APPENDIX

APPENDIX

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APPENDIX A

THIRD DIVISION
DOYLE, P. J.,
REESE and BROWN, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
https://www.gaappeals.us/rules

DEADLINES ARE NO LONGER TOLLED IN THIS COURT. ALL FILINGS MUST BE SUBMITTED WITHIN THE TIMES SET BY OUR COURT RULES.

June 18, 2021

In the Court of Appeals of Georgia

A21A0184. CWIK v. THE STATE.

REESE, Judge.

In 2018, a Hall County jury found Matthew Cwik guilty of one count of aggravated child molestation and five counts of child molestation.[1] Cwik filed an amended motion for new trial, which the trial court denied, and this appeal followed. Cwik asserts that the trial court erred in denying his motion because the evidence was insufficient to establish venue, he

[1] OCGA §§ 16-6-4 (a), (c).

received ineffective assistance of counsel, he was prejudiced when an e-mail was inadvertently displayed before the jury, and the victim should not have been allowed to testify in her military uniform. For the reasons set forth infra, we affirm the trial court's ruling.

Viewed in the light most favorable to the jury's verdict,[2] the record shows the following. The victim, A. B., first met Cwik when she was approximately nine or ten years old when Cwik began dating her mother. Cwik married A. B.'s mother approximately one year later. Although A. B. did not remember exactly when Cwik first started touching her inappropriately, she testified that she was "11 or 12, 13 at the oldest maybe." The touching started over her clothes, but eventually Cwik began touching her directly on her breasts, vagina, and anus with his hands and mouth, in addition to having her touch his penis. The abuse occurred in the family home, "[u]sually in [A. B.'s] room[,]" while her mother was working, and continued regularly until A. B. was 14. A. B. ultimately disclosed the abuse to her school counselor. Subsequently, the Division of Family and Children Services ("DFCS") and the Hall County sheriff's office were called in to investigate the allegations.

A Hall County grand jury indicted Cwik on one count of aggravated child molestation, five counts of

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[2] See *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979); *Rankin v. State*, 278 Ga. 704, 705 (606 SE2d 269) (2004).

child molestation, and one count of incest.[3] At trial, over Cwik's objection, the court permitted A. B. to testify while wearing her National Guard uniform, but it provided a limiting instruction to the jury. After the jury found Cwik guilty of all charges except the one count of incest, the trial court sentenced him to life, with the first 40 years to be served in confinement.

> On appeal, the appellate court reviews a challenge to the sufficiency of the venue evidence just like it reviews a challenge to the evidence of guilt: we view the evidence of venue in a light most favorable to support the verdict and determine whether the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the crime was committed in the county where the defendant was indicted.[4]

Further, "[i]n reviewing a trial court's determination regarding a claim of ineffective assistance of counsel, this court upholds the trial court's factual findings unless they are clearly erroneous; we review a trial court's legal conclusions de novo."[5] Additionally, "where there is no prosecutorial misconduct and the basis for a mistrial is the effect of outside influences on the jury, a trial court has broad discretion in deciding whether

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[3] OCGA §§ 16-6-4 (a), (c); 16-6-22 (a).

[4] *Oates v. State*, 355 Ga. App. 301, 304 (2) (844 SE2d 239) (2020) (citation and punctuation omitted).

[5] *Bubrick v. State*, 293 Ga. App. 502, 504 (3) (667 SE2d 666) (2008) (punctuation and footnote omitted).

to grant a mistrial[.]"[6] Finally, the trial court's decision to allow a victim to testify in her military uniform is reviewed for abuse of discretion.[7] With these guiding principles in mind, we now turn to Cwik's claims of error.

1. Cwik argues that the evidence presented at trial was insufficient to prove venue beyond a reasonable doubt. According to Cwik, the State failed to establish venue because A. B. did not specifically testify regarding the address where the acts occurred. He also asserts that although Jerry Phillips, an investigator with the Hall County sheriff's department, testified that the acts occurred at the victim's home located in Hall County, his statement was hearsay because he lacked personal knowledge that the abuse occurred at this location.

