Appendix A.

Appendix A.

FIFTH DIVISION
MCFADDEN, P. J.,
BRANCH and BETHEL, JJ.

March 29, 2017

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A17A0606. MARTIN v. THE STATE.

PER CURIAM.

After a jury trial, David Martin was convicted of aggravated child molestation and sexual battery and sentenced to 25 years to serve in confinement and life on probation. The trial court denied Martin's amended motion for new trial, and Martin filed the instant appeal. Martin argues that his convictions should be reversed for two reasons: (1) a witness improperly bolstered the victim's testimony; and (2) his trial counsel's failure to challenge the superior court's jurisdiction constituted ineffective assistance of counsel. Discerning no error, we affirm.

Viewed in the light most favorable to the jury's verdict, the evidence adduced at trial showed that the nine-year-old victim lived with her mother and her mother's boyfriend in a two-bedroom apartment and shared a bedroom with her siblings. In

Appendix A.

February of 2011, 17-year-old Martin was at the apartment playing video games with the boyfriend while the victim and her siblings watched tv in her mother's bedroom. Martin walked into the room and began to talk to the victim about a celebrity she wanted to meet. Martin stated that he might be able to arrange a meeting and returned to the living room. Shortly thereafter, Martin returned to the mother's bedroom and led the victim to her bedroom, where he told her to sit on the bed, put a t-shirt over her face, and told her to open her mouth. When she told him "no," he opened her mouth with his thumbs then inserted his penis into her mouth. He told her to move her tongue around, which she did not do, then she felt something wet come out of his penis. Next, Martin told the victim to turn around and placed his penis on her clothed bottom. Soon thereafter, the mother's boyfriend called Martin, and when the victim turned around, he was pulling up his pants and buckling his belt buckle. Martin told her not to tell anyone what happened and left the room.

When the victim's mother returned home, the victim told her what happened, and the mother called the police. Detective Rose of the Sandy Springs Police Department was called to the scene to investigate by the responding officers. She spoke with the victim's mother, directed that the victim be taken to the hospital, and then interviewed Martin, who was still present at the scene, after reading him his

Miranda rights. Detective Rose shared the allegations with Martin, who denied assaulting the victim.

After interviewing Martin, Detective Rose went to Scottish Rite Hospital, where the victim was examined, and swabbed her mouth for DNA. Detective Rose also arranged a forensic interview for the victim, which occurred approximately a week later. After watching the interview, Detective Rose secured a warrant and arrested Martin. During Martin's second interview, he again denied the assault. However, when Detective Rose told Martin that she knew something happened and believed the victim, Martin confessed to the assault. Detective Rose later obtained the results of the swabs, which revealed the presence of seminal fluid in the victim's mouth.

Martin was convicted of aggravated child molestation and sexual battery. Martin filed a motion for new trial, which the trial court denied following a hearing. This appeal followed.

1. In his first enumeration of error, Martin argues that the trial court should have granted his motion for a mistrial after Detective Rose improperly bolstered the credibility of the victim. "The abuse of discretion standard applies to the review of

the denial by the trial court of a motion for mistrial." *Jones v. State*, 335 Ga. App. 591, 592 (1) (782 SE2d 489) (2016). We find no abuse of discretion here.

As discussed above, when Detective Rose testified at trial about her second interview of Martin, she stated, "I believe something happened. I know what she said. I know something happened. [The victim] told me, and I believe what she's telling [] me that something has happen[ed]." Shortly thereafter, Martin admitted to the molestation. Martin contends that this testimony amounted to improper bolstering and cites *Gaston v. State*, 317 Ga. App. 645 (731 SE2d 79) (2012), in support of his position. *Gaston* appropriately explains that "[t]he credibility of a witness, including a victim witness, is a matter for the jury's determination under proper instruction from the court. It is well established that in no circumstance may a witness's credibility be bolstered by the opinion of another as to whether the witness is telling the truth." Id. at 647-648 (1) (punctuation omitted.). In that case, we reversed the judgment of the trial court where the father of the victim was improperly allowed to bolster the victim's molestation outcry where the case turned on the victim's credibility. Id. at 648-649. The outcome of *Gaston*, however, is inapposite here where the comment occurred during a police interview.

