INDEX OF APPENDICES

Burnett v. State

Court of Appeals of Georgia

February 28, 2023, Decided

A22A1640.

Reporter
367 Ga. App. 285 *; 884 S.E.2d 587 **; 2023 Ga. App. LEXIS 105 ***

BURNETT v. THE ***STATE***.

Subsequent History: Reconsideration denied March 16, 2023 — Cert. applied for.

Prior History: Sodomy, etc. Glynn Superior Court. Before Judge Guy.

Disposition: Judgment affirmed.

Core Terms

trial counsel, ineffective, trial court, argues, charges, motion for a new trial, contends, counsel's performance, conflicting interest, jurors, effective assistance of counsel, trial strategy

Case Summary

Overview

HOLDINGS: [1]-The evidence was sufficient to authorize the jury to find that defendant committed the offenses of aggravated sodomy and child molestation under O.C.G.A. §§ 16-6-2(a)(2) and 16-6-4(a)(1), as charged in the indictment because the testimony of the victim, who was ten years old at the time of trial, alone was sufficient; [2]-The trial court did not err in finding that trial counsel's questioning during voir dire was the result of trial strategy that was professionally reasonable. Further, defendant failed to establish prejudice as he did not present any evidence that additional questioning of the potential jurors would have revealed an improper bias against him or established that the jurors were not qualified to serve.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Weight & Sufficiency

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN1[↓] **Province of Court & Jury, Credibility of Witnesses**

In reviewing a challenge to the sufficiency of the evidence to support a conviction, the relevant question under Jackson v. Virginia 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. In applying this standard, an appellate court does not resolve conflicts in the testimony, weigh the evidence, or draw inferences from the evidence, as those are functions of the jury. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the ***state***'s case, the jury's verdict will be upheld.

Constitutional Law > ... > Fundamental

Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN2[] **Criminal Process, Assistance of Counsel**

To prevail on a claim of ineffective assistance of counsel, a defendant generally must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. To satisfy the deficiency prong, a defendant must demonstrate that his attorney performed at trial in an objectively unreasonable way considering all the circumstances and in the light of prevailing professional norms. This requires a defendant to overcome the strong presumption that trial counsel's performance was adequate. To carry the burden of overcoming this presumption, a defendant must show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not. In particular, 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. To satisfy the prejudice prong, a defendant must establish a reasonable probability that, in the absence of counsel's deficient performance, the result of the trial would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN3[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

If an appellant fails to meet his or her burden of proving either prong of the Strickland test, the reviewing court does not have to examine the other prong. An appellate court will affirm a trial court's determination that a defendant has received effective assistance of counsel in the absence of clear error.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Deficiency cannot be demonstrated by merely arguing that there is another, or even a better, way for counsel to have performed. The simple fact that additional documents might have been helpful is not enough to show counsel should have reviewed them.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN5[] **Criminal Process, Assistance of Counsel**

The decision on which jurors to accept and which jurors to strike is one of trial strategy, and trial counsel's strategic decisions made after thorough investigation are virtually unchallengeable.

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN6[] **Trials, Opening Statements**

A reasonable strategic decision not to give an opening statement does not amount to ineffective assistance.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Evidence > ... > Examination > Cross-Examinations > Scope

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN7[] **Criminal Process, Assistance of Counsel**

The scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN8[] **Effective Assistance of Counsel, Trials**

Deciding which jury instructions to request is a matter of trial strategy.

Criminal Law & Procedure > Trials > Opening Statements

HN9[] **Trials, Opening Statements**

Defense counsel is permitted wide latitude in making an opening statement and closing arguments and is not ineffective simply because another attorney might have used different language or placed a different emphasis on the evidence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Legal Ethics > Client Relations > Conflicts of Interest

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN10[] **Criminal Process, Assistance of Counsel**

One component of the right to the effective assistance of counsel is the right to representation that is free of actual conflicts of interest. An actual conflict, for purposes of the right to counsel, is a conflict of interest that adversely affects counsel's performance, not just a mere theoretical division of loyalties. If the defendant shows that his trial counsel had an actual conflict of interest, he need not show that the outcome of the proceedings would have been different to receive a new trial. Instead, prejudice is presumed if the defendant demonstrates that the conflict of interest existed and that it significantly affected counsel's performance.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN11[] **Clearly Erroneous Review, Findings of Fact**

Although an appellate court owes no deference to the trial court's application of the law to the facts, as the reviewing court, the appellate court owes substantial deference to the way in which the trial court assessed the credibility of witnesses and found the relevant facts. To that end, the appellate court must accept the factual findings of the trial court unless they are clearly erroneous, and it must view the evidentiary record in the light most favorable to the findings and judgment of the trial court.

Headnotes/Summary

Headnotes

Georgia Advance Headnotes

GA(1)[] (1)

Criminal Law & Procedure. > Criminal Offenses. > Sex Crimes. > Sexual Assault.

The evidence was sufficient to authorize the jury to find that defendant committed the offenses of aggravated sodomy and child molestation as charged in the indictment, because the testimony of the victim, who was ten years old at the time of trial, alone was sufficient.

GA(2)[] (2)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Defendant failed to show that counsel's performance was deficient based on the failure to seek funds for an investigator, failure to interview witnesses, failure to seek an in camera inspection of the victims' records from school and the Georgia Department of Family and Children's Services (DFCS), failure to retain an expert in the forensic interviewing of children, inability to recall whether counsel had listened to the recordings of statements made by key witnesses, admission to having no strategy to rebut the ***State***'s expert, failure to prepare defendant to testify, and failure to request a continuance despite being unprepared for trial because deficiency could not be demonstrated by merely arguing that there was another, or even a better, way for counsel to have performed. Defendant also failed to establish prejudice, as defendant failed to produce any of the DFCS or school records that defendant contended trial counsel should have reviewed and the simple fact that additional documents might have been helpful was not enough.

GA(3)[⬇] (3)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Defendant was not denied effective assistance of counsel during jury selection, as trial counsel testified at the motion for new trial hearing, inter alia, that counsel had reviewed the juror questionnaires, did not use the last peremptory strike because counsel was satisfied with the jurors, and did not ask more questions because counsel was concerned about tainting the entire panel. The trial court did not err in finding that trial counsel's questioning during voir dire was the result of trial strategy that was professionally reasonable, and defendant failed to establish prejudice as defendant did not present any evidence that additional questioning of the potential jurors would have revealed an improper bias against defendant or established that the jurors were not qualified to serve.

GA(4)[⬇] (4)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Trial counsel was not ineffective in waiving an initial opening statement and waiting until the ***State*** had rested its case to make an opening statement, as trial counsel testified that it was part of counsel's trial strategy not to give an opening statement at the beginning of the trial in order not to show the prosecution the defense's hand too early; such a reasonable strategic decision did not amount to ineffective assistance.

GA(5)[⬇] (5)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Trial counsel was not ineffective in cross-examining the victim, as trial counsel testified that the victim was crying as the victim came into the courtroom and that counsel did not want to come across as a "bully" in cross-examining the victim.

GA(6)[⬇] (6)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Even assuming that trial counsel's performance was deficient for failing to cross-examine the ***State***'s expert and to secure an expert, defendant did not attempt to show what favorable evidence counsel should have elicited and thus failed to show prejudice.

GA(7)[⬇] (7)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Trial counsel was not ineffective for failing to ask defendant if defendant was guilty when defendant took the stand because the trial court advised the jury that defendant had pled not guilty to the charges in the indictment, and defendant testified that the only time defendant had touched the victim's bottom was when defendant spanked the victim with the mother's permission. Defendant also testified that defendant was never alone with the victim; thus, defendant failed to establish a reasonable probability that the outcome of the trial would have been different absent counsel's alleged deficient performance.

GA(8)[⬇] (8)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Because defendant failed to question trial counsel regarding the failure to seek a jury instruction on a lesser included offense at the hearing on his motion for new trial, it was unclear whether trial counsel inadvertently failed to request a jury charge on a lesser included offense or opted for an "all or nothing" defense, which was a permissible trial strategy. Absent a proffer of the necessary evidence to support the claim, defendant's claim of ineffective assistance of trial counsel failed.

GA(9)[] (9)

Criminal Law & Procedure. > Counsel. > Effective Assistance. > Trials.

Defendant's claim that trial counsel's performance during the sentencing phase of the trial was ineffective in that counsel failed to request a continuance, present mitigation evidence, and argue for merger lacked merit because defendant failed to identify any mitigation evidence and thus could not establish prejudice. Defendant also failed to support the argument with citation of authority and failed to show a reasonable likelihood that the result of the proceeding would have been different had counsel argued that the convictions should merge.