> Unless venue must be changed to obtain an impartial jury, a criminal case must be tried in the county where the crime was committed. [V]enue is a jurisdictional fact the State must prove beyond a reasonable doubt in every criminal case. The State may meet its burden at trial using either direct or circumstantial evidence, and the determination of whether

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[6] *Blake v. State*, 304 Ga. 747, 750 (2) (822 SE2d 207) (2018) (citation and punctuation omitted).

[7] See *Harp v. State*, 347 Ga. App. 610, 614 (2) (820 SE2d 449) (2018).

> venue has been established is an issue soundly within the province of the jury.[8]

Here, A. B. testified that Cwik touched her at their home, specifically in her room, and that she lived with her family at the time the acts occurred. Phillips also testified at trial that following A. B.'s disclosure of the abuse, the Hall County patrol division met DFCS at a house located on Ben Parks Road, which was the same street provided as the Cwiks' home address located in Hall County. Moreover, when the State asked Phillips "based on your investigation, where was the abuse alleged to have happened[,]" Phillips responded with Cwik's Hall County address. There was also no evidence suggesting that the acts occurred at another address. Therefore, because jurors are allowed "to draw reasonable inferences from circumstantial evidence in deciding whether a crime was committed in the county alleged[,]"[9] we conclude that, based on the evidence presented, a reasonable jury could have found that the acts occurred within Hall County.

Furthermore, although Cwik argued that Phillips's statement regarding where the acts occurred was hearsay, and therefore insufficient to establish venue, this argument is unavailing. Even assuming that Phillips's statement was hearsay, Cwik failed to object to it at trial, and consequently the testimony became

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[8] *Worthen v. State*, 304 Ga. 862, 865 (3) (a) (823 SE2d 291) (2019) (citations and punctuation omitted).

[9] Id. at 868 (3) (c).

"legal evidence and admissible."[10] Accordingly, for purposes of determining venue, the jury could consider the statement in the context of the other evidence regarding where the crimes occurred.[11] Therefore, considering the above, the evidence was sufficient for a rational trier of fact to find that venue was established in Hall County.

2. Cwik also argues that because trial counsel failed to object to Phillips's statement as hearsay, his performance constituted ineffective assistance, and the prejudice from this error was sufficient to warrant a new trial.

> 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.[12]

However, "[f]ailure to satisfy either prong of this test is fatal to an effective assistance claim[.]"[13]

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[10] OCGA § 24-8-802; see *Mason v. State*, 353 Ga. App. 404, 408 (3) (837 SE2d 711) (2020).

[11] See *Mason*, 353 Ga. App. at 408 (3).

[12] *Beck v. State*, 285 Ga. App. 764, 765 (647 SE2d 408) (2007) (citation and punctuation omitted).

[13] *Pihlman v. State*, 292 Ga. App. 612, 615 (3) (a) (664 SE2d 904) (2008).

Here, even assuming that Phillips's statement constituted hearsay and trial counsel's failure to object was an error, Cwik has failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[14] As noted in Division 1, supra, the State may meet its burden using either direct or circumstantial evidence.[15] Considering the evidence presented regarding where the crimes occurred, Cwik has not demonstrated that there was a reasonable likelihood that the jury would have reached a different conclusion even if trial counsel had objected to Phillips's statement.[16]

Additionally, Cwik cannot show that trial counsel was deficient in failing to object to Phillips's statement because the statement itself did not constitute hearsay. At trial, Phillips testified that, based on his investigation, the abuse had occurred at Cwik's home address, which is located in Hall County. As the Supreme Court of Georgia has stated, a detective's "comment on the results of his investigation [is] not hearsay evidence[ ]" where the testimony "was limited to the findings of the detective's investigation and did not include or make reference to out-of-court

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[14] *Jackson v. State*, 321 Ga. App. 607, 610 (1) (739 SE2d 86) (2013) (citations and punctuation omitted).

[15] *Worthen*, 304 Ga. at 865 (3) (a).

