

APPENDIX

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342 Ga.App. 411
Court of Appeals of Georgia.

GREGORY

v.

The **STATE**.

A17A0209

|
June 28, 2017

|
Reconsideration Denied July 17, 2017

|
Certiorari Denied March 20, 2018

Synopsis

Background: Defendant was convicted in the Superior Court, Gwinnett County, Warren Davis, J., of aggravated battery. Defendant appealed.

Holdings: The Court of Appeals, Bethel, J., held that:

[1] introduction of statements made on 9-1-1 **call** by victim did not violate defendant's right to confront the caller;

[2] defendant abandoned for appeal argument that trial court erred in admitting statements made by victim in a 9-1-1 **call** as an excited utterance;

[3] statement by neighbor of victim was admissible as an excited utterance;

[4] defendant could not show prejudice to support ineffective assistance of counsel claim based on counsel's failure to object to the admission of evidence on the ground that **State** failed to file pre-trial notice of its intent to introduce evidence as a business record;

[5] defendant did not receive ineffective assistance when his trial counsel failed to object to the admission of 9-1-1 recording;

[6] judge did not improperly comment on evidence; and

[7] court was permitted to redact portions of victim's 9-1-1 **call**.

Affirmed.

West Headnotes (13)

[1] **Criminal Law** ⇌ Innocence

Criminal Law ⇌ Construction of Evidence

On appeal, the defendant is no longer presumed innocent and all of the evidence is to be viewed in the light most favorable to the jury verdict.

Cases that cite this headnote

[2] **Criminal Law** ⇌ Use of documentary evidence

Statements made on 9-1-1 **call** by victim were not testimonial in nature, and thus admission of 9-1-1 recording did not violate defendant's right to confront the caller as a witness in aggravated battery prosecution, where 9-1-1 **call** was made several minutes after defendant had fled the premises, and the statements made by victim were made while defendant remained at large, and provided information that could aid authorities in defendant's capture. U.S. Const. Amend. 6; Ga. Code Ann. § 16-5-24.

Cases that cite this headnote

[3] **Criminal Law** ⇌ Specification of errors

Criminal Law ⇌ Points and authorities

Defendant abandoned for appeal argument that trial court erred in admitting statements made by victim in a 9-1-1 **call** as an excited utterance in aggravated battery prosecution; defendant failed to cite to the record or draw out any authority supporting his argument, but only baldly asserted that the **State** failed to lay the proper foundation for admission of the evidence. Ga. Code Ann. § 16-5-24; Ga. Ct. App. R. 25(c) (2).

Cases that cite this headnote

[4] **Criminal Law** ⇌ Incriminating accused

Criminal Law ➡ Length of time elapsed as affecting admissibility

Statement by neighbor of victim, in which neighbor testified that victim told her that defendant beat victim up, was admissible as an excited utterance in aggravated battery prosecution, where neighbor heard screaming outside her home which prompted her to go outside, where she found victim sitting on the ground, crying, and hysterical, and although the record did not establish the exact time line between the conclusion of victim's violent encounter with defendant and her subsequent statements to her neighbor, the neighbor's testimony established both victim's demeanor at the time the statements were made and the source of her distress. Ga. Code Ann. §§ 16-5-24, 24-8-803(2).

Cases that cite this headnote

[5] Criminal Law ➡ Hearsay

Decisions by the trial court with regard to admission of evidence pursuant to a hearsay objection are reviewed for abuse of discretion.

Cases that cite this headnote

[6] Criminal Law ➡ Res Gestae; Excited Utterances

Testimony that the declarant appeared upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception.

Cases that cite this headnote

[7] Criminal Law ➡ Documentary evidence

Defendant could not show prejudice to support ineffective assistance of counsel claim based on counsel's failure to object to the admission of evidence on the grounds that the **State** failed to file pre-trial notice of its intent to introduce a 9-1-1 **call** recording as a business record; although **State** admitted that it did not provide defendant with a separate document indicating its intent to introduce the evidence as business record, defendant received copies of the evidence as part of pre-trial discovery, which afforded defendant the opportunity to raise any objections he had to the recording and its accompanying documents. U.S. Const. Amend. 6; Ga. Code Ann. § 24-902.

Cases that cite this headnote

[8] Criminal Law ⇌ Documentary evidence

Defendant did not receive ineffective assistance, in prosecution for aggravated battery, when his trial counsel failed to object to the admission of a 9-1-1 recording of statements made by victim; the recording of the **call** was made by the county 9-1-1 center, and was accompanied in the record by a written declaration from the 9-1-1 operations center certifying that it met the requirements of the rule governing records of regularly conducted activity. U.S. Const. Amend. 6; Ga. Code Ann. §§ 16-5-24, 24-8-803(2); 24-9-902(11).