> When the officer made the comments about which [Martin] complains, the officer was not then a sworn witness. Instead, [she] was interviewing a suspect in the course of a law enforcement investigation, and as our Supreme Court has acknowledged, law enforcement interrogations are, by their very nature, attempts to determine the ultimate issue and the credibility of witnesses. Comments made in such an interview and designed to elicit a response from a suspect do not amount to opinion testimony, even when a recording of the comments is admitted at trial.

Roberts v. State, 313 Ga. App. 849, 851 (2) (723 SE2d 73) (2012) (citation and punctuation omitted). See also *Collum v. State*, 281 Ga. 719, 723 (3) (642 SE2d 640) (2007); *Dority v. State*, 335 Ga. App. 83, 92 (2)(780 SE2d 129) (2015). We pointed out in *Roberts* that these comments are admitted as long as their probative value outweighs their "tendency to unduly arouse the jury's emotions of prejudice, hostility or sympathy." *Roberts*, 313 Ga. App. at 851 (2). The fact that the comments led to an admission gave probative value to the circumstances under which the colloquy occurred. See id. The potential prejudicial effect of admitting the comments was therefore minimal. As we reasoned in *Roberts*, even if the comments had not been admitted, the jury would have surmised that Detective Rose believed the victim's version of events since she arrested Martin based on the victim's allegations. Id. at 852. Accordingly, this enumerated error fails.

2. Next, Martin asserts for the first time on appeal that trial counsel was ineffective for failing to file a plea in bar to challenge the superior court's jurisdiction. Martin argues that the juvenile court had exclusive jurisdiction over the case because even though he was 17 years old when the incident occurred, he was under juvenile supervision at the time. Martin asserted this argument in his third amended motion for new trial, but his trial counsel abandoned the argument for lack of legal merit during the hearing on the motion for new trial, obviating the need for a ruling on the issue. The trial judge, however, noted on the record that Martin had preserved the right to assert his jurisdictional challenge on appeal. In Martin's appellate brief, his counsel again concedes that this argument has no merit but explains that he asserts it solely because of the desires of his client.[1]

When a claim of ineffective assistance is raised for the first time on appeal, we remand the case for an evidentiary hearing unless "we can determine from the record that the defendant cannot establish ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (104 SC 2052, 80

[1] Under these unique circumstances, Martin's counsel does not violate the prohibition against asserting his own ineffectiveness. See *Garland v. State*, 283 Ga. 201, 203 (657 SE2d 842) (2008) (trial counsel can not ethically assert or argue their own ineffectiveness).

LE2d 674) (1984)." *Ruiz v. State*, 286 Ga. 146, 149 (2) (b) (686 SE2d 253) (2009). "Under *Strickland*, a defendant must show that trial counsel's performance was professionally deficient, and but for counsel's unprofessional errors, there exists a reasonable probability that the outcome of the proceeding would have been more favorable." Id.

In this instant case, we need not remand the case to the trial court for an evidentiary hearing because we can determine from the record that Martin cannot establish an ineffective assistance of counsel claim. Pursuant to OCGA § 15-11-10, the juvenile court has exclusive original jurisdiction over juvenile matters except as provided in OCGA § 15-11-560, which governs concurrent and original jurisdiction of superior court and provides, in pertinent part: "[t]he superior court shall have exclusive original jurisdiction over the trial of any child 13 to 17 years of age who is alleged to have committed any of the following offenses: . . . (6) Aggravated child molestation." OCGA § 15-11-560 (b) (6). It is undisputed that Martin was 17 years old at the time the incident occurred. The failure to file a meritless motion does not amount to ineffective assistance of counsel. See *Scales v. State*, 310 Ga. App. 48, 57 (a) (712 SE2d 555) (2011) (failing to pursue a futile motion does not constitute

ineffective assistance of counsel). Consequently, this enumerated error, too, lacks merit.

Judgment affirmed. Division Per Curiam. All Judges concur.

Appendix B. Appendix B.

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

DAVID MARTIN, GDC# 1001403010, Petitioner, vs. RONALD BRAWNER, Warden, Respondent.	* * * * * * * * * *	CIVIL ACTION NO. 2020-SU-CV-49568 HABEAS CORPUS

FILED IN OFFICE THIS
21 DAY OF January, 2021
Cynthia Smith
Dep. CLERK OF SUPERIOR COURT
BALDWIN COUNTY, GEORGIA

FINAL ORDER

Petitioner, David Martin, filed this petition for a writ of habeas corpus, challenging his 2014 Fulton County jury trial convictions and sentences for aggravated child molestation and sexual battery, affirmed on appeal in 2017. Based upon the record as established at the May 27, 2020 hearing[1], this Court makes the following findings of fact and conclusions of law and DENIES relief.