GA(10)[] (10)

Legal Ethics. > Client Relations. > Conflicts of Interest.

The trial court did not clearly err in finding that counsel had no actual conflict of interest where counsel testified that counsel shared office space with counsel's mother, that they were not a partnership, and that the mother did not pay his salary. Additionally, it remains uncontroverted that counsel's mother did not practice in Glynn County as a Special Assistant Attorney General and that, more importantly, the Georgia Department of Family and Children's Services (DFCS) was not involved as either a party or as a witness in these proceedings, and there was no evidence of record reflecting that counsel discussed defendant's case with the mother or that the mother or anyone else from DFCS advised the ***State*** as to any aspect of the case.

GA(11)[] (11)

Legal Ethics. > Client Relations. > Conflicts of Interest.

Defendant's trial counsel did not have a conflict of interest because counsel had already applied for and accepted a prosecutorial position with the Army JAG Corps, as trial counsel testified at the motion for new trial hearing that counsel had not yet begun working as a JAG officer when counsel tried defendant's case, that the case had nothing to do with the military, and that counsel's role as a JAG officer would also involve defense work.

Counsel: *Kevin R. **Gough***, for appellant.

Keith Higgins, District Attorney, Benjamin E. Gephardt, Assistant District Attorney, for appellee.

Judges: **[***1]** DOYLE, Presiding Judge. Rickman, C. J., and Senior Appellate Judge Herbert E. Phipps concur.

Opinion by: DOYLE

Opinion

[*285] **[**591]** DOYLE, Presiding Judge.

Jonathan ***Burnett*** appeals from an order of the Superior Court of Glynn County, denying his motion for new trial after a jury found him guilty of one count of aggravated sodomy and two counts of child molestation.[1] On appeal, ***Burnett*** challenges the sufficiency of the evidence and argues that he was denied effective assistance of counsel. For the reasons set forth infra, we affirm.

Viewed in the light most favorable to the verdict,[2] the record shows the following. When Z. N. was eight years old, she told her cousin that, two years earlier, ***Burnett*** had "raped" her and specifically that he had touched her "bottom" with his hands and had put his "private part," which she identified as his penis, inside her "bottom." Z. N. testified to these acts at trial.

Burnett was indicted with the three charges involving Z. N., as well as ten **[**592]** charges involving a second alleged victim, J. W. The jury found ***Burnett*** not

[1] See OCGA §§ 16-6-2 (a) (2); 16-6-4 (a) (1).

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

guilty of all charges involving J. W., but found him guilty of the three charges involving Z. N. Following a hearing, **[*286]** the trial court denied ***Burnett***'s motion for new trial. **[***2]** This appeal followed.

1. ***Burnett*** argues that, notwithstanding contrary authority, such as *Kea* ***v.*** ***State***,[3] the evidence was so weak and contradictory that a rational jury could not have found him guilty of the charges. Other than *Kea*, ***Burnett*** cites only to *Jackson* ***v.*** *Virginia*[4] in support of his argument, and does not cite to any portions of the trial transcript. Specifically, ***Burnett*** contends that the evidence was so weak that the charges involving Z. N. were not brought until the allegations involving J. W. came to light. Because ***Burnett*** was found not guilty of the charges involving J. W., he argues that the evidence presented with respect to her cannot buttress the evidence regarding Z. N.

HN1[↑] As this Court ***stated*** in *Kea*,

> [i]n reviewing a challenge to the sufficiency of the evidence to support a conviction, the relevant question [under *Jackson* ***v.*** *Virginia*[5]] 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. In applying this standard, we do not resolve conflicts in the testimony, weigh the evidence, or draw inferences from the evidence, as those are functions **[***3]** of the jury. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the ***state***'s case, the jury's verdict will be upheld.[6]

Assuming arguendo that ***Burnett*** did not abandon this argument by failing to support it with citations of authority and with specific references to the record,[7] we hold that ***GA(1)***[↑] (1) the evidence was sufficient to authorize the jury to find that ***Burnett*** committed the offenses of aggravated sodomy and child molestation, as charged in the indictment. The testimony of Z. N., who was ten years old at the time of trial, alone was sufficient.[8]

[*287] 2. ***HN2***[↑] ***Burnett*** argues that he was denied effective assistance of counsel based on the cumulative errors made by his trial attorney.

> To prevail on a claim of ineffective assistance of counsel, a defendant generally must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. To satisfy the deficiency prong, a defendant must demonstrate that his attorney performed at trial in an objectively unreasonable way considering all the circumstances and in the light of prevailing professional norms. This requires a defendant to overcome the **[***4]** strong presumption that trial counsel's performance was adequate. To carry the burden of overcoming this presumption, a defendant must show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not. In particular, 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. To satisfy the prejudice prong, a defendant must establish a reasonable probability that, in the absence of counsel's deficient performance, the result of the trial would have been different. ***HN3***[↑] If an appellant fails to **[**593]** meet his or her burden of proving either prong of the *Strickland* test,[9] the reviewing court does not have to examine the other prong.[10]

"Moreover, we will affirm a trial court's determination

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[3] *344 Ga. App. 251 (810 SE2d 152) (2018)*.

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

[5] *443 U. S. at 319 (III) (B)*.

[6] (Citations and punctuation omitted.) *344 Ga. App. at 252 (1) (a)*.

[7] See *Court of Appeals Rule 25 (d) (1)*.

[8] See *Bowman* ***v.*** ***State***, *332 Ga. App. 766, 769 (1) (774 SE2d 805) (2015)* ("It is axiomatic that the testimony of a single witness is sufficient to prove the elements of the crime charged. This rule is often applicable to child molestation cases where ... the victim and the defendant are the only people present when the alleged molestation occurs.") (citations and punctuation omitted); see also *OCGA §§ 17-3-1 (c)*; *17-3-2.1 (a) (3)*, *(a) (5)*, *(b) (4)*, *(b) (5)* (detailing seven-year limitation period where the victim is under 16).

[9] See *Strickland* ***v.*** *Washington, 466 U. S. 668, 694 (III) (B) (104 SCt 2052, 80 LE2d 674) (1984)*.

[10] (Citations and punctuation omitted.) *Anthony* ***v.*** ***State***, *311 Ga. 293, 294-295 (1) (857 SE2d 682) (2021)*.

that a defendant has received effective assistance of counsel in the absence of clear error."[11]

(a) ***Burnett*** complains that his trial counsel failed to adequately investigate and prepare for trial. ***Burnett*** specifically contends that trial counsel did not seek funds for an investigator, did not interview witnesses, did not seek **[***5]** an in camera inspection of the victims' records from school and the Georgia Department of Family and Children's Services ("DFCS"), did not retain an expert in the forensic interviewing of children, could not even recall whether he had listened to the recordings of statements made by key witnesses, **[*288]** admitted he had no strategy to rebut the ***State***'s expert, failed to prepare ***Burnett*** to testify, and did not request a continuance despite being unprepared for trial.

GA(2)[↑] (2) ***Burnett*** has failed to show that his counsel's performance was deficient. *HN4*[↑] "[D]eficiency cannot be demonstrated by merely arguing that there is another, or even a better, way for counsel to have performed."[12] ***Burnett*** has also failed to establish prejudice. For example, he has failed to produce any of the DFCS or school records that he contends his trial attorney should have reviewed.[13] "The simple fact that additional documents might have been helpful is not enough."[14]

(b) ***Burnett*** argues that he was denied effective assistance of counsel during jury selection, when his attorney asked only seven questions, did not meaningfully follow up on information obtained from the juror questionnaire cards, and did not use all available peremptory strikes. **[***6]**

HN5[↑] "The decision on which jurors to accept and which jurors to strike is one of trial strategy, and trial counsel's strategic decisions made after thorough investigation are virtually unchallengeable."[15] In this case, *GA(3)*[↑] (3) trial counsel testified at the motion for new trial hearing, inter alia, that he had reviewed the juror questionnaires, he did not use his last peremptory strike because he was satisfied with the jurors, and he did not ask more questions because he was concerned about tainting the entire panel. The trial court did not err in finding that trial counsel's questioning during voir dire was the result of trial strategy that was professionally reasonable.[16] Further, ***Burnett*** has not established prejudice as he has not presented any evidence that additional questioning of the potential jurors would have revealed an improper bias against him or established that the jurors were not qualified to serve.[17]

(c) ***Burnett*** argues that*GA(4)*[↑] (4) trial counsel was ineffective in waiving an initial opening statement and waiting until the ***State*** had rested its case to make an opening statement.