Cases that cite this headnote

[9] Criminal Law ⇌ Remarks on ruling on admissibility of evidence

Criminal Law ⇌ Expressions as to weight and sufficiency of evidence and guilt of accused

Trial judge did not improperly comment on evidence, in aggravated battery prosecution, when judge referenced a 9-1-1 recording made by “alleged victim;” defendant argued that comment relieved the **State** of its affirmative burden to prove that victim placed the 9-1-1 **call**, but the fact that victim was the alleged victim in the case, or that she was the caller on the 9-1-1 recording, was never in dispute. Ga. Code Ann. §§ 16-5-24, 17-8-57.

Cases that cite this headnote

[10] Criminal Law ⇌ Comments on evidence and witnesses

A judge's commentary on the evidence constitutes plain error, and counsel's failure to contemporaneously object to such comment does not preclude appellate review. Ga. Code Ann. § 17-8-57.

Cases that cite this headnote

[11] Criminal Law ⇌ Expressions as to weight and sufficiency of evidence and guilt of accused

Criminal Law ⇌ Expressions as to weight and sufficiency of evidence and guilt of accused

In order to violate the rule prohibiting a judge from expressing an opinion on a defendant's guilt and necessitate reversal, the trial court's comments must pertain to a disputed issue of fact in the case. Ga. Code Ann. § 17-8-57.

Cases that cite this headnote

[12] Criminal Law ⇨ Expressions affecting credibility of witnesses

Criminal Law ⇨ Expressions as to weight and sufficiency of evidence and guilt of accused

The purpose of the statute governing a judge's comments in front of a jury is to prevent the trial court from invading the province of the jury, either by expressing its views on the credibility of a witness or by indicating what facts it believes have or have not been established by the evidence. Ga. Code Ann. § 17-8-57.

Cases that cite this headnote

[13] Criminal Law ⇨ Introduction of documentary and demonstrative evidence

Trial court was permitted to redact portions of victim's 9-1-1 **call** in aggravated battery prosecution, where the proper foundation for the **call** as an admissible business record had been laid, and the redactions were made at the trial court's instruction so as to eliminate any extraneous statements made by victim that impermissibly addressed defendant's character. Ga. Code Ann. § 16-5-24; 24-9-902(11).

Cases that cite this headnote

Attorneys and Law Firms

****368** Frances C. Kuo, Lawrenceville, for Appellant.

Daniel J. Porter, District Attorney, Robert D. Wolf, Assistant District Attorney, for Appellee.

Opinion

Bethel, Judge.

***411** Richard **Gregory** appeals from the denial of his motion for a new trial following his conviction on a single count of aggravated battery for which he was sentenced to twenty years imprisonment and ordered to pay a fine. On appeal, **Gregory** alleges that the trial court erred by admitting into evidence and publishing to the jury a recording of a 9-1-1 **call** that was

placed shortly after the incident giving rise to his arrest, and by admitting certain statements by a witness over the defendant's hearsay objection. He also alleges that his trial counsel was ineffective by failing to object to the admission of the 9-1-1 **call** recording. Finally, he argues that the ****369** trial judge improperly commented on the evidence in the case when instructing the jury as to what it would hear when the 9-1-1 **call** was played in court. For the reasons set forth below, we affirm his conviction.

[1] On appeal, the defendant “is no longer presumed innocent and all of the evidence is to be viewed in the light most favorable to the jury verdict.” *Batten v. State*, 295 Ga. 442, 443 (1), 761 S.E.2d 70 (2014). So viewed, shortly after midnight one evening, Karen Andrews was at ***412** the home of a friend when she placed a **call** to **Gregory** asking that he come to the house to pick her up. He arrived a few minutes later, and the two of them drove back to Andrews' house where they spent the night.

The next afternoon, a neighbor of Andrews heard screaming outside her home. The neighbor walked out of her house and ran down the street, finding Andrews sitting on the ground. Andrews was hysterical and crying, her eye was swollen, and her face was bleeding. At that time, the neighbor also saw a man leave Andrews' house, get into a car parked in Andrews' driveway, and drive away. The neighbor later testified that Andrews told her that the man had beaten her up.¹

A few minutes later, Andrews placed a 9-1-1 **call** to the county police department.² Andrews remained on the line with the operator until police arrived, at which time the responding officer observed injuries to her face. Following further investigation by the police, including an interview of Andrews, **Gregory** was arrested and charged with a single count of aggravated battery.³

Before trial, **Gregory** moved to suppress the recording of Andrews' 9-1-1 **call**. The court denied the motion but ruled that certain statements made by Andrews in the **call** placing **Gregory's** character at issue would be redacted from the recording prior to trial.

