 253 (1) (438 SE2d 708) (1993); Gentry v. State, 63 Ga. App. 275, 276 (11 SE2d 39) (1940). An amendment to the indictment can be actual or constructive; "[a] constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment" as a result of erroneous jury instructions or a prosecutor's statements to the jury. (Citations and punctuation omitted.) United States v. Castro, 89 F3d 1443, 1452-1453 (III) (11th Cir. 1996). See Salahuddin v. State, 241 Ga. App. 168, 170 (2) (525 SE2d 422) (1999) (physical precedent only), abrogated on other grounds by Simpson v. State, 277 Ga. 356, 358 (2) (589 SE2d 90) (2003).

Significantly, however, an indictment embraces all lesser included offenses of the charged offense. Spence v. State, 7 Ga. App. 825, 827 (68 SE 443) (1910). See OCGA § 16-1-6 ("An accused may be convicted of a crime included in a crime charged in the indictment or accusation."). An indictment places an accused on notice that he can be convicted of the crimes expressly charged as well as lesser crimes that are included in the charged offenses as a matter of law or fact. Millender v. State, 286 Ga. App. 331, 333 (2) (648 SE2d 777) (2007). Indeed, if an offense is a lesser included offense as a matter of law or fact, an accused can be convicted of that offense even if the trial court directs a verdict on the offense expressly charged in the indictment. See Clarke v. State, 239 Ga. 42, 44 (4) (235 SE2d 524) (1977); Williams v. State, 196 Ga. App. 154, 155-156 (1) (395 SE2d 399) (1990).

The lesser offense of involuntary manslaughter in the commission of an unlawful act can be included as a matter of fact in the greater offense of murder. See, e.g., Morris v. State, 310 Ga. App. 126 (2011); Mitchell v. State, 277 Ga. App. 65, 67, n. 2 (625 SE2d 487) (2005). A lesser offense may be included as a

matter of fact in a greater offense charged in the indictment, if the indictment alleges the facts necessary to establish the essential elements of the lesser offense, and if the evidence presented at trial is sufficient to establish that offense. Youmans v. State, 270 Ga. App. 832, 835 (2) (608 SE2d 300) (2004). See Little v. State, 278 Ga. 425, 428 (4) (603 SE2d 252) (2004); Loren v. State, 268 Ga. 792, 796 (3) (493 SE2d 175) (1997); Heggs v. State, 246 Ga. App. 354, 355-356 (1) (540 SE2d 643) (2000). Here, the evidence at trial was sufficient to establish the lesser offense of involuntary manslaughter in the commission of the unlawful act of reckless conduct, as discussed in Paragraph 1, above. Thus, the sole issue is whether the indictment in this case alleged the facts necessary to establish the essential elements of that lesser offense. Morris v. State, 310 Ga. App. 126 (2011); Malone v State, 238 GA. 251 (1977); Kilpatrick v State 255 Ga. 344 (1986).

Moreover, counsel for the Defendant argued that the Defendant should be found guilty of this lesser included offense. Any error, therefore, was invited by counsel as part of his trial strategy, as testified to by trial counsel at the Defendant's motion for new trial. As the Supreme Court explained in Cheddersingh v. State, 290 Ga. 680, 682-684 (724 SE2d 366) (2012), affirmative waiver, which involves the intentional relinquishment or abandonment of a known right, as opposed to mere forfeiture by failing to object, prevents a finding of plain error. In Nelson v. State, 325 Ga. App. 819 (2014), Nelson requested that the trial court instruct the jury on theft by receiving as a lesser included offense of theft by taking and participated with the court in crafting the charge that was given. On appeal, Nelson argued that theft by receiving was not a lesser included offense of theft by taking, and that, therefore, the trial court committed plain and obvious error by giving the requested charge because he was not separately charged with that offense, and it was not otherwise included within the allegations of the charging accusation. In denying this basis for relief, the Court of Appeals cited

Bellamy v. State, 312 Ga. App. 899 (2011), stating "[a] party cannot invite error by requesting a certain jury instruction, and then complain on appeal that the instruction, when given, is incorrect." (Citation and punctuation omitted.) Bellamy v. State, 312 Ga. App. 899, 901 (1) (720 SE2d 323) (2011).

In order to prove ineffective assistance of trial counsel, a Defendant must show that counsel made errors so serious that he was not functioning as counsel guaranteed by the sixth amendment, and but for such errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). There is a strong presumption that counsel's actions are the result of sound trial strategy, and counsel's actions are judged from his perspective at the time of trial. Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential." Id. Choices relating to trial strategy made by counsel after a thorough investigation of law and facts are virtually unchallengeable, so long as they are not wholly unreasonable. Id. Counsel's strategic trial decisions in this case were informed by the evidence, and not unreasonable.