PROCEDURAL HISTORY

Petitioner was indicted by a Fulton County grand jury on June 7, 2011, for aggravated child molestation (count 1) and sexual battery (count 2). (HT. 76-78).

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[1] Citations to the May 27, 2020, evidentiary hearing transcript will be referred to as "HT," followed by the page number.

Exhibit C. Appendix B.

Petitioner was represented at trial by Brian A. Hobbs. (HT. 525). At a jury trial held in September of 2014, Petitioner was found guilty of both counts. (HT. 218). Petitioner was sentenced to life, serve twenty-five years for aggravated child molestation (count 1) and five years concurrent for sexual battery (count 2). (HT. 210).

Petitioner appealed his convictions and sentences through new counsel, Jackie G. Patterson, alleging:

1) the trial court committed reversible error in denying the defense motion for mistrial after the arresting officer bolstered the credibility of the victim; and,

2) Petitioner received ineffective assistance of counsel when trial counsel failed to file a plea-in-bar when the juvenile court had exclusive jurisdiction of the offense, since Petitioner was on juvenile supervision at the time of the offense even though he was seventeen years old.

(HT. 1239-51).

The Georgia Court of Appeals found that these grounds lacked merit and affirmed Petitioner's convictions and sentences on March 29, 2017. *Martin v. State*, No. A17A0606 (Ga. App. Mar. 29, 2017) (unpublished). (HT. 1271-78).

Petitioner filed this habeas corpus petition on March 18, 2020, challenging his Fulton County convictions and raising three grounds for relief. The case came before this Court on May 27, 2020, for an evidentiary hearing at which Petitioner testified and the documents from his criminal case were tendered.

After the hearing, Petitioner filed an amendment on June 22, 2020 in which he sought to add as a ground for relief that his fifth and fourteenth amendment rights were violated when his jury list was not composed correctly under Georgia's new or old composition laws. The Civil Practice Act permits a habeas corpus petitioner the "unfettered right" to amend his petition up until the time of the evidentiary hearing; after the start of the hearing, the petitioner must seek leave of court. *Nelson v. Zant*, 261 Ga. 358, 359, 405 S.E.2d 250 (1991). Though O.C.G.A. § 9-11-14(b) provides that the pleadings will conform to the evidence absent objection, nothing in the Civil Practice Act permits a party to amend his pleadings after the hearing has ended. The Court will not consider the new ground raised in the post-hearing amendment[2].

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[2] The Court notes that the amended claim is based on a state statute, as well as a Supreme Court decision applying the statute. *Ricks v. State*, 301 Ga. 171, 800 S.E.2d 307 (2017). Petitioner cannot elevate these statutory claims to constitutional ones by attempting to attach a "due process" label to them, and thus, as alleged violations of state law or state procedural rules are not cognizable in habeas corpus, the amended claim would provide no basis for

The Court will address similar claims together.

DEFAULTED GROUNDS

In ground 1, Petitioner alleges that the superior court lacked subject matter jurisdiction in violation of due process, because the juvenile court never conducted a hearing waiving jurisdiction over Petitioner's case.

In a portion of ground 2, Petitioner alleges that he received ineffective assistance of counsel when his trial counsel failed to research juvenile records and move to dismiss based on the juvenile court jurisdiction.

Findings of Fact and Conclusions of Law

These claims were not raised at trial and on direct appeal, so they are procedurally defaulted under O.C.G.A. 9-14-48(d), and Petitioner has failed to show cause and prejudice to overcome the default[3].

Pursuant to O.C.G.A. § 9-14-48(d):

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with

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relief even if timely brought. *Britt v. Smith*, 274 Ga. 611, 612, 556 S.E.2d 435 (2001).

[3] While these claims specifically as pled were not raised on appeal, note that Petitioner did claim on direct appeal that trial counsel was ineffective for failing to file a plea-in-bar based on juvenile court jurisdiction, due to the fact that Petitioner was on juvenile supervision at the time of the offense. (HT. 1248-49).

such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

Because Petitioner did not raise these claims at trial and on direct appeal, or post-trial and on direct appeal when he had new counsel, they are procedurally defaulted. *Todd v. Turpin*, 268 Ga. 820, 493 S.E.2d 900 (1997); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991); *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985). To show cause to overcome the default, Petitioner must demonstrate "cause" to overcome the default – i.e., that "some objective factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted." *Head v. Carr*, 273 Ga. 613, 614, 544 S.E.2d 409 (2001); *Turpin v. Todd*, 268 Ga. at 825.).