At the motion for new trial hearing, trial counsel testified that it was part of his trial strategy not to give an opening **[***7]** statement at the beginning of the trial in order not to show the prosecution the **[*289]** defense's hand too early. *HN6*[↑] "Such a reasonable strategic decision **[**594]** does not amount to ineffective assistance."[18]

(d) ***Burnett*** contends that counsel was ineffective in his cross-examination of Z. N. and specifically in failing to explore an inconsistency in the dates of the offenses.

GA(5)[↑] (5) Trial counsel testified that Z. N. was crying as she came into the courtroom and that he did not want to come across as a "bully" in cross-examining her. *HN7*[↑] "[T]he scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel."[19]

(e) ***Burnett*** argues that trial counsel was ineffective

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[11] *Leaptrot v. State, 272 Ga. App. 587, 592 (2) (612 SE2d 887) (2005).*

[12] *Davis v. State, 306 Ga. 140, 144 (3) (829 SE2d 321) (2019).*

[13] See *Gilmer v. State, 339 Ga. App. 593, 600 (2) (d) (794 SE2d 653) (2016).*

[14] *Dority v. State, 335 Ga. App. 83, 107 (4) (i) (780 SE2d 129) (2015).*

[15] (Citation and punctuation omitted.) *Port v. State, 295 Ga. App. 109, 113 (2) (c) (671 SE2d 200) (2008).*

[16] See *Bright v. State, 292 Ga. 273, 275 (2) (b) (736 SE2d 380) (2013).*

[17] See *id. at 276 (2) (b).*

[18] *Lawrence v. State, 286 Ga. 533, 534 (2) (690 SE2d 801) (2010).*

[19] (Citation and punctuation omitted.) *Cooper v. State, 281 Ga. 760, 762 (4) (a) (642 SE2d 817) (2007);* see *Campos v. State, 263 Ga. App. 119, 122 (587 SE2d 264) (2003)* (holding that trial counsel was not ineffective for declining to call the child victim as a witness for purposes of cross-examination).

because he mishandled expert testimony by failing to cross-examine the ***State***'s expert and failing to secure his own expert.

GA(6)[↑] (6) Even assuming that trial counsel's performance was deficient in this regard, ***Burnett*** has not attempted to show what favorable evidence counsel should have elicited and thus has failed to show prejudice.[20]

(f) ***Burnett*** argues that trial counsel was ineffective in failing to ask him if he was not guilty when he took the stand in his own defense.

GA(7)[↑] (7) The trial court advised the jury **[***8]** that ***Burnett*** had pled not guilty to the charges in the indictment, and ***Burnett*** testified that the only time he had touched Z. N.'s "bottom" was when he spanked her with her mother's permission. ***Burnett*** also testified that he was never alone with Z. N. ***Burnett*** has again failed to establish a reasonable probability that the outcome of the trial would have been different absent counsel's alleged deficient performance.[21]

(g) ***Burnett*** contends that counsel was ineffective for failing to request a jury instruction on sexual battery as a lesser included offense.

With regard to Count 11 (aggravated sodomy) and Count 12 (child molestation by placing his penis on Z. N.'s buttocks), the evidence would not have supported such a charge, and ***Burnett*** thus cannot show that he was prejudiced by counsel's failure to request **[*290]** the charge.[22] With regard to Count 13, which charged ***Burnett*** with child molestation by placing his hand on Z. N.'s buttocks,[23] there was some evidence to support a charge of the lesser included offense of sexual battery as ***Burnett*** testified that he had spanked Z. N.

HN8[↑] "Deciding which jury instructions to request is a matter of trial strategy."[24] *GA(8)*[↑] (8) ***Burnett*** failed to question trial counsel regarding **[***9]** this matter at the hearing on his motion for new trial. Specifically, it is unclear whether trial counsel inadvertently failed to request a jury charge on a lesser included offense or opted for an "all or nothing" defense, which is a permissible trial strategy.[25] Absent a proffer of the necessary evidence to support this claim, ***Burnett***'s claim of ineffective assistance of trial counsel fails.[26]

(h) ***Burnett*** contends that trial counsel was ineffective in not spending more time during closing argument addressing the charges involving Z. N.

[595]** *HN9*[↑] "Defense counsel is permitted wide latitude in making an opening statement and closing arguments and is not ineffective simply because another attorney might have used different language or placed a different emphasis on the evidence."[27] In denying the motion for new trial, the trial court found that, in closing argument,

> counsel outlined the defense's theories that [the other alleged victim's] mother had compelled her to fabricate the allegations and that [Z. N.] had lied about being spanked. [Counsel] pointed out that the ***State*** had presented no medical evidence and that reasonable doubt was apparent. Moreover, ***Burnett*** was acquitted on ten of the thirteen charges. This **[***10]** is a relevant factor which belies ***Burnett***'s claim that his counsel's closing fell below the *Strickland* standard.

We find no clear error in the trial court's finding that counsel was not ineffective in his closing argument.[28]

(i) ***Burnett*** argues that *GA(9)*[↑] (9) trial counsel's performance during the sentencing phase of the trial was ineffective in that counsel failed to **[*291]** request a

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[20] See *Lawrence, 286 Ga. at 534 (2)*.

[21] See *Key v. **State**, 247 Ga. App. 796, 797 (2) (545 SE2d 363) (2001)* (no prejudice from counsel's failure to elicit specific testimony from the defendant regarding the timing of a robbery where the jury had already heard evidence regarding the discrepancy in timing).

[22] See *Sanchez v. **State**, 327 Ga. App. 500, 502 (2) (759 SE2d 576) (2014)*.

[23] See *OCGA § 16-6-4 (a) (1)*.

[24] *Goodson v. **State**, 305 Ga. 246, 250 (2) (b) (824 SE2d 371) (2019)*.

[25] See *Smith v. **State**, 301 Ga. 348, 353-354 (III) (b) (801 SE2d 18) (2017)*.

[26] See *Daniels v. **State**, 296 Ga. App. 795, 803 (5) (b) (676 SE2d 13) (2009)*.

[27] (Citation and punctuation omitted.) *Merritt v. **State**, 310 Ga. 433, 435 (2) (a) (851 SE2d 555) (2020)*.

[28] See *Haynes v. **State**, 234 Ga. App. 272, 275 (4) (507 SE2d 151) (1998)*.

continuance, present mitigation evidence, and argue for merger.

Burnett has failed to identify any mitigation evidence and thus cannot establish prejudice.[29] He has also failed to support his argument with citation of authority.[30] ***Burnett*** has thus not shown a reasonable likelihood that the result of the proceeding would have been different had counsel argued that the convictions should merge.[31]

(j) ***Burnett*** argues that the trial court should have granted a new trial based on counsel's cumulative errors. Because ***Burnett*** has failed to show multiple errors, this claim fails.[32]

3. ***Burnett*** contends that he was denied effective assistance of counsel because his attorney had a conflict of interest in that counsel's mother represented DFCS for several Georgia counties and, at the time of trial, counsel had been accepted into the Judge Advocate General's **[***11]** ("JAG") Corps of the United ***States*** Army.

> ***HN10***[↑] One component of the right to the effective assistance of counsel is the right to representation that is free of actual conflicts of interest. An actual conflict, for purposes of the right to counsel, is a conflict of interest that adversely affects counsel's performance, not just a mere theoretical division of loyalties. If the defendant shows that his trial counsel had an actual conflict of interest, he need not show that the outcome of the proceedings would have been different to receive a new trial. Instead, prejudice is presumed if the defendant demonstrates that the conflict of interest existed and that it significantly affected counsel's performance.[33]

HN11[↑] Although we owe no deference to the trial court's application of the law to the facts, as the reviewing court, we

> owe substantial deference ... to the way in which the trial court assessed the credibility of witnesses and found the relevant facts. To that end, we must accept the factual findings of the trial court unless they are clearly erroneous, **[*292]** and we must view the evidentiary record in the light most favorable to the findings and judgment of the trial court.[34]

[596]** (a) ***Burnett*** argues that **[***12]** a conflict of interest existed because his counsel's law firm concurrently represented DFCS as a Special Assistant Attorney General ("SAAG") representing five counties, three of which were in the Brunswick Judicial Circuit, which includes Glynn County.[35] According to ***Burnett***, this necessitated the law firm working with the same District Attorney that prosecuted ***Burnett***'s case and any request to inspect the DFCS files of the victims would be directed to the same agency the law firm represented. To support this claim, ***Burnett*** presented evidence at the motion for new trial hearing from counsel's law firm website that, as the trial court found, "arguably implies that [trial counsel] and his mother are law partners[.]" ***Burnett*** argues that this conflict appears to have affected counsel's representation, in that counsel did not file a motion for in camera inspection of DFCS files in this case.[36]

However, the trial court did not clearly err in its further factual findings:

> [Trial counsel] testified that he shares office

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[29] See *St. Germain v. **State***, 358 Ga. App. 163, 165 (1) (b) (853 SE2d 394) (2021).