As such, this enumeration is without merit, and must be denied.

CONCLUSION

1. Viewed in the light most favorable to the State, the evidence was sufficient to warrant the verdict and conviction. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).
2. The verdict was not against the weight of the evidence. OCGA § 5-5-20
3. The verdict is not contrary to law and principles of equity and justice. OCGA § 5-5-21.
4. The Defendant did not receive constitutionally ineffective assistance of counsel.
5. No error was committed during the trial of the Defendant's case. Any alleged

error did not contribute to the verdict, and is therefore harmless beyond a reasonable doubt.

Accordingly, the Defendant's Motion for New Trial is hereby **DENIED**.

SO ORDERED, this 13th day of March, 2019.

Thomas L. Hodges III

Hon. Thomas L. Hodges, III
Senior Judge, Superior Court
Northern Judicial Circuit

Order prepared by:
D. Parks White, District Attorney
Northern Judicial Circuit
Georgia State Bar# 753098
P.O. Box 247
Elberton, GA 30635
Phone: 706-795-6326; Fax: 706-795-3588
Email: dpwhite@pacga.org

IN THE SUPERIOR COURT OF ELBERT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	**CASE NO: 2016-ER-158**
	)	
MICHAEL WATKINS,	)	
	)	
Defendant	)	
	)	

TRANSCRIPT OF HEARING ON MOTION FOR NEW TRIAL

Heard before the Honorable Thomas L. Hodges, III, Senior Judge of the Superior Courts of Georgia, in the Elbert County Courthouse, 45 Forest Avenue, Elberton, Georgia, on February 25, 2019.

A P P E A R A N C E S:

For the State:

MARK P. SMITH, ESQ.
Assistant District Attorney
P.O. Box 515
Hartwell, Georgia 30643

For the Defendant:

HOWARD ANDERSON, ESQ.
P.O. Box 661
Pendleton, South Carolina 29670

SPEEDY REPORTING, INC.
CAROL MALLORY, CCR/CVR-M
P.O. Box 1942
Athens, Georgia 30603
(706) 353-2049

THE COURT: Michael Watkins, motion for new trial. Is the State ready to proceed?

MR. MARK SMITH: Yes, Your Honor.

THE COURT: Good. Thank you.

MR. ANDERSON: Judge, in speaking with the State, I would like to propose, with the consent of the State to, after we do the brief testimony, to allow a post-hearing briefing instead of oral argument. I've found that speeds up the appeal process when I can go ahead and do my brief for the Court of Appeals and submit it as my post-hearing brief because the -- the briefing schedule up in Atlanta is very short. So I would propose that we -- if you'd give me 14 days after today to submit a post-hearing brief so they can have 14 days to respond. That's what I would propose, Your Honor.

MR. MARK SMITH: State's got no objection to that, Your Honor.

THE COURT: Okay.

MR. ANDERSON: All right. Thank you, Judge.

THE COURT: That sounds like a plan.

MR. ANDERSON: Okay. At this time I would call Mr. Wasserman to the stand, please. Please raise your hand.

[Witness sworn by Mr. Anderson.]

HARVEY WASSERMAN

Called as a witness by the State, having first been duly sworn, is examined and testifies as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Please state your name for the record.

A Harvey Wasserman.

Q Mr. Wasserman, what do you do for a living?

A I'm an attorney and currently hold the position of circuit public defender for the Northern Circuit of Georgia.

Q And how long have you been working in this circuit?

A As an attorney?

Q Yes.

A Since 2002.

Q Did you have occasion to represent the defendant here today?

A I did.

Q In what context have you represented him?

A In two cases, the one we're here for today where he was charged with, I think, malice and felony -- and felony murder; and another case where he was charged with child molestation.

Q Okay. For the case involving malice murder and some other related charges, do you recall your -- your trial in that case?

A Yes. I -- though I haven't looked at the transcript

recently but I -- I have a pretty good general recollection of it.

Q What -- what generally do you remember about the trial, just to orient us?

A Well, factually, Mr. Watkins was charged with deliberately drowning his wife, Meredith, while she was under the influence of drugs and/or alcohol to the extent, according to the State's version, that she was either unconscious or so impaired she couldn't physically resist Mr. Watkins' attempts to drown her.