"Cause" to overcome a default may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). "Actual prejudice" may be shown through satisfying the prejudice prong of *Strickland* or satisfying the actual prejudice test of *United States v. Frady*, 456 U.S. 152, 170 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin* at 828-29. "[A] habeas petitioner who meets both prongs of the *Strickland* test has established the necessary cause

and prejudice to overcome the procedural bar of OCGA § 9-14-48(d)." *Battles v. Chapman*, 269 Ga. 702, 506 S.E.2d 838 (1998).

Petitioner has not shown cause as defined in *Todd* to overcome the default of this claim. *Todd v. Turpin*, 268 Ga. at 820. While these specific allegations are defaulted, Petitioner's appellate counsel *did* raise a similar allegation, i.e. that trial counsel was ineffective for failing to file a plea-in-bar, arguing that the juvenile court, rather than the superior court, had exclusive jurisdiction of the offense. (HT. 1248-49). Petitioner has not demonstrated that appellate counsel's decision to raise a challenge to the superior court's jurisdiction orto trial counsel's performance in the manner she chose was not a reasonable, tactical decision that any competent attorney in the same situation would have made. *Shorter v. Waters*, 275 Ga. 581, 585, 571 S.E.2d 373 (2002).

Petitioner has similarly failed to demonstrate he was prejudiced on either of the above grounds, as he his case was properly brought in superior court. A valid indictment was returned by the Fulton County grand jury charging Petitioner with felony offenses committed in Fulton County. (HT. 76-78). Such indictment granted subject matter jurisdiction in Petitioner's case. *See Goodrum v. State*, 259 Ga. App. 704, 704-05, 578 S.E.2d 484 (2003) (stating that, when a valid indictment in a criminal case alleges that a defendant committed felony acts in a particular county, the superior court of

said county has exclusive jurisdiction over that person); *Brown v. State*, 346 Ga. App. 245, 246-47, 816 S.E.2d 111 (2018).

The fact that Petitioner was a juvenile does not change that fact. As the Court of Appeals found in reviewing the ineffective assistance of trial counsel claim raised on appeal:

> Pursuant to O.C.G.A. § 15-11-10, the juvenile court has exclusive jurisdiction over juvenile matters *except* as provided in O.C.G.A. § 15-11-560, which governs concurrent and original jurisdiction of superior court and provides, in pertinent part: "[t]he superior court shall have exclusive original jurisdiction over the trial of any child 13 to 17 years of age who is alleged to have committed any of the following offenses: ... (6) Aggravated child molestation." O.C.G.A. § 15-11-560(b)(6). It is undisputed that [Petitioner] was 17 years old at the time the incident occurred.

Martin, No. A17A0606; (HT. 1277) (emphasis added).

Because the Superior Court had jurisdiction over Petitioner's case at the outset, Petitioner has not demonstrated either that a waiver hearing would need to occur in Juvenile Court or that his case would be subject to dismissal if trial counsel had sought to do so. Thus, ground 1 and a portion of ground 2 are defaulted and provide no basis for relief.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
(Part of Ground 2 and Ground 3)

In the remainder of ground 2, Petitioner alleges that he received ineffective assistance of counsel when his appellate counsel failed to research juvenile records and move to dismiss based on juvenile court jurisdiction.

In ground 3, Petitioner alleges that he received ineffective assistance of counsel when his appellate counsel failed to claim on appeal that trial counsel was ineffective for not arguing that the indictment was void due to not being returned in open court with the minutes attached to it.

Findings of Fact and Conclusions of Law

Strickland v. Washington, 466 U.S. 684, 687 (1984), sets forth a two-pronged test, both of which must be proven by the petitioner in order to prevail on a claim of ineffective assistance.

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

Strickland, 466 U.S. at 687.

As to the first prong, this Court's scrutiny of an attorney's performance must be "highly deferential." *Strickland*, 466 U.S. at 689.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

Counsel is "strongly presumed" to have rendered effective assistance and made "all significant decisions in the exercise of reasonable professional judgment." *Id.* A petitioner has the burden of proof to overcome the "strong presumption" that counsel's conduct falls within the range of reasonable professional conduct and affirmatively show that the purported deficiencies in counsel's performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222, 227, 564 S.E.2d 192 (2002).