[30] See *Court of Appeals Rule 25 (d) (1)*.

[31] See *Turnbull v. **State***, 317 Ga. App. 719, 727-728 (2) (d) (732 SE2d 786) (2012). At trial, Z. N. described conduct that happened "[t]en times." See *Pavlov v. **State***, 362 Ga. App. 831, 835-837 (2) (870 SE2d 449) (2022) (trial court did not err in failing to merge distinct acts of child molestation and aggravated child molestation convictions for sentencing).

[32] See *Jones v. **State***, 358 Ga. App. 584, 589 (4) (855 SE2d 761) (2021).

[33] (Citations and punctuation omitted.) *Moss v. **State***, 312 Ga. 202, 205-206 (2) (a) (862 SE2d 309) (2021).

[34] (Citations omitted.) *Tolbert v. **State***, 298 Ga. 147, 151 (2) (a) (780 SE2d 298) (2015).

[35] See *OCGA § 15-6-1 (7)* ("Brunswick Judicial Circuit [is] composed of the Counties of Appling, Camden, Glynn, Wayne, and Jeff Davis[.]").

[36] See *Pryor v. **State***, 333 Ga. App. 408, 412 (2) (776 SE2d 474) (2015) ("The critical question is whether the conflict significantly affected the representation, not whether it affected the outcome of the underlying proceedings.") (citation and punctuation omitted).

> space with his mother, that they are not a partnership, and that she does not pay his salary. Additionally, it remains uncontroverted that [counsel's] mother does not practice in **[***13]** Glynn County as a SAAG and that, more importantly, [DFCS] was not involved as either a party or as a witness in these proceedings. Moreover, there is no evidence of record reflecting that [counsel] discussed ***Burnett***'s case with his mother or that she or anyone else from [DFCS] advised the ***State*** as to any aspect of the case.

Viewing the evidence in the light most favorable to the trial court's findings, *GA(10)*[↑] (10) the trial court did not clearly err in finding there was no actual conflict.

(b) Finally, ***Burnett*** contends that his *GA(11)*[↑] (11) attorney had a conflict of interest because he had already applied for and accepted a prosecutorial position with the Army JAG Corps.

[*293] Trial counsel testified at the motion for new trial hearing that he had not yet begun working as a JAG officer when he tried ***Burnett***'s case, that the case had nothing to do with the military, and that his role as a JAG officer would also involve defense work. The trial court did not clearly err in finding that there was "no indication that [trial counsel's] post-trial employment as a JAG had any significant or adverse effect on his representation."[37] Accordingly, the trial court did not err in denying ***Burnett***'s motion for new trial on this ground. **[***14]**

Judgment affirmed. Rickman, C. J., and Senior Appellate Judge Herbert E. Phipps concur.

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[37] Compare *Sallie v. State, 269 Ga. 446, 448 (2) (499 SE2d 897) (1998)* (reversing convictions because an actual conflict of interest existed where a lawyer represented a capital defendant in the same court in which he was a full-time law clerk); see *Cuyler v. Sullivan, 446 U. S. 335, 350 (IV) (B) (100 SCt 1708, 64 LE2d 333) (1980)* ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.").

SUPREME COURT OF GEORGIA
Case No. S23C0805

September 19, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JONATHAN BURNETT v. THE STATE.

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

All the Justices concur.

Court of Appeals Case No. A22A1640

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

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Criminal Action No. CR-1600569-063
	)	
JONATHAN BURNETT,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant Jonathan Burnett's motion for new trial. At the January 9, 2020 hearing on the motion, Burnett was present and represented by Kevin Gough, Esq., with Assistant District Attorney Thomas Buscemi, Esq. appearing for the State.

On December 1, 2016, the Glynn County Grand Jury indicted Burnett in a thirteen-count indictment on charges of aggravated child molestation (Counts 1, 4, and 7), aggravated sodomy, (Counts 2, 5, 8, and 11), incest (Counts 3, 6, and 9), and child molestation (Counts 10, 12 and 13). The case was tried before a Glynn County jury from October 17, 2017 to October 19, 2017. Burnett was found guilty as to Counts 11 through 13 and was acquitted as to the remaining charges. That same day, the Court sentenced Burnett to life in prison as to Count 11. As to Counts 12 and 13, Burnett was sentenced to twenty years, to be served concurrent with Count 11.

The evidence adduced at trial established that in June of 2015, Investigator Stephanie Oliver with the Glynn County Police Department became involved in an investigation regarding allegations of sexual abuse made by then eight-year-old Z'Quayshia Nixon.[1] Nixon was referred by Oliver for a forensic interview, which was conducted by the local children's advocacy center.[2] No medical examination of Nixon was conducted.[3] During the forensic interview, Nixon disclosed

[1] Trial Transcript, Volume 2 ("TT2"), pp. 145-146.
[2] *Id.*, State's Exhibit 5.
[3] *Id.* at 153-154.

that her godfather, Jonathan Burnett, had done something "nasty" to her, which she described as rape. More specifically, Nixon stated that Burnett had touched her on the outside of her "butt" as well as inside her "butt." Nixon circled a penis on an anatomical drawing provided during the interview to indicate what Burnett touched her with. She also indicated that he used his hands to touch her.[4] After interviewing several witnesses, however, Oliver's investigation stalled and the case was eventually closed without an arrest.[5]

Later, Nixon's case was reopened in September 2016 when Oliver received new information regarding similar allegations of sexual abuse made by Burnett's daughter, Janiyah Wright.[6] By the time Wright's allegations became known to Oliver, Wright had undergone a forensic interview and medical examination in Milledgeville, Georgia, where she resided with her mother.[7] The medical examination yielded normal results.[8] In her first forensic interview, Wright disclosed that her father had put his "no-no area" in her "no-area," "butt," and in her mouth. She also said that Burnett had used his tongue in her "no-no area."[9] Subsequent interviews of Wright, however, did not disclose additional information.[10] Oliver's investigation revealed that while the two children did not know each other, the children's mothers did.[11]

At trial, twelve-year-old D'Mariyhana Riddle, Nixon's cousin, testified that while Nixon was visiting Riddle in 2015, Nixon told her that Burnett had raped her when she was six years old and that he had placed his "private part" in Nixon's bottom.[12] Riddle immediately told her mother

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[4] State's Ex. 5.
[5] TT2: 147.
[6] *Id.* at 147-148.
[7] *Id.* at 149-150.
[8] *Id.* at 149-150.
[9] State's Exhibit 4; TT2:175.
[10] *Id.* at 156-157.
[11] *Id.* at 157-158.
[12] *Id.* at 180-182; 189.

of what Nixon had reported.[13]

Nixon testified at trial that she knew Burnett as her godfather and that she had started visiting him at his home in Brunswick, Georgia when she was four years old.[14] Nixon stated that during those visits Burnett would take her upstairs, put her on a bed, take off her clothes, and touch her.[15] Nixon detailed that Burnett would touch her inside her bottom and sometimes her chest with his "inappropriate parts" and his hands.[16] Nixon revealed that, in total, Burnett had done this ten times, with the abuse occurring in several locations, including Burnett's home, an abandoned house, and in a home across the street.[17] Nixon testified that she had waited to tell someone about the abuse because Burnett had told her that if she reported it, he would find a way to do it again.[18]

Cassandra Wright, Janiyah's mother, testified that she and Burnett, who she had known since she was nine years old, had previously dated beginning in 2009.[19] Janiyah was born as a result of this relationship and Burnett remained a part of her life after the relationship ended.[20] After moving to Milledgeville, Georgia, Janiyah would visit her father during the summer and on various weekends. The last time Janiyah visited Burnett was from July 8 through July 23, 2016, when Janiyah was five years old.[21] Cassandra testified that on the evening of July 23, 2016, her father picked up Janiyah from Burnett's home and took her to his sister's house. Afterwards, during Janiyah's evening bath, Cassandra asked Janiyah if anyone had touched her, to which Janiyah responded that a long time ago Burnett had used his finger and his tongue in her buttocks