Andrews was not available to testify at the trial,⁴ and the **State** did not **call** anyone from the 9-1-1 center to testify regarding her **call**. Instead, the redacted 9-1-1 recording was played before the jury in conjunction with testimony from the police officer who arrived at Andrews' house following the **call**. The recording was accompanied by several documents relating to the **call**, including a records certification from the 9-1-1 center and a copy of the dispatch report (known as a CAD report).⁵

Although the State had provided each of these documents and a copy of the recording to Gregory as part of pre-trial discovery, the State did not provide Gregory with separate notice of its intent to introduce the 9-1-1 recording as a business record pursuant to *413 OCGA § 24-9-902 (11) (“Rule 902 (11)”). Gregory did not challenge the admissibility of the recording and the documents as business records.⁶

The trial judge, prior to playing the recording, instructed the jury that it was about to hear an audio recording of the “alleged victim” on the 9-1-1 call. Gregory made no objection to this instruction at trial. Later testimony by a police investigator indicated **370 that Karen Andrews was the person who placed the 9-1-1 call, but this information was not shared with the jury through witness testimony before the recording of the call was played in court.

Gregory was convicted of a single count of aggravated battery. The trial court denied of Gregory's motion for a new trial and this appeal followed.

[2] 1. Gregory first asserts that the trial court erred by denying his motion to suppress the 9-1-1 recording, arguing that admission of the call violated Gregory's Sixth Amendment right to confront the caller as a witness because at least some of the statements made on the call were testimonial in nature. Gregory also argues that the recording should have been suppressed because statements made by Andrews on the call were not admissible under any hearsay exception. For the reasons set forth below, we affirm the trial court's denial of Gregory's motion to suppress.

(a) In *Crawford v. Washington*,⁷ the United States Supreme Court held that statements made by witnesses outside the courtroom that are testimonial in nature are barred from admission into evidence by the Confrontation Clause unless the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. A subsequent decision by the United States Supreme Court, *Davis v. Washington*,⁸ applied this principle to the admission of a victim's 9-1-1 conversation in which she identified the defendant as her assailant. In *Davis*, the Supreme Court held that statements made to the 9-1-1 operator while the defendant was in the home of the caller in violation of a protective order were not testimonial. *Davis*, 547 U.S. at 826-28 (III)(A), 126 S.Ct. 2266. The Supreme Court reasoned that *414 statements made to the operator identifying the defendant were made while the incident was still unfolding (as opposed to a description of past events) and that the primary purpose of the colloquy with the 9-1-1 operator was to obtain police assistance to intervene in “an ongoing emergency” where physical harm to the caller was possible. *Id.*

As the Georgia Supreme Court subsequently noted,

[i]n *Michigan v. Bryant*,^[9] the Supreme Court gave further guidance on this subject. The court referenced the “primary purpose” test, but cited additional factors to determine whether a statement was made to meet an ongoing emergency, including the nature of the emergency, the formality of the exchange, and the probable intent of the parties judged by an objective observer.

Hatley v. State, 290 Ga. 480, 485 (II), 722 S.E.2d 67 (2012).

Here, we agree with the trial court that the statements on the **call** were not testimonial in nature. The 9-1-1 **call** was placed several minutes after **Gregory** had driven away from Andrews' house, and her statements on the **call** described in some detail her injuries and the incident that occurred between her and **Gregory** that afternoon. However, on the **call**, Andrews provided **Gregory's** physical description, described his vehicle, identified his residence, and **stated** the location Andrews believed him to be driving toward after he left her house. She also indicated to the operator that she believed **Gregory** was sending someone to her house to kill her.

This case is closely analogous to the Georgia Supreme Court's decision in *Thomas v. State*, 284 Ga. 540, 542-45 (2), 668 S.E.2d 711 (2008). In *Thomas*, the victim was attacked by the defendant in a vehicle parked in front of her home. *Id.* at 541, 668 S.E.2d 711. She was found by a neighbor who placed a 9-1-1 **call** on her behalf in which the neighbor relayed information from the victim identifying her attacker and the source of her injuries. *Id.* The neighbor also provided a description of the assailant's vehicle. *Id.* The Georgia Supreme Court ruled that these statements were not testimonial, in that they ****371** were made “while the incident was still ongoing and the perpetrator was at large.” *Id.* at 543 (2), 668 S.E.2d 711.