An appointed appellate attorney has no constitutional duty to raise every non-frivolous issue requested by a client. *Jones v. Barnes*, 463 U.S. 745 (1983). A petitioner can still raise a *Strickland* claim based on an appellate attorney's failure to raise a particular claim "but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). The "controlling principle" is whether appellate counsel's decision was a reasonable, tactical decision that any competent attorney in the same situation would have made. *Shorter v. Waters*, 275 Ga. 581, 585, 571 S.E.2d 373 (2002).

As to *Strickland*'s prejudice prong:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. Where the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must show there is a reasonable probability that the outcome of his appeal would have been different had the issue been raised. *Nelson v. Hall*, 275 Ga. 792, 573 S.E.2d 42 (2002). When such a claim relies on the failure to raise a claim of ineffective assistance of trial counsel, a demonstration of prejudice under *Strickland* requires *both* a finding that trial counsel provided deficient representation and that the defendant was prejudiced by trial counsel's deficiencies. *Gramiak v. Beasley*, 304 Ga. 512, 513-14, 820 S.E.2d 50 (2018).

Petitioner has failed to meet his burden under *Strickland* to establish that counsel's performance was deficient for failing to raise the claims now asserted on appeal.

First, Petitioner alleges that appellate counsel was ineffective for failing to research juvenile records and move to dismiss based on juvenile court jurisdiction. However, as set out above, while appellate counsel did not raise this issue exactly as now pled, she did claim on appeal that trial counsel was ineffective for failing to file a plea-in-bar, arguing that the juvenile court, rather than the superior court, had exclusive jurisdiction of the offense. (HT. 1248-49). Petitioner has not demonstrated that the decision to raise a challenge to the superior court's jurisdiction in the manner chosen was not a

reasonable, tactical decision that any competent attorney in the same situation would have made. *Shorter*, 275 Ga. at 585.

Further, Petitioner has not shown that he was prejudiced by his counsel's decision. The Court of Appeals determined that the Superior Court in Petitioner's case had original, exclusive jurisdiction based on the crime for which Petitioner was charged. (HT. 1277); *see* O.C.G.A. §15-11-10; O.C.G.A. § 15-11-560(b)(6). For this reason, a motion to dismiss based on juvenile jurisdiction or any allegedly invalid waiver order would have been denied. Thus, Petitioner has not demonstrated a reasonable probability that the outcome of his appeal would have been different but for appellate counsel's decisions.

Petitioner also alleges that appellate counsel was ineffective for failing to claim on appeal that trial counsel was ineffective for not arguing that the indictment was void due to not being returned in open court with the minutes attached to it. As set out above, Petitioner was indicted by the Fulton County grand jury for crimes which allegedly occurred in Fulton County. (HT. 76-78). Petitioner has not presented any evidence that the indictment was not returned in open court. *See, e.g., Thompson v. State*, 304 Ga. 146, 149, 816 S.E.2d 646 (2018) ("There is no express requirement that the indictment contain a written statement that it was received in 'open court,' or that it be signed."); *White v. State*, 312 Ga. App. 421, 428, 718 S.E.2d 335 (2011).

As for the minutes of the grand jury, Petitioner has not shown that such a thing existed in the first place, nor that its absence rendered his indictment infirm. As such, Petitioner has not demonstrated either that his appellate counsel was ineffective for failing to raise this issue of trial counsel ineffectiveness or that he was prejudiced thereby. *Hayes v. State*, 262 Ga. 881, 884-85, 426 S.E.2d 886 (1993) (failure to raise a meritless claim cannot be evidence of effective assistance).

The remainder of ground 2 and ground 3 provide no basis for relief.

PETITIONER'S MOTION FOR DISCOVERY

Petitioner also filed several motions for discovery, including a motion for discovery of evidence to support a ground that he sought to add after the hearing was over. In these motions, Petitioner seeks to have Respondent provide to him or bring to a second hearing: all evidence in his case concerning system data of the jury composition list for 2011 and 2014; his juvenile court records; minutes of the grand jury, and appellate counsel, Jackie G. Patterson.