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[13] *Id.* at 183.
[14] *Id.* at 194.
[15] *Id.* at 195. Nixon described this as "rape." *Id.*
[16] *Id.* at 196, 199.
[17] *Id.* at 197.
[18] *Id.* at 198.
[19] *Id.* at 219.
[20] *Id.* at 221-222.
[21] *Id.*

and in her "no-no area."[22] Cassandra retrieved her cell phone and recorded her conversation with Janiyah again, after which the child was taken to the hospital.[23] The day after, Cassandra questioned Burnett about their daughter's disclosure, to which Burnett stated that if he had done anything, it was to show Janiyah what not to allow someone to do to her.[24]

Janiyah Wright's testimony at trial was limited and did not provide any further disclosures, but she acknowledged that what she had stated in the forensic interview had been the truth.[25]

Defendant presented several witnesses at trial, including his wife, Shacole Burnett; his mother, Cora Burnett; his father, Johnny Burnett; and Cozee Cooper, a friend. Shacole Burnett stated that she was the one whose responsibility it was to bathe Janiyah when she would come to visit.[26] Shacole added that she had personally observed Burnett spank Nixon and that Nixon's mother had given Burnett permission to do so.[27]

Burnett testified in his own defense, recounting that he had started dating Wright's mother in 2009 and that in November the following year she had become pregnant with Wright.[28] The relationship ended and Burnett married Shacole in 2013. Despite his marriage to Shacole, Burnett maintained a sexual relationship with Cassandra.[29] According to Burnett, Cassandra erroneously came to believe that he was going to end his marriage so that they could be a family.[30] With regard to the allegations of sexual abuse of Wright, Burnett testified that he had taught her about her private areas because Cassandra had asked him to. Burnett told Investigator Oliver that he had, in fact, touched Wright's breasts, pelvic area, and on the buttocks while Wright was taking a bath

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[22] *Id.* at 224-225.
[23] *Id.* at 226-228; State's Exhibit 6.
[24] *Id.* at 229.
[25] *Id.* at 240-251. State's Exhibit 7, the forensic interview, was published for the jury. *Id.* at 258-260.
[26] *Id.* at 285.
[27] *Id.* at 287-289
[28] *Id.* at 306-307.
[29] *Id.* at 309, 311-314.
[30] *Id.* at 317.

because he was inquiring if anyone had ever touched her in those areas.[31] As to the allegations involving Nixon, Burnett testified that he had spanked her before and that had been the only time he touched her bottom.[32]

Upon conviction, Burnett timely filed his motion for new trial, alleging that: (i) he should be acquitted due to the State's failure to prove guilt beyond a reasonable doubt; (ii) although the State proved his guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the trial court exercising its discretion to grant him a new trial; (iii) the Court committed errors of law[33]; and that (iv) he did not receive effective assistance of counsel at trial or at sentencing. At the hearing on his motion, Burnett sought additional time to brief his claim of ineffective assistance of counsel, which this Court liberally extended on numerous occasions at Burnett's request.[34]

After careful consideration of the issues raised in Burnett's motion, the arguments of counsel, the jurisprudence of this state, and the entire record before it, the Court finds as follows:

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[31] *Id.* at 327-329.

[32] *Id.* at 322-323.

[33] Burnett's motion for new trial was never particularized as to alleged trial court error(s); however, Burnett was permitted additional briefing. A review of the record adduced at the motion for new trial hearing as well as the briefing submitted reveals no asserted errors attributable to the trial court. Accordingly, this Court deems any grounds on this basis to be have been abandoned.

[34] On January 13, 2020, the Court granted Burnett thirty days from the filing of the motion for new trial transcript to submit briefing. A revised briefing order was entered on March 16, 2020, upon motion of the Defendant, requiring Burnett's post-hearing brief to be submitted by April 17, 2020. A second revised scheduling order was entered pursuant to the Supreme Court of Georgia's Declaration of Statewide Judicial Emergency, with post-hearing briefs due by June 30, 2020. A third scheduling order was entered extending the briefing deadline to September 30, 2020, pursuant to the parties' joint request. A status conference was convened before this Court on November 19, 2020, wherein the deadline for briefing was extended to November 23, 2020. Part one of Burnett's post-hearing brief was filed on December 16, 2020; part two was filed on January 1, 2021. Said brief noted that Burnett would be filing a third and final brief. On March 1, 2021, the Court ordered that Burnett file his final post-hearing brief by March 9, 2021, and that the State would have ninety days therefrom to file its response. Burnett filed his final brief on August 20, 2021. The Court ordered the State's response to be due by November 15, 2021, and Defendant's reply thereto to be due by December 15, 2021. On November 16, 2021, the State filed its response, to which Burnett has never replied.

I. SUFFICIENCY OF THE EVIDENCE AND GENERAL GROUNDS

The evidence adduced at trial, as summarized above, when viewed in a light most favorable to the verdicts, is legally sufficient to authorize any rational trier of fact to find Burnett guilty beyond a reasonable doubt for the crimes for which he was convicted.[35]

However, the Court's inquiry does not end here; rather, when examining properly raised grounds under O.C.G.A. §§ 5-5-20[36] and 5-5-21,[37] the Court is required to exercise its broad discretion to sit as the thirteenth juror.[38] In so doing, the Court must consider some of the things it otherwise cannot when assessing legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of the witnesses, and the weight of the evidence.[39] Having done so here, the Court finds that the jury verdicts are not decidedly or strongly against the weight of the evidence presented, nor contrary to the evidence or the principles of justice and equity.[40] Burnett's motion on these grounds is **DENIED**.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Burnett alleges that trial counsel's representation of him was constitutionally ineffective in several respects; specifically, that he had been deprived of his Sixth Amendment right to conflict-free counsel and that his trial counsel rendered ineffective assistance in conducting voir dire and opening statements, in his investigation and preparation for trial, in his cross-examination of

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[35] *Jackson v. Virginia*, 443 U.S. 307 (1979); *White v. State*, 293 Ga. 523 (2013); *Kea v. State*, 344 Ga. App. 251, 252 (2018) ("As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the state's case, the jury's verdict will be upheld").

[36] O.C.G.A. § 5-5-20 provides that "[i]n any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury."

[37] O.C.G.A. § 5-5-21 provides that "[t]he presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding."

[38] *State v. Hamilton*, 299 Ga. 667, 670 (2016) (citing *White*, 293 Ga. at 524-525). A motion for new trial alleging the verdict may be decidedly and strongly against the weight of the evidence is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *King v. State*, 344 Ga. App. 244 (2018).

[39] *Hamilton*, 299 Ga. at 670.

[40] O.C.G.A. §§ 5-5-20 and 5-5-21; *Hamilton* at 670.

State's witnesses, in failing to obtain an expert witness, in failing to prepare Burnett for his testimony, in not requesting a jury charge as to a lesser-included offense, in closing arguments, and during sentencing. Burnett argues that, cumulatively, these errors of trial counsel necessitate both a new trial and a new sentencing hearing.

The now familiar two-pronged standard articulated in *Strickland v. Washington*[41] is employed by the trial court in assessing the merits of a claim of ineffective assistance of counsel:

> In order to prevail on a claim of ineffective assistance of counsel, [the defendant] must show both that his trial counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.[42]

The burden rests on the accused to overcome the strong presumption of effective representation.[43] Thus, with respect to the performance component,

> [t]o establish deficient performance, [the defendant] must overcome the strong presumption that his or her counsel's conduct falls within a broad range of reasonable professional conduct and show that his counsel performed in an objectively unreasonable way, considering all the circumstances and in the light of prevailing professional norms.[44]

The reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial and under the circumstances of the case.[45] Essentially, a defendant "must show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not."[46]

As to *Strickland's* prejudice component, a "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome, considering the totality of the

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[41] 466 U.S. 668 (1984).
[42] *Smith v. State*, 296 Ga. 731, 733 (2015) (citing *Strickland*, supra.); *Wainright v. State*, 305 Ga. 63, 68 (2019).
[43] *Welborn v. State*, 278 Ga. 12, 13 (2004).
[44] *Smith*, 296 Ga. at 733 (quoting *Prince v. State*, 295 Ga. 788, 791 (2014). *See also Rollins v. State*, 277 Ga. 488 (2004).
[45] *Smith v. State*, 302 Ga. App. 128, 133 (2010) (citing *Brown v. State*, 293 Ga. App. 633, 634 (2008)).
[46] *Davis v. State*, 299 Ga. 180, 183 (2016).

evidence before the jury.[47] The likelihood of a different result must be substantial, not just conceivable.[48] Ultimately, the effect of prejudice must be viewed cumulatively; meaning that the Court should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel.[49] Should Burnett fail to satisfy either prong of the *Strickland* test, however, the Court need not address the other prong.[50] So viewed, this Court will address Burnett's arguments in turn.