Here, like in *Thomas*, even though the 9-1-1 **call** in this case was made several minutes after **Gregory** had fled the premises, the statements made by Andrews were not testimonial because they were ***415** made while **Gregory** remained at large and because they provided information that could aid authorities in his capture.¹⁰ We therefore affirm the trial court's determination that statements made by **Gregory** in the recording were not testimonial.

[3] (b) **Gregory** also argues that the trial court erred in concluding that the statements in the **call** were admissible as an excited utterance and under what it refers to as the “necessity exception.” From the record below, it appears that the trial court determined that the contents of the **call** could be admitted pursuant to OCGA § 24-8-803 (2) (“Rule 803 (2)”) as an excited utterance and pursuant to OCGA § 24-8-804 (a)(4) (“Rule 804 (a)(4)”), which applies to unavailable witnesses. **Gregory**, however, fails to cite to the record or draw out

any authority supporting his argument on this point. Instead, he baldly asserts that the **State** failed to lay the proper foundation for admission of the evidence. Because of the dearth of information provided to this Court in support of this argument, pursuant to Court of Appeals Rule 25 (c) (2), we deem the argument abandoned and do not consider it here. *See Slimbey v. State*, 288 Ga. App. 717, 718, 655 S.E.2d 223 (2007) (finding abandonment of issues on appeal where appellant did not support his enumeration of error with citations to record or applicable case law).

[4] 2. **Gregory** next argues that the trial court erred in overruling his hearsay objection to the testimony of Karen Andrews' neighbor regarding statements the neighbor heard Andrews make following the incident. At trial, the neighbor testified that Andrews told her that "he beat me up and ... she thought he was her friend, that he was different, but that he was like all the others. He just wanted sex. And when she turned him down, he beat her up."

Gregory objected to the admission of this testimony on hearsay grounds. The **State** responded that Andrews' statements recounted by the neighbor were admissible as an excited utterance pursuant to Rule 803 (2). The trial court admitted this testimony over **Gregory's** objection as an excited utterance.

[5] An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of *416 excitement caused by the event or condition." OCGA § 24-8-803 (2). As the Georgia Supreme Court has explained,

[i]n order to qualify as an excited utterance, an event precipitating the statement must have been sufficiently startling to render inoperative the declarant's normal reflective thought processes and the declarant's statement must have been the result of a spontaneous reaction, and not the result of reflective thought.

Walthour v. State, 269 Ga. 396, 397 (2), 497 S.E.2d 799 (1998). Decisions by the trial court with regard to admission of evidence pursuant to a hearsay objection are reviewed for abuse of discretion. *Reeves v. State*, 294 Ga. 673, 676 (2), 755 S.E.2d 695 (2014).

Here, the record shows that the neighbor heard screaming outside her home which prompted her to go outside. She walked down the street and found Andrews sitting on the ground. When she came to Andrews, she found her crying and hysterical and saw that Andrews' eye was swollen and that she was bleeding. It was at this time that Andrews made the statements to the neighbor that were recounted at trial.

[6] **372 Although, as **Gregory** argues, the record at trial does not establish the exact time line between the conclusion of Andrews' violent encounter with **Gregory** and her subsequent

statements to her neighbor, the neighbor's testimony establishes both Andrews' demeanor at the time the statements were made and the source of her distress. As the Georgia Supreme Court has discussed,

[w]hile the declarant must still be under the stress or excitement that the startling event caused, the excited utterance need not be made contemporaneously to the startling event. It is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance.

Robbins v. State, 300 Ga. 387, 390-91 (2), 793 S.E.2d 62 (2016) (citation and punctuation omitted). Moreover, “[t]estimony that the declarant appeared ... upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception.” *Daniel v. State*, 285 Ga. 406, 410 (6), 677 S.E.2d 120 (2009) (citation and punctuation omitted). Accordingly, on the *417 record before us, we cannot say that the trial court abused its discretion in admitting Andrews' statements to her neighbor as an excited utterance.

[7] 3. **Gregory** argues that his trial counsel was ineffective by failing to object to the admission of the 9-1-1 recording, the CAD report, and the business record certification on the ground that the **State** failed to file pre-trial notice of its intent to introduce the recording as a business record pursuant to OCGA § 24-8-803 (6) (“Rule 803 (6)”) and OCGA § 24-9-902 (11) (“Rule 902 (11)”). We disagree with this contention because **Gregory** cannot show a reasonable probability that the outcome of his case would have been different had a separate notice been provided.

Rule 902 (11) provides, in relevant part, that

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration[.]