In habeas corpus actions, "a court may receive proof by depositions, oral testimony, affidavits, or other evidence." O.C.G.A. § 9-14-48(a). Other discovery is not permitted absent leave of court and *a showing of exceptional circumstances*. O.C.G.A. § 9-14-48(a). Petitioner has neither been granted

leave of court nor made a satisfactory showing of any exceptional circumstances. Petitioner's motions for discovery are DENIED.

CONCLUSION

Wherefore, the habeas corpus petition is denied.

If Petitioner desires to appeal this order, he must file an application for a certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days of the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Baldwin County Superior Court within the same thirty (30) day period.

The Clerk of the Superior Court is hereby directed to provide a copy of this order to Petitioner, Respondent, and the Attorney General's Office.

SO ORDERED, this 20th day of January, 2020.

TERRY N. MASSEY, Judge
Superior Courts
Ocmulgee Judicial Circuit

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties with the attached **FINAL ORDER** by hand-delivery, electronic transmission, facsimile and/or by depositing same in the United States Mail, with sufficient postage affixed thereto as follows:

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Meghan Hill
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Original Filed with Clerk's Office

This 22st day of January, 2021

Cynthia Smith

Clerk of Superior Court Baldwin County
Ocmulgee Judicial Circuit

IN THE COURT OF APPEALS
STATE OF GEORGIA

APPEAL CASE NO. A17A0606

DAVID MARTIN *

*

Appellant, *

*

vs. *

*

STATE OF GEORGIA *

Appendix C.

BRIEF OF APPELLANT

Jackie G. Patterson
Attorney for Appellant
Ga. Bar No. 566511

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Appendix C.

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TABLE OF AUTHORITIES

PART I.

PROCEDURAL HISTORY

David Martin ("Defendant) was indicted by a Fulton County Grand Jury on the charges of Aggravated Child Molestation and sexual battery. He was tried by jury before the Honorable Judge Robert McBurney and was found guilty of all charges on September 26th 2014. He was sentence to 25 years to serve in prison plus life on probation for the Aggravated Child Molestation and 5 years to serve for Felony Sexual Battery to run concurrent.

The Defendant filed a timely motion for a new trial and filed a second and third amended motion for a new trial. The defendant's motion for a new trial was heard on August 5th 2016 and the trial court denied it on September 2nd 2016, (R-p. 316) and a timely notice of appeal was filed. (R- p.1)

STATEMENT OF FACTS

The facts disclosed at trial and recited in the trial court's order denying the defendant's motion for new trial showed that on February 24th 2011, nine year old K.B (victim) was at home in the apartment she shared with her brother, sister, mother, and mother's boyfriend, Qundavius Allen. The defendant was visiting that day, so that he and Mr. Allen could play video games. That evening while the victim's mother was out running errands, Allen and Defendant were gaming in the living room as the victim played with her siblings in the back bedroom. The Defendant left twice from playing video games and went into the bedroom where the victim was playing. The Defendant talked to the victim about her idol Justin Bieber and he stated to the victim that he would get Bieber to contact her.

Shortly there after the Defendant returned to play video games but went back to the bedroom a second time and pulled the victim away from her siblings into an adjacent room where he sat her on the bed and told her to close her eyes, place a t-shirt over her head and most of her face, and ordered her to open her mouth. She closed her eyes but did not open her mouth but the Defendant pried her mouth open with his thumb and inserted his penis.

He told the victim to move her tongue around on it and after the victim felt something wet, he told her to turn over and rubbed his penis on her clothed bottom. The assault ended when Mr. Allen call for the Defendant to return to the video game. He told the victim not to tell anyone. When the victim's mother returned home she told her mother and her mother informed Mr. Allen right away who then confronted the Defendant.

The Defendant denied the assault. The victim was taken to the hospital for examination, which revealed no injuries but was consistent with the assault the victim has described. Swabs of the victim's mouth showed the presence of seminal fluid but it could not be determined whose fluid it was. Several days later after the defendant's arrest he was Mirandized and after several denials, he confessed. At trial the defendant stated his confession was a result of the arresting officer threatening him if he did not tell them what they wanted to hear. There are two enumerations of error in this case to be decided.