A. Conflicts of Interest

The federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel.[51] One aspect of this right is a defendant's entitlement to representation that is free of actual conflicts of interest.[52] Indeed, "[c]ounsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."[53] Loyalty to a client is therefore

> impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.[54]

As a threshold matter then, the defendant must establish that an actual conflict of interest exists.[55] An actual conflict is one "that adversely affects counsel's performance, not just a mere

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[47] *Gonzales v. State*, 350 Ga. App. 297, 302 (2019) (citing *Scott v. State*, 301 Ga. 573, 575 (2017)); *Strickland*, 466 U.S. at 695.
[48] *Id.* at 302 (citing *Hill v. State*, 291 Ga. 160, 164 (2012)).
[49] *State v. Lane*, 308 Ga. 10, 14 (2020).
[50] *Id.*
[51] *Sallie v. State*, 269 Ga. 446, 447 (1998) (citing *Strickland*, 466 U.S. at 668); *Edwards v. Lewis*, 283 Ga. 345 (2008); Ga. Const. of 1983 Art. I, Sec. I, Para. XIV ("Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.").
[52] *Edwards*, 283 Ga. at 348 (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). See also *Sallie*, 269 Ga. at 448 ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflict."); Ga. Rules of Professional Conduct R. 1.7(a).
[53] *Sallie*, 269 Ga. at 448 (citing *Strickland*, 466 U.S. at 688).
[54] Ga. Rules of Professional Conduct R. 1.7 cmt [4].
[55] *Williams v. State*, 302 Ga. 404, 408 (2017).

theoretical division of loyalties."[56] It must be "palpable and have a substantial basis in fact. A theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence."[57] Until an actual conflict is presented, a defendant has not established the constitutional predicate for a claim of ineffective assistance of counsel.[58]

However, in cases where a defendant can demonstrate that his counsel's conflict of interest actually affected the adequacy of his representation, the defendant need not show prejudice, as is ordinarily required under *Strickland's* two-pronged test, to receive a new trial.[59] Under these circumstances, the focus thus becomes whether the conflict significantly affected the *representation*, not whether it affected the outcome of the proceedings.[60]

So viewed, Burnett asserts that his trial counsel, Jack Downie, was operating under two distinct conflicts of interest – first, that Downie's mother was the Special Assistant Attorney General for Georgia's Department of Family and Children Services in three of the five counties within the Brunswick Judicial Circuit (within which Glynn County lies), and second, that Downie had accepted a position as a Judge Advocate General, a commission which was to begin immediately after Burnett's trial. It is undisputed from the record that neither fact was disclosed to Burnett during the course of Downie's representation.

While evidence presented at the motion for new trial hearing reflects that the website for Downie's law firm arguably implies that he and his mother are law partners,[61] Downie testified

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[56] (Internal punctuation omitted) *Id.* at 408 (citing *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)). See also *State v. Abernathy*, 289 Ga. 603, 607 (2011).
[57] *Lamb v. State*, 267 Ga. 41, 42 (1996) (citing *Hamilton v. State*, 255 Ga. 468, 470 (1986)). See also *Hall v. Jackson*, 310 Ga. 714, 721 (2021) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)).
[58] *Cuyler*, 446 U.S. at 349.
[59] *Id.* at 349-350. See also *Moss v. State*, 312 Ga. 202, 206 (2021); *White v. State*, 287 Ga. 713, 722 (2010) (finding that actual conflicts of interest render the verdict unreliable); *Edwards*, 283 Ga. at 349 (citing *Mickens*, 535 U.S. at 173).
[60] *Edwards*, 283 Ga. at 351.
[61] January 9, 2020 Motion for New Trial Transcript ("MNT"); Defendant's Exhibit 1.

that he shares office space with his mother, that they are not a partnership, and that she does not pay his salary.[62] Additionally, it remains uncontroverted that Downie's mother does not practice in Glynn County as a SAAG and that, more importantly, the Department was not involved as either a party or as a witness in these proceedings. Moreover, there is no evidence of record reflecting that Downie discussed Burnett's case with his mother or that she or anyone else from the Department advised the State as to any aspect of the case. In sum, this Court finds that Downie's mother's position as a SAAG is not a conflict for Sixth Amendment purposes.[63] Further, there is no evidence that suggests that this fact had any bearing on Downie's representation of Burnett or that it produced undivided loyalties such that it would impugn Burnett's conviction.

As for Downie's subsequent position as a JAG, Downie testified that at the time of Burnett's trial he had accepted the JAG commission but had not commenced employment.[64] And although a component of Downie's position would be to prosecute criminal cases while in the military, this responsibility did not extend to non-military prosecutions. In fact, as of the date of the motion hearing, Downie had not participated in the prosecution rotation.[65] Therefore, again, there is no indication that Downie's post-trial employment as a JAG had any significant or adverse effect on his representation.

Burnett has failed to prove that, due to any alleged conflict of interest, there was any inability on Downie's part to raise a defense or meritorious issue, any conflict with any witness offered by the State, any restraint on his ability to cross-examine witnesses, or that either alleged

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[62] MNT: 12, 137.
[63] Compare *Wood v. Georgia*, 450 U.S. 261 (1981) (finding s conflict of interest where trial counsel was provided by petitioners' employer and acted as the employer's agent); *Edwards v. Lewis*, 283 Ga. 345 (2008) (finding a conflict of interest where public defender was instructed by his superiors not to pursue a jury array issue due to an agreement with the superior court judges); *Sallie v. State*, 269 Ga. 446 (1998) (finding a conflict of interest where co-counsel was simultaneously acting as the sole law clerk for the circuit in which the case was tried).
[64] *Id.* at 16-18.
[65] *Id.* at 138.

conflict had any influence on his decisions at trial.[66] Thus, Burnett's claim of ineffective assistance of counsel on this basis fails and is hereby **DENIED**.

B. Jury Selection

Burnett next asserts that his trial counsel rendered ineffective assistance in conducting voir dire, arguing that the quality and quantity of Downie's questions of the jury pool fell outside the broad range of reasonable professional conduct contemplated under *Strickland*. In scrutinizing this claim, the Court must bear in mind that "[t]he test regarding effective assistance of counsel is to be not errorless counsel, and not counsel judged ineffective by hindsight, but counsel rendering reasonably effective assistance."[67] To be sure, the reasonableness of counsel's conduct is examined from his perspective at the time of trial and under the particular circumstances of the case.[68] Decisions regarding trial tactics or strategy may form the basis for an ineffective claim "only if they were so patently unreasonable that no competent attorney would have followed such a course."[69] Indeed, counsel's own hindsight has no role in the Court's assessment of an attorney's performance – "every effort must be made to eliminate [its] distorting effects[.]"[70]

So guided, Burnett alleges that Downie only asked seven questions in voir dire and that of those seven, the majority were not designed to elicit responses that would warrant a juror be struck for cause. In particular, Burnett takes umbrage with Downie's omission of what he argues is a seminal question of jury selection in criminal cases: "Have you, a close friend or family member, ever been the victim of a crime?"[71] Burnett also points to trial counsel's alleged failure to ask follow-up questions for those jurors who did answer a related question on the juror information

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[66] See *Jackson v. State*, 271 Ga. 705 (1999).
[67] *King v. State*, 337 Ga. App. 32, 35 (2016) (citing *Smith v. State*, 309 Ga. App. 241, 247 (2011)).
[68] *Lockhart v. State*, 298 Ga. 384, 385 (2016) (citing *Redding v. State*, 297 Ga. 845, 80 (2015)).
[69] *Id.*
[70] *Id.* at 386 (citing *Mohamud v. State*, 297 Ga. 532, 533 (2015)).
[71] Defendant's Brief, Part Two, p. 2.

card in the affirmative.[72] At the motion hearing, Downie reasoned that he was focusing on assisting his client with presenting himself well and staying calm before the jury as well as balancing the concern of asking too many questions against asking too few.[73] Based on these articulated strategies, the Court finds that, as a whole, Burnett has failed to show that trial counsel's questioning of the jury pool was objectively unreasonable. Nonetheless, Burnett has neither presented evidence that additional questioning of the potential jurors would have revealed improper bias nor evidence establishing that the jurors empaneled were not qualified to serve.[74] Consequently, Burnett has not demonstrated a reasonable probability that the alleged deficient performance changed the outcome of his trial. Thus, on this basis neither prong of *Strickland* has been met.