To establish ineffective assistance of counsel under *Strickland v. Washington*,¹¹ the defendant must show that trial counsel's performance was deficient and that there is a reasonable possibility that the trial result would have been different if not for the deficient performance.

In this case, without regard to his trial counsel's performance, **Gregory** cannot satisfy the second prong of the *Strickland* analysis because he has not shown how the result of his trial would differ had he received a separate notice. Although the **State** admits that it did not

provide **Gregory** with a separate document indicating its intent to introduce the documents as business records, it is not clear how **Gregory** was harmed by the failure to receive this notice. What is clear is that **Gregory** received copies of the 9-1-1 recording and its supporting documentation (which certified the recording and the CAD report as business records in compliance with Rules 803 (6) and 902 (11)) as part of pre-trial discovery. He filed a motion in limine to suppress the 9-1-1 recording and later objected that the **State** had not properly laid the foundation for the admission of the 9-1-1 recording into evidence.

***418** Although **Gregory's** trial counsel did not raise any objection to admission of the evidence as a business record, the **State's** disclosure of the evidence and the ensuing pretrial proceedings afforded **Gregory** the opportunity to raise any objections he had to the recording and its accompanying documents. We find that this satisfies Rule 902 (11)'s broad notice requirement.

Accordingly, as **Gregory** cannot show that the trial court would have been likely to exclude the 9-1-1 recording had he received separate notice of the **State's** intent to introduce it—or, more importantly, that his trial result would have been different had his counsel objected on the basis of the notice requirement—he has not satisfied the second prong of the *Strickland* analysis. We therefore agree with the trial court that **Gregory** has not shown ineffective assistance of counsel ****373** with respect to his trial counsel's failure to raise the notice requirement.

4. **Gregory** next argues that the trial court erred in admitting the recording of the 9-1-1 **call** because it was not a business record and because the **State** failed to authenticate the caller's voice prior to playing the recording to the jury. He also argues that admission of the recording was in error because it contained hearsay. Finally, **Gregory** maintains that his counsel was ineffective by failing to object to the admission of the recording on these bases.

[8] (a) We agree with the trial court that **Gregory** did not receive ineffective assistance when his trial counsel failed to object to the admission of the 9-1-1 recording because the recording could properly be admitted as a self-authenticating business record under Rules 803 (6) and 902 (11). Here, the recording of the **call** was made by the county 9-1-1 center, and it was accompanied in the record by a written declaration from the 9-1-1 operations center certifying that it met the requirements of Rules 803 (6) and 902 (11). **Gregory** points us to no authority indicating that a recording of a 9-1-1 **call** by the operations center is not a record made as part of that agency's regularly-conducted activity or that it somehow otherwise fails to meet the requirements of Rules 803 (6) or 902 (11).

Likewise, we find **Gregory's** attempts to analogize 9-1-1 recordings to accident or incident reports made in anticipation of potential litigation unpersuasive. The redacted version of

the 9-1-1 recording played for the jury contains no additional information other than the conversation that unfolded between Andrews and the operator. More importantly, it does not contain the verbal or written impressions of an investigator or statements by any other parties made after the incident in question, that might undermine the recording's credibility. This is in contrast to the cases cited by **Gregory** in which a third party, unconnected to the incident in question prepares a report which *419 includes statements in addition to the witness's own testimony of what occurred. *Cf., e.g., Palmer v. Hoffman*, 318 U.S. 109, 113-15 (I), 63 S.Ct. 477, 87 L.Ed. 645 (1943) (finding the accident report prepared by the train company based on a later interview of the train conductor by an agent from regulatory agency was not admissible as business record, as the record was "calculated for use essentially in the court, not in the business.").

We therefore agree with the trial court that the 9-1-1 recording was admissible as a business record pursuant to Rules 803 (6) and 902 (11), and, as such, "additional extrinsic evidence of authenticity" other than the certification by the records custodian was not required. Accordingly, **Gregory's** counsel was not ineffective in failing to raise an objection to the admission of the recording on that basis.

(b) **Gregory's** arguments regarding admission of the 9-1-1 recording pursuant to exceptions to the hearsay rule mirror the points raised in regard to his motion to suppress, which we addressed in Division 1(b) of this opinion, *supra*. As noted, we have deemed this argument abandoned pursuant to Court of Appeals Rule 25 (c) (2).

[9] 5. **Gregory** argues that the trial judge improperly commented on what the evidence in the case had proven when the judge instructed the jury that it would be hearing a 9-1-1 **call** made by "the alleged victim" in the case. We disagree.

At trial, **Gregory** objected to the introduction of the recording, arguing that Andrews' voice had not been