My discussions with Mr. Watkins he certainly denied doing anything of an intentional nature, but he did admit she wanted to go swimming in the quarry, that she was under the influence, that this was something she regularly did, and he felt that if he did not take her, she would -- might go and drive on her own, and he thought it was safer for her for him to accompany her there.

Q Do you remember the closing argument that you gave in the case generally?

A Yes.

Q Do you recall whether you asked for a lesser-included in your closing argument?

A I did.

Q And why did you ask for the lesser-included?

A Well, he was charged with felony and malice murder,

both of which carry up to a life sentence or life without parole. There was -- you know, from the get-go my evaluation of the case there was evidence that could support those theories of the case by the State. I didn't think, you know, would be a reasonable doubt issue on those. There was evidence surrounding the circumstances of Meredith's drowning and their relationship and her -- her self-transitional issues and the fact Mr. -- you know, she drowned in -- in water that was waist high -- that I was concerned, you know, there was certainly a possibility of him being found guilty of a malice or felony murder.

I thought it was, given her level of intoxication as came out through the autopsy report and my discussions with our expert, it was clear she was under the influence. You know, my expert was saying because of her -- her life-long addiction, she wouldn't have been as compromised as somebody who doesn't use drugs regularly. But I'm an attorney who's come to conclude, even in a bench trial, as this was, you never ever know what's going to happen. I'm not a mind reader. I didn't know what Judge Hodges was going to conclude, but I thought he was a better option than a jury.

And that, I thought, given the fact she was clearly under the influence with, I think, about 3.3 of alcohol, and I forget what, if any, drugs, that a reasonable person could conclude he was reckless or somehow unlawful in taking her

swimming when she was in that condition. And that he -- he could have, I thought -- most people thought that he should've been able to control her and prevent her from not going swimming.

This is not what maybe Mr. Watkins believed about her, but he wasn't deciding his own case. And so I did ask the judge to consider the lesser of involuntary manslaughter.

Q Having thought about the issue further, do you think that that was a mistake on your part?

A It was a mistake of law because I -- you know, when I had done the research, you know, I -- I had read cases that said that involuntary could be a lesser of -- of felony or malice murder, but I didn't research it full enough to realize to get an involuntary the act that would be the basis of an involuntary had to be some type of lesser act of what was alleged in the malice or felony murder charges. Those charged him with pushing her under the water. My involuntary claim was based on him just taking her swimming. And since that factual allegation was not part of the malice or felony murders, it really couldn't be seen as a lesser of what was alleged, it was a mistake of law to ask for that.

Q And you didn't ask for that in writing; correct?

A No, it came up, I think, in closing.

MR. ANDERSON: No further questions, Judge.

CROSS-EXAMINATION

BY MR. MARK SMITH:

Q Afternoon, Mr. Wasserman.

A One time only.

Q Mr. Wasserman, you testified earlier that when you evaluated the case, you were looking for certain things and that you came to the conclusion that it was certainly possible that the jury could find your client guilty beyond a reasonable doubt of the offenses charged; is that correct?

A Yes.

Q And when, approximately, did you make this determination through your representation of Mr. Watkins?

A Of -- of what?

Q The determination that it was -- it was certainly possible for a jury to reach -- was it during trial or --?

A Oh, no. No. No. This -- this was months before trial after reading the complete file that the State had provided in discovery and having a number of discussions with Mr. Watkins, talking to some witnesses.

Q So you discussed the implications of the evidence with Mr. Watkins; that's correct?

A Yes.

Q In any of those discussions, without getting into what was said, did you discuss your research and asking for a lesser-included?

A I told him that I thought it was wise, that I was recommending we -- we ask for a lesser-included. I don't think I went into a legal analysis, just that I thought it would be a -- a good move.

Q But it was discussed with him?

A Oh, yes.

Q And was it discussed with him prior to trial?

A Yes.

Q Would it be fair to say that this was a trial strategy that was used?

A Yes.

Q And did -- did your client ultimately benefit from this trial strategy?

A Well, I would have to ask Judge Hodges if I didn't ask for the lesser what his verdict would've been. So I -- I don't know.

Q Was your client ultimately convicted as he was charged?

A No. He was found guilty of involuntary.

MR. MARK SMITH: Okay. No further questions, Your Honor.

MR. ANDERSON: No redirect, Judge.

THE COURT: Thank you. Thank you, Mr. Wasserman.

THE WITNESS: Thank you, Your Honor.

THE COURT: Do you have any further business today?

THE WITNESS: Just to help Mr. Magill if he needs me, Your Honor.

THE COURT: Okay.