Burnett further alleges that Downie was ineffective in using only eight of his nine peremptory strikes. It is well established that decisions regarding which, and how many, jurors to strike and which to accept are questions of trial strategy.[75] But pretermitting the merits of Burnett's claim, this Court finds that Burnett has not shown how this was prejudicial.[76] Accordingly, Burnett's motion for new trial as to this basis is **DENIED**.

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[72] In Georgia, "there is no per se rule excluding victims of crime from a jury, even if the crime charged in the indictment is the same crime of which the potential juror was a victim." *Boyd v. State*, 351 Ga. App. 469, 475 (2019) (quoting *Doss v. State*, 264 Ga. App. 205, 211 (2003)).

[73] MNT: 70, 86.

[74] *Bright v. State*, 292 Ga. 273, 276 (2013) (finding that counsel's questioning was reasonable despite counsel's failure to as any jurors whether they had been the victim of a violent crime). See also *Taylor v. State*, 302 Ga. 176 (2017) (finding that counsel's performance was not deficient where the transcript revealed that no jurors who were seated on jury had expressed an opinion that they could not be fair and impartial); *White v. State*, 293 Ga. 825 (2017) (failure to show prejudice where juror's family member had been a victim of a crime).

[75] *Id.*; *Simpson v. State*, 298 Ga. 314, 318 (2016) (citing *Shields v. State*, 307 Ga. App. 830, 832 (2011)).

[76] See *Shields*, supra.; *Hill v. State*, 291 Ga. 160, 164 (2012) ("The likelihood of a different result must be substantial, not just conceivable").

C. Opening Statement

Burnett further contends that his right to effective assistance of counsel was violated when trial counsel reserved his opening statement until after the close of the State's evidence. For the reasons which follow, this Court finds Burnett's argument to be without merit.

Under Georgia law, defense counsel is given wide latitude in making opening statements and closing arguments.[77] Contrary to Burnett's representations that waiver of an opening statement is tantamount to malpractice under prevailing professional norms, Georgia's uniform rules expressly allow a defendant to make an opening statement either immediately after the State's opening or following the conclusion of the State's presentation of the evidence.[78] Likewise, "[t]he mere waiver of an opening statement can be characterized as a trial tactic which cannot be equated to ineffective assistance of counsel."[79] Here, trial counsel testified that his strategy in deferring his opening statement was to "see how the State...was going to tell their story. Then I wanted the opportunity to let the jurors know that we were going to have witnesses that were going to rebut what they said, and that's exactly what I did show."[80] He further explained his belief that the defense had witnesses that the State would not adequately be able to challenge if revealed at that juncture.[81] The Court finds that such a decision does not amount to ineffective assistance under the performance prong of *Strickland*.[82]

And while Burnett also argues that the deferred opening Downie did make was wanting in substance, the fact that another attorney might have argued the case differently does not show

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[77] *Muller v. State*, 284 Ga. 70, 73 (2008) (citing *Davenport v. State*, 283 Ga. 171, 175 (2008)).
[78] U.S.C.R. 10.2.
[79] *Polk v. State*, 275 Ga. App. 467, 470 (2005) (citing *Futch v. State*, 151 Ga. App. 519, 520 (1979)).
[80] MNT: 93-94.
[81] *Id.* at 100.
[82] See *Lawrence v. State*, 286 Ga. 533 (2010) (finding that counsel who waived opening to "leave the door open" to pursue any advantageous strategy after hearing the State's evidence was not ineffective).

ineffectiveness.[83] Indeed, although trial counsel's opening may have unconventional, he did indicate to the jurors that they should listen to the evidence presented.[84] What is more, "in light of the fact that the opening statement and closing argument are not to be considered as evidence by the jury, [Burnett] has not shown that there is a reasonable probability that the outcome of trial would have been affected if his counsel had opening and closed differently."[85] On this basis, Burnett's motion is hereby **DENIED**.

D. Investigation and Trial Preparation

Burnett submits that his trial counsel further deprived him of effective assistance of counsel by inadequately investigating and preparing for trial. He argues that, among other things, trial counsel did not interview the State's witnesses or seek an *in camera* inspection of DFCS or school records, or formulate a plan to challenge Nixon's forensic interview.

In determining whether a claim of ineffectiveness meets the *Strickland* standard for relief, "a particular decision not to investigate must be directed assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment."[86] Thus, decisions amounting to strategy and trial tactics preponderate in favor of a finding of reasonableness.

So viewed, a review of the motion transcript reveals that Downie studied the evidence in Burnett's case file, spoke with the Defendant and his family, and contacted Burnett's two prior attorneys, despite not recalling whether he reached out to other State's witnesses.[87] But pretermitting whether the alleged errors of trial counsel constituted deficient performance,[88] Burnett has failed to show that, but for these errors, the outcome of trial would have been different.

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[83] *King v. State*, 241 Ga. App. 894, 895 (2000).
[84] TT2: 269-270. See *Hazelrigs v. State*, 255 Ga. App. 784, 785 (2002)).
[85] *Muller*, 284 Ga. at 73 (citing *Hazelrigs*, 255 Ga. App. at 785-786).
[86] *Strickland*, 466 U.S. at 691.
[87] MNT: 29, 143-144.
[88] See *Minton v. State*, 205 Ga. App. 430, 431 (1992) (citing *Penaranda v. State*, 203 Ga. App. 740, 744 (1992) (finding counsel's preparation was not so slight as to give rise to a claim of ineffective assistance of counsel).

Here, Burnett's assertions are unsupported by a proffer of the evidence that would have been uncovered by a more thorough investigation. This lack of evidence is fatal to Burnett's claims. Indeed, the Supreme Court of Georgia has found that where a defendant has failed to show that a more thorough investigation would have yielded any significant exculpatory evidence, the defendant has failed to establish prejudice from the allegedly deficient investigation.[89]

Moreover, while it appears that trial counsel never obtained either child's DFCS or school records, neither did his appellate counsel. This Court, therefore, has nothing to consider in evaluating whether these records would have aided Burnett in his defense such that the disposition of Counts 11 through 13 would have been different.[90] Indeed, "[t]he simple fact that that additional documents might have been helpful is not enough" for a finding of ineffectiveness.[91] Thus, Burnett's motion as to this basis is **DENIED**.

E. Failure to Request a Continuance

Burnett states that trial counsel erred in not requesting a continuance of the trial. Downie testified that he was keenly aware of the statutory speedy trial demand filed and that the State had requested a continuance one time prior due to being unprepared to proceed. Downie explained that his strategy, therefore, was to take advantage of this fact, as further delay would have made it more likely that the State would have been better prepared.[92] So considered, Burnett has cited no authority to support a finding that counsel's performance was outside the wide range of professionally competent assistance in this regard and has equally failed to show any prejudice or disadvantage in not continuing the case, or any likelihood that the trial court would have granted

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[89] *Shank v. State*, 290 Ga. 844, 848 (2012). See also *Collins v. State*, 300 Ga. App. 657 (2009).
[90] See *Gilmer v. State*, 339 Ga. App. 593 92016) (no evidence that there were relevant records).
[91] *Dority v. State*, 335 Ga. App. 83, 107 (2015).
[92] MNT: 147-148.

such a continuance if sought. Accordingly, his claim is without merit and Defendant's motion on this basis is hereby **DENIED**.

F. Cross-Examination of State's Witnesses

Burnett further avers that trial counsel did not adequately challenge the testimony of the State's witnesses, arguing that counsel did not dispute the time frame of the allegations within Counts 11 through 13 or otherwise impeach Nixon's testimony. But the fact that a different attorney could have questioned the child differently does not give rise to a claim of ineffectiveness. Further, "[d]ecisions about what particular questions to ask on cross-examination are quintessential trial strategy and will rarely constitute ineffective assistance of counsel. In particular, whether to impeach prosecution witnesses and how to do so are tactical decisions."[93] Here, the record shows that trial counsel believed that a "less is more" approach was beneficial in his cross-examination of the minor child as there was a danger in appearing too aggressive. Additionally, trial counsel agreed that it was better to highlight the child's lack of recollection of the incidents rather than try to refresh her memory with her prior inconsistent statements.[94] Given the totality of the circumstances, this Court cannot conclude that these strategies were professionally unreasonable or that there was a reasonable probability that the outcome of trial would have been different if additional questioning had occurred. Burnett has not shown deficient performance, let alone prejudice. Accordingly, as to this basis his motion is **DENIED**.