[16] See *Mohamed v. State*, 307 Ga. 89, 94 (3) (b) (834 SE2d 762) (2019).

statements made to him[.]"[17] Therefore, because Phillips's limited statement concerned only the results of his investigation, specifically where the abuse occurred, and did not include statements made by others, this statement standing alone did not constitute hearsay.[18] Thus, trial counsel's failure to object was not deficient.[19]

3. Cwik argues that the trial court abused its discretion in not declaring a mistrial because an e-mail to the District Attorney's office was inadvertently displayed during the trial.

"The decision whether any unauthorized statement, communicated to the jury either individually or as a group, is so prejudicial as to warrant a mistrial is in the discretion of the trial court."[20] Additionally, "a jury verdict will not be upset solely because of such [statements], unless the statements are so prejudicial that the verdict must be deemed inherently lacking in due process."[21]

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[17] *Porter v. State*, 292 Ga. 292, 293-294 (2) (736 SE2d 409) (2013); see *Jones v. State*, 329 Ga. App. 478, 481 (3) (765 SE2d 657) (2014).

[18] See OCGA § 24-8-801 (c); see also see *Jones*, 329 Ga. App. at 481 (3).

[19] See *Wesley v. State*, 286 Ga. 355, 356 (3) (a) (689 SE2d 280) (2010) ("[T]rial counsel did not perform deficiently by failing to make a meritless objection to the admission of this evidence.").

[20] *Cooke v. State*, 230 Ga. App. 326, 327 (496 SE2d 337) (1998).

[21] *Sims v. State*, 266 Ga. 417, 419 (3) (467 SE2d 574) (1996) (citation and punctuation omitted).

Here, while showing a video to the jury, an internal State e-mail was displayed briefly on the screen. The court and trial counsel noted that they were only able to read part of the e-mail, and when the jurors were asked if they saw the e-mail, only two individuals (one juror and one alternate) raised their hands.

The two jurors were subsequently questioned independently about what they saw. The first juror testified, "I think it said, Daddy Cwik is testifying. I didn't see the whole thing." She also stated that it was only visible "one, two seconds maybe." When asked if it would impact her ability "to give a true and fair verdict[,]" she responded "[n]o sir, I don't believe so."

The alternate juror testified that he was only able to read part of the message, specifically "[s]omething about Daddy Cwik [and] something about the African-American spy." He also stated that the e-mail would not impact his ability to render a true and fair verdict. The court subsequently provided a limiting instruction regarding the e-mail to each juror individually.

Based on the record before us, the message was only displayed briefly, the two jurors who saw it were only able to read a portion of the e-mail, and both jurors received limiting instructions. Therefore, we conclude that the brief display of the message was not so prejudicial as to render the verdict inherently lacking in due process, and accordingly, the trial court did not abuse its discretion.

4. Cwik argues the trial court abused its discretion in allowing A. B. to testify in her National Guard uniform. He asserts that allowing her, as the State's

central witness, to appear in military uniform improperly bolstered her credibility before the jury.

This Court has held that "a trial court does not abuse its discretion in allowing a witness on active duty in the military to testify in uniform[.]"[22] Quoting the Tennessee Court of Criminal Appeals, testifying in military uniform "is little different from a police officer testifying in a police uniform. . . . [W]hether a witness or a victim is a common laborer, an engineer, or a doctor, is a fact which may be considered by the jury but is clearly not determinative of the credibility of that person."[23]

Here, A. B. testified that she had joined the National Guard and completed boot camp and the required training shortly before trial. She also testified that she would be participating in the Reserve Officer Training College ("ROTC") program when she started college, which she testified would be approximately a week after the trial. Further, as A. B. was a witness, her credibility was subject to cross-examination.[24] Thus, the present situation is different from the "much-litigated question of a defendant's courtroom attire[,]"[25]

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[22] *Carver v. State*, 324 Ga. App. 422, 425 (750 SE2d 735) (2013).

[23] Id. at 424 (citations and punctuation omitted).