1. The improper bolstering by Detective Sandra Rose saying in front of the jury that she believes the victim story during her forensic interview. The defendant gave a recorded interview (T-Vol. 3 of 3, p.31) about the incident. On direct examination the prosecutor asked Detective Rose,

Q. And the first time he said nothing happened and offered no explanation?

A. Right.

Q. Tell the jury, if you could, just summarize what Mr. Martin said in this interview.

A. At this time I sit him down. I said I have talked to the victim (K.B.). I know what happened. I need you to tell me the truth about what happened. He again started to say, I don't know, noting happen. I said No. I believe something happened. K.B. told me, "*AND I BELIEVE WHAT SHE'S TELLING ME THAT SOMETHING HAPPENED.*" (T-Vol. 3 of 3, p.34). And eventually he comes around and says Yes, something happened and that he put his penis in her mouth and he ultimately gives a confession. (T-Vol. 3 of 3, p. 34). The video interview was played for the jury as well that repeated the bolstering of the credibility of the victim. (T-Vol. 3 of 3, p. 36).

The defense made a motion for a mistrial and the court denied it. (T-Vol. 3 of 3, p. 60-65).

2. For the first time on appeal the defendant asserts that trial counsel was ineffective by not filing a plea in bar since juvenile court had exclusive jurisdiction of his case since that the time of the offense he was on SUPERVISION by the Fulton County Juvenile Court. Trial counsel testified that the defendant was 17 years old at the time of the offense. He testified that he was aware that the defendant was on Juvenile court supervision. (Motion for New Trial Transcript, 10-3-2016, P. 17). **This testimony was not disputed by the State**. He was asked why he did not file a plea and bar? Trial counsel stated because at the time of his offense he had just turned 17. He further stated that if the defendant has be 16 at the time of the offense he would have filed a plea in bar. He stated there was no legal basis to file a plea in bar. (Motion for New Trial Transcript, 10-3-2016, P.18) Appellate counsel initially attempted to abandon this claim of error because after researching the case of Crankshaw v State, 243 Ga. 183 (1979) it did not support the defendant's position. The trial court recessed to give time for the defendant to consult with counsel after defendant raised his hand to speak. (Motion for New Trial Transcript, 10-3-2016,

P. 9-12). Appellant counsel cited O.C.G.A. 15-11-2-(10)(E) that reads in part....(10)"Child" means any individual who is:

(E) Under the age of 21 years who committed an act of delinquency before reaching the age of 17 years and who has been placed under the supervision of the court or on probation to the court for the purpose of enforcing orders of the court. (Motion for New Trial Transcript, 10-3-2016, P.51). The trial court denied the defendant' motion for new trial (R-P.316), based in part upon State v. Crankshaw, 243 Ga. 183 (1979) where the last paragraph in Crankshaw reads: In our opinion, Code Ann. s 24A-401(c)(2), now 15-11-2(10)(E) is intended merely as a device for extending the jurisdiction of the juvenile courts to take actions against persons between the age of 17 and 21 years authorized under other sections of the Juvenile Court Code specifically, Code Ann. s 24A-2701 (Ga.L.1971, pp. 709, 738; 1974, pp. 1126, 1131), (which permits the juvenile court to extend an order of probation until the juvenile reaches the age of 21 years); Code Ann. s 24A-3503(d)(2) (Ga.L.1971, pp. 709, 751; 1973, pp. 882, 888) (which allows a child who has been fingerprinted in an investigation of a crime to have his fingerprints removed from the files and destroyed if the child reaches 21 years of age and there is no record that he committed a criminal offense after reaching 16 years of age); and Code Ann. s 24A-3901(a) (Ga.L.1971, pp. 709, 755; 1973, pp. 882, 889) (which allows the juvenile court to act as a court of inquiry for any person 17 years of age or over, whenever such person is brought before the court in the course of any proceeding instituted under Code Title 24A). Code Ann. s 24A-401(c)(2) ***should not be construed as giving the juvenile courts jurisdiction over noncapital felonies committed by persons after they have reached the age of 17 years.***

State v. Crankshaw, 243 Ga. 183, 183, 253 S.E.2d 69, 69–70 (1979)

PART II

ENUMERATION OF ERRORS

1. **The trial court committed reversible error denied the defense motion for a mistrial after the arresting officer bolstered to credibility of the victim.**

2. Trial Counsel was ineffective by not filing a plea in bar when Juvenile Court had exclusive jurisdiction of the offense in this since the defendant was on juvenile supervision at the time of the offense even though he was 17 years old when the offense.

STATEMENT OF JURISDICTION

The Court of Appeals, rather than the Supreme Court, has jurisdiction of this appeal by virtue of the fact that it is an appeal from a judgment of conviction for a misdemeanor, which is a non-capital offense.