G. Expert Witnesses

Burnett contends that counsel erred by not obtaining an expert witness to combat the children's forensic interviews. It is well established under Georgia law, however, that the decision as to which defense witnesses to call is "a matter of trial strategy and tactics" and that "tactical

[93] *Davis v. State*, 306 Ga. 140, 146 (2019) (citing *Smith v. State*, 303 Ga. 643, 648 (2018)).
[94] MNT: 111-112, 115, 145-146.

errors in that regard will not constitute ineffective assistance of counsel unless those errors are unreasonable ones no competent attorney would have made under similar circumstances."[95] So viewed, trial counsel testified that his strategy in approaching the State's forensic expert was to highlight the fact that she was biased because she was being compensated by the State to testify and further explained that he had tried to emphasize her admission that there was no way to determine if the child was fabricating.[96] Obtaining a paid expert of his own would therefore undercut this approach. This Court does not find trial counsel's strategy, as elucidated at the motion for new trial hearing, to be unreasonable or that counsel's performance was ineffective.[97]

As Burnett has failed to demonstrate that his trial counsel's performance in this regard was deficient so as to prevail on a claim of ineffective assistance of counsel, an analysis of the prejudice prong of the *Strickland* test is not necessary or required.[98] Nevertheless, it is apparent that the record is devoid of any showing of prejudice – Burnett cannot show that any harm flowed from the lack of opportunity to rebut the State's expert with his own because no defense expert testified at the motion for new trial hearing.[99] Without an affirmative showing on the record, the Court cannot evaluate the effect a defense expert would have had on the outcome of the proceedings.[100] To be sure, "unfounded speculation does not add up to a showing of professionally deficient performance by trial counsel."[101] Burnett's motion as to this basis is hereby **DENIED**.

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[95] *Patterson v. State*, 350 Ga. App. 540, 550 (2019) (citing *Haynes v. State*, 326 Ga. App. 336, 343 (2014)).
[96] MNT: 56-57.
[97] See *Lawton v. State*, 340 Ga. App. 903, 905 (2017).
[98] *Young v. State*, 329 Ga. App. 70, 75 (2014) (citing *Works v. State*, 301 Ga. App. 108, 114 (2009)).
[99] The Court notes that appellate counsel orally requested funds for an expert at the motion hearing, but this Court denied the request given the ample opportunity to have requested expert funds prior to the hearing date and the fact that counsel made no proffer as to what the expert would likely testified to.
[100] *Thornton v. State*, 305 Ga. App. 692, 694-695 (2010).
[101] *Pyburn v. State*, 301 Ga. App. 372-376 (2009) (citing *Williams v. State*, 284 Ga. 849, 851 (2009)).

H. Defendant's Testimony

Burnett claims that his trial counsel failed to adequately prepare him for his testimony at trial, arguing that counsel spent insufficient time with him and specifically emphasizing the fact that Burnett was never prompted to say that he was innocent of the charges against him.

First, there exists no magic amount of time that counsel must spend with a client in preparation for trial.[102] Nevertheless, Burnett has not articulated how additional time or trial preparation would have changed the outcome and thus he has not met his burden under *Strickland*. Secondly, there is no evidence that the jury was unaware that Burnett was pleading not guilty to the offenses before it. Indeed, the Court appropriately charged the jury that Burnett had entered a plea of not guilty. Moreover, the fact that Burnett was acquitted of ten of the crimes with which he was charged "is inconsistent with a finding that his counsel's conduct undermined the proper functioning of the adversarial process."[103] For these reasons, Burnett's motion on these grounds is **DENIED**.

I. Jury Charge

Burnett avers that his trial counsel was ineffective in not requesting that the Court charge the jury on the lesser-included offense of sexual battery. The decision whether to request a particular jury charge falls within the ambit of trial tactics and strategy.[104] "Trial tactics, however mistaken they may appear with hindsight, are almost never adequate grounds for finding trial counsel to be ineffective...unless such tactical decisions are so patently unreasonable that no competent attorney would have chosen them."[105] Indeed, "a charge request must be apt, a correct statement of the law, and precisely adjusted to the theory of the case. [Cit.] If the evidence shows

[102] *Vanholten v. State*, 271 Ga. App. 782, 783 (2005) (quoting *Waddell v. State*, 224 Ga. App. 172, 175 (1996)).
[103] *Pyburn*, 301 Ga. App. 375-376.
[104] *Duvall*, 273 Ga. App. at 148.
[105] *Id.* (citing Brantley v. State, 271 Ga. App. 733, 736 (2005)).

either the completed offense as indicted or no offense at all," the trial court would not be authorized to instruct on the lesser crime.[106]

With regard to Counts 11 through 13, Burnett did not rely on a lesser-included defense – that he intentionally made physical contact with the intimate parts of Nixon without her consent.[107] Instead, he testified that he had not committed any of the acts as charged, but rather believed Nixon to be fabricating the allegations because she was angry over being spanked.[108] As determined in this Court's findings on the sufficiency of the evidence, however, the State's case established all elements of the offenses charged. As such, there was no evidence presented that raised a lesser offense and there was no error in not requesting same.[109]

As Burnett has not demonstrated deficient performance or prejudice under *Strickland*, his motion on this basis is hereby **DENIED.**

J. Closing Argument

As with his opening statement, this Court finds that trial counsel's closing argument did not constitute deficient performance, but was based on reasonable professional strategy. A review of the record reflects that counsel outlined the defense's theories that Wright's mother had compelled her to fabricate the allegations and that Nixon had lied about being spanked. He pointed out that the State had presented no medical evidence and that reasonable doubt was apparent.[110] Moreover, Burnett was acquitted on ten of the thirteen charges. This is a relevant factor which belies Burnett's claim that his counsel's closing fell below the *Strickland* standard.[111] Further,

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[106] *Smith v. State*, 310 Ga. App. 392, 395 (2011).
[107] O.C.G.A. § 16-6-22.1.
[108] *Id.*
[109] See *Linto v. State*, 292 Ga. App. 482, 486 (2008) (citing *McGruder v. State*, 279 Ga. App. 851, 855 (2006)).
[110] October 19, 2017 Trial Transcript, Volume III, pp. 345-349.
[111] *Sanchious v. State*, 359 Ga. App. 649, 859 S.E.2d 814, 824, fn. 5 (2021).

prejudice is not presumed under these circumstances. Thus, with no showing under the prejudice prong, Burnett's claim fails.

Burnett's motion is hereby **DENIED**.

K. Sentencing

In his last particularized error, Burnett argues that his trial counsel should have asked that the sentencing hearing be continued to provide him the opportunity to present mitigation evidence and argument as to merger. Again, as with other grounds raised in his motion, Burnett has not identified any witnesses or other mitigation evidence that would have been presented at trial had a continuance been sought (and granted). "At a motion for new trial hearing, either the uncalled witness must testify or the defendant must introduce a legally recognized substitute for the uncalled witness's testimony."[112] This Burnett did not do.

Further, with regard to merger, Burnett has not shown a reasonably probability that the Court would have sentenced him differently. As Burnett can show neither deficient performance nor prejudice, his motion is **DENIED**.

L. Cumulative Error

Lastly, Burnett urges this Court to grant him a new trial under the doctrine of cumulative error, pursuant to *State v. Lane*.[113] Without multiple errors, however, there can be no cumulative error.[114] Thus, based on the Court's findings above, *Lane* is inapplicable to these proceedings.

The Court has considered any remaining grounds asserted in Burnett's motion for new trial and finds them to be without merit.

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[112] *St. Germain v. State*, 358 Ga. App. 163, 165 (2021) (citing *Price v. State*, 305 Ga. 608, 614 (2019)).
[113] 308 Ga. 10 (2020).
[114] See *Jones v. State*, 358 Ga. App. 584 (2021); *Sullivan v. State*, 301 Ga. 37 (2017) ("We evaluate only the effects of matters determined to be error, not the cumulative effect of non-errors").

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED that Burnett's motion for new trial be and is hereby **DENIED** in its entirety.

SO ORDERED, this the 18 day of March, 2022.

ROBERT W. GUY, JR., Judge
Superior Courts of Georgia
Brunswick Judicial Circuit