[24] Cf. *Harp*, 347 Ga. App. at 614 (2) (holding the trial court did not abuse its discretion in refusing to allow the defendant to wear his military uniform where, inter alia, he did not testify and was not subject to cross-examination).

[25] *Carver,* 324 Ga. App. at 425.

as defendants, unlike witnesses, may be present without taking the stand. Moreover, the court provided a limiting instruction charging the jury not to consider her uniform before she testified.[26] Therefore, allowing A. B. to testify in her uniform did not unduly prejudice Cwik, and accordingly, the trial court did not abuse its discretion.[27]

Judgment affirmed. Doyle, P. J., and Brown, J., concur.

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[26] See id. at 426.

[27] See id.

APPENDIX B

Court of Appeals
of the State of Georgia

ATLANTA, July 07, 2021

The Court of Appeals hereby passes the following order:

A21A0184. MATTHEW DAVID CWIK 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, 07/07/2021
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.
/s/ Stephen E. Castlen, Clerk.

APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S21C1317

January 11, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MATTHEW DAVID CWIK v. THE STATE.

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

All the Justices concur, except Peterson, J., who dissents.

Court of Appeals Case No. A21A0184

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.

/s/ [Illegible] , Clerk.

APPENDIX D

Excerpt of Trial Transcript in the Superior Court of Hall County, State of Georgia

August 7, 2018

* * *

[pp. 38-44]

Likewise, I understand Ava Bergeron will be the first witness called by the State. Is that correct?

ASSISTANT D.A. FOWLER: That's correct.

THE COURT: Is she ready, present and ready to proceed with her testimony?

ASSISTANT D.A. FOWLER: I'm sorry?

THE COURT: Is she here and ready to testify?

ASSISTANT D.A. FOWLER: Yes.

THE COURT: Mr. Pate, would this time be appropriate for you to voir dire?

MR. PATE: Yes, your Honor. Thank you.

THE COURT: We'll go ahead and bring Ms. Bergeron in to allow Mr. Pate to voir dire her in regard to the issue of her attire. And then I'll allow y'all to take a short break before I bring the jurors back in.

Ms. Bergeron, if you will follow the bailiff.

Ms. Fowler, if you will swear the witness in, please.

ASSISTANT D.A. FOWLER: I will.

Good morning. Will you raise your right hand.

(Witness sworn.)

THE COURT: Ms. Bergeron, you can have a seat. Ms. Bergeron, I will give you an initial -- obviously the jury is not present. During the course of your testimony, the jury will be present, but there's a preliminary matter the Court wishes to take up outside the jury's presence.

There was some discussion and there will be an issue ruled upon by the Court about the attire. I understand that you are in the Army or a branch of the Army.

At this time I'll allow for voir dire in regards to Ms. Bergeron and her attire.

MR. PATE: Thank you, your Honor.

AVA BERGERON
was called, and having been previously duly sworn,
was examined and testified as follows on

VOIR DIRE EXAMINATION

BY MR. PATE:

Q. Good morning, Ms. Bergeron.

A. Good morning, sir.

Q. Are you currently active duty in the United States Army?

A. No, sir. I'm in the National Guard.

Q. You're in the National Guard. And what is your current assignment?

A. I'm going to drill every month, and I'm starting school in about a week-and-a-half.

Q. So today you're not -- if you were not here in court, you're not participating in any drills?

A. No, sir.

Q. You would not be going to school today because you haven't started class, is that correct?

A. Yes, sir.

Q. Why then would you wear your uniform to court?

A. Sir, I just got back from being on active duty. I just got done with training. It's what I'm used to wearing, what I'm comfortable in, makes me feel safe, makes me feel secure.

Q. Makes you feel safe and secure.

And, again, I'm not aware of any rules or regulations within the Guard about wearing your uniform when you're not on duty. Are there any rules or regulations to that effect?

A. Not to my knowledge. I asked my chain of command, and they said it was completely fine with them.

Q. Did you wear your uniform yesterday?

A. No, sir.

MR. PATE: That's all I have, your Honor.

THE COURT: All right.