MR. ANDERSON: Judge, Mr. Watkins will take the stand briefly. Please raise your hand.

[Witness is sworn by Mr. Anderson.]

MICHAEL WATKINS

Called as a witness by the State, having first been duly sworn, is examined and testifies as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Please state your name for the record.

A My name is Michael Watkins.

Q Mr. Watkins, are you the defendant in this case?

A I can't hear you.

Q I'm sorry. Are you the defendant in this case?

A Yes sir.

Q And -- and were you represented by Mr. Wasserman at trial?

A Yes sir.

Q At the -- after the close of the evidence and before Mr. Wasserman gave his closing argument, did you and Mr. Wasserman discuss his closing argument as to what it was going to be?

A He met with me before the final part of the trial, if that's what you're asking me --

Q And --

A -- and we talked.

Q And did you talk about whether he was going to ask for a lesser-included offense?

A No, he told me he wanted to do that and I told him not to do that.

MR. ANDERSON: No further questions, Judge.

CROSS-EXAMINATION

BY MR. MARK SMITH:

Q Mr. Watkins, you testified that Mr. Wasserman, before his closing argument, mentioned a lesser-included offense to you; is that correct?

A He mentioned it.

Q Did he mention --

A He asked me did I --.

Q -- how it would benefit you in any way?

A What?

Q Did he mention how it might benefit you in any way?

A No, he just mentioned that he would like for me to do that and I said no.

Q Okay. Did he bring this up with you at any point in time prior to closing?

A Yes. On our second meeting when I was in the Elbert County Jail around August 10th, maybe.

Q Okay.

A But during that time he also wanted me to do something called a blind plea deal and I said no. And I said don't ever mention it again.

Q And Mr. Watkins, were you ultimately convicted of the offenses that you were charged for?

A No.

Q And did you ultimately receive a lesser sentence than you would've gotten had you been convicted of the offenses charged?

A Could you ask me that in a -- could you rephrase that question, please?

Q Yes. The -- the penalties for the offenses you were charged carry up to a life sentence.

A I know that.

Q So you did not receive a life sentence, did you?

A No.

Q So you benefitted from Mr. Wasserman's asking for a lesser-included?

A No.

Q You didn't?

A No. I'm innocent. My God knows that I'm innocent, and I just don't believe there was enough evidence for the

State to make its case. Because there was no witness testimony, there was no DNA testimony, there was no evidence that I had done anything wrong except drive my wife to a lake. And that's not illegal to drive somebody to a lake. Okay?

MR. MARK SMITH: No further questions, Your Honor.

MR. ANDERSON: No redirect, Your Honor.

THE COURT: You can come down.

MR. ANDERSON: And no further evidence from the defense, Your Honor.

THE COURT: All right. Guess it would be unusual, but does the State wish to put up anything?

MR. MARK SMITH: No, Your Honor. State has no witnesses.

THE COURT: All right. You wanted 14 days. This is Monday the 25th.

MR. ANDERSON: So Judge, I show to serve my brief by the 11th.

THE COURT: Okay, defense brief by March 11th. And you were willing to give the State an additional 14 days from that.

MR. MARK SMITH: Which I show would be the 25th, Your Honor.

THE COURT: March 25th. Okay.

MR. ANDERSON: That'll work, Your Honor.

THE COURT: We're agreed on that?

MR. MARK SMITH: Yes, Your Honor.

THE COURT: Okay.

[Proceeding is concluded.]

CERTIFICATE

STATE OF GEORGIA

COUNTY OF ATHENS-CLARKE

I, Carol Mallory, Certified Verbatim Reporter, Certified Court Reporter, B-2159, hereby certify that the foregoing pages numbered 2 through 13 constitute a true, complete, and accurate transcript of the Hearing on Motion for New Trial in the case of State of Georgia vs. Michael Watkins, heard before the Honorable Thomas L. Hodges, III, Judge of the Superior Courts of Georgia in Elbert County Case Number 2016-ER-158, taken down by me and transcribed under my supervision to the best of my ability.

I further certify that I am a disinterested party to this action and that I am neither of kin nor counsel to any of the parties hereto.

This certification is expressly withdrawn and denied upon disassembly, photocopying, or duplication in any manner or upon certification of the foregoing transcript or any part thereof by any person or entity other than by me. This certification is further expressly withdrawn and denied absent my original signature and original seal appearing hereon below.

In witness whereof, I hereby affix my hand on this the 27th day of February, 2019.

_____

Carol Mallory, CVR-M/CCR-B-2159