Furthermore, there is no constitutional issues presented for review; and the Court of Appeals has jurisdiction in all cases in which jurisdiction has not been conferred upon the Supreme Court. Article VI, Sec. V, para. III, Constitution of the State of Georgia (1983).

PART III

ARGUMENT AND CITATION OF AUTHORITIES

1. **The trial court committed reversible error denied the defense motion for a mistrial after the arresting officer bolstered to credibility of the victim.**

Standard of review: Denial of motion for mistrial is reviewed for abuse of discretion.

This case is controlled by Gaston v. State, 317 Ga. App. 645 (2012) where Gaston was convicted on Aggravated Child Molestation and other sex offenses and the following transpired at trial:

During the state's direct examination of R.C.'s father, the following exchange occurred over the objections of Gaston's counsel:

Q. ... [W]hen [R.C.] told you that she had been sexually molested by Melvin Gaston in 2006, did you believe her?

A. Yes.

...

Q. What was the answer[?]

A. Yes.

Q. You believed her, but then you sent her back in 2007 and 2008?

A. Yes.

Q. And why did you do that?

A. I was told to.

...

Q. Do you regret that decision?

A. I regret it.

...

Q. When [R.C.] told you that she had been molested by Melvin Gaston twice in 2008, did you believe her?

A. Yes.

Gaston v. State, 317 Ga. App. 645, 647, 731 S.E.2d 79, 80–81 (2012)

"The credibility of a witness, including a victim witness, is a matter for the jury's determination under proper instruction from the court. It is well established that in no circumstance may a witness'[s] credibility be bolstered by the opinion of another ... as to whether the witness is telling the truth." Gaston v. State, 317 Ga. App. 645, 647–48, 731 S.E.2d 79, 81 (2012)

The denial of the defendant's motion for a mistrial requires reversal of his conviction.

2. Trial Counsel was ineffective by not filing a plea in bar when Juvenile Court had exclusive jurisdiction of the offense in this since the defendant was on juvenile supervision at the time of the offense even though he was 17 years old when the offense

Standard of review: In order to prevail on a claim of ineffective assistance, appellant "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. Appellant "must overcome the strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct." In reviewing a lower court's determination of a claim of ineffective assistance of counsel, an appellate court gives deference to the lower court's factual findings, which are upheld unless clearly erroneous; the lower court's legal conclusions are reviewed de novo. Sweet v. State, 278 Ga. 320, 321–22, 602 S.E.2d 603, 606 (2004).

As this Court is aware from the above statement of facts and issues, Appellant counsel attempted to abandon this enumeration of error base upon State v. Crankshaw, supra. I cannot cite any statute or case law that states that juvenile court had jurisdiction over my client when a defendant is accused of committing aggravated child molestation if he has reached the AGE OF 17 at the time of the offense even though he was on juvenile court supervision. In being candid with the

court even at the expense of my client being totally upset and angry with my actions in this brief on this issue, if the law is not on my client's side I cannot make up law that does not exist to support this claim. As noted in the trial courts order in part..... (a) Except as provided in subsection (b) of this Code section, the court shall have concurrent jurisdiction with the superior court over a child who is alleged to have committed a delinquent act which would be considered a crime if tried in a superior court and for which an adult may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution. ***(b) The superior court shall have exclusive original jurisdiction over the trial of any child 13 to 17 years of age who is alleged to have committed any of the following offenses:***

(1) Murder;

(2) Murder in the second degree;

(3) Voluntary manslaughter;

(4) Rape;

(5) Aggravated sodomy;

(6) Aggravated child molestation;

(7) Aggravated sexual battery; or

(8) Armed robbery if committed with a firearm.

O.C.G.A. § 15-11-560

I am asking this court not to consider this enumeration of error as abandoned because my client still needs to get a ruling on this issue even though my client and I have disagreed on this issue throughout this appeal. I have to do what I feel is ethical even if it makes my client unhappy.

PART IV

CONCLUSION

Based upon the above facts and law, the trial court committed reversible error and request that his convictions be reversed.

This December 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the above and foregoing Brief of Appellant upon Opposing Counsel of Record by regular hand delivery to:

Paul Howard
District Attorney Fulton County
136 Pryor St. 3rd Floor
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This December 13, 2016

/s/Jackie G. Patterson
Jackie G. Patterson
Attorney for Appellant