ASSISTANT D.A. FOWLER: If I could ask a couple of follow-ups.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY ASSISTANT D.A. FOWLER:

Q. Ava, if you were going to school -- are you still working on financial aid and that sort of thing?

A. No.

Q. Do you have any reason to need to go to school this week?

A. No.

Q. Okay. Do you sometimes wear your uniform even when you're not going to school or doing necessarily Army-related things?

A. Yes.

ASSISTANT D.A. FOWLER: That's all. Thank you.

THE COURT: All right. Any redirect.

MR. PATE: No. Thank you.

THE COURT: Ms. Bergeron, you can step back outside at this time. Thank you.

All right. Counsel, argument.

MR. PATE: Just briefly, your Honor. I recognize this is within the Court's discretion, but I don't think it's really supported by Carver v. State. I think the language in that case is clear that -- it addressed a trial court not abusing its discretion in allowing a witness on active duty in the military to testify in uniform. And the basis was that -- for that was the rationale that the witness should be entitled to dress in a manner ordinary to him or her.

And it, frankly, said -- it distinguished between a reservist or retired military member, which is similar, I think, to what we have here in with a Guard member.

I think the reason she's doing it is not because she's simply coming in from work or about to go to work when she leaves court. She testified she's doing it because it makes her feel more comfortable.

While that may be entirely valid and okay, it's not what happened in Carver v. State. That was a very different case. So if the Court does allow it, I think there needs to be a recognition that we're going beyond Carver at this point. And there's no other case law we could find in Georgia addressing this particular situation, where she's literally putting on the uniform to testify.

THE COURT: Ms. Fowler.

ASSISTANT D.A. FOWLER: I'll agree that this is not the same situation as Carver, but I think Carver does stand for the proposition that allowing the witness to wear something like that is fully within the Court's discretion.

She just testified with Mr. Pate that she's more comfortable in it. She wore it the whole time in boot camp, which she just got finished with. She testified with me that she does wear it on days that she doesn't even have to do military stuff because she's more comfortable in it.

The jury is going to know that she's in the military. I think that's a perfectly acceptable fact they'll hear during her testimony. They need to know who she is and what she does.

The fact that she's wearing her fatigues I don't think makes any difference to the jury.

The Court can and probably should give a limiting instruction saying that the witness's manner of dress should not be considered in weighing her credibility, just as someone who comes to court who normally wears jeans and T-shirts but is wearing a suit or a jacket with nice slacks.

People dress a way that makes them feel comfortable when they come to court because it's scary, especially for an 18-year-old talking about sexual abuse in front of the person who abused her.

I don't think it would be an abuse of discretion in this case, your Honor. I don't think it unfairly prejudices the defendant. And I don't think it would suggest to the jury that she's more credible just because she's wearing fatigues.

THE COURT: I will acknowledge, Mr. Pate, your argument. I do believe it does step a little bit outside of Carver because Carver deals with an active duty

military member. However, I also recognize that Ms. Bergeron is an active member of the United States Army National Guard. National Guard members are called into active duty just as any other branch of military are, and I respect the service of individuals across our branches of military.

With the broad discretion that Carver does lay out, I am going to allow Ms. Bergeron to testify in her uniform, in her fatigues.

However, Mr. Pate, as I indicated to you prior to the beginning of trial today, I will certainly consider and will almost certainly give any limiting instruction if you would like to craft one over the next ten minutes of time. If you would like to develop a limiting instruction and we can discuss with Ms. Fowler. And then I will give a limiting instruction.

I will give that limiting instruction before she testifies, after she testifies, and at the close of the case if -- Mr. Pate, if the defendant would like. Or I will do that at any time the defendant would request. Because I believe that's the appropriate remedy to any potential bias or undue prejudice for the defendant in the case. Otherwise, I do not see that there would be any type of prejudice or bias against the defendant by allowing Ms. Bergeron to testify in her fatigues.

With that, that will be the order of the Court.

I am going to give y'all until 10:16 -- that's about a ten-minute break -- to go and use the restroom, get any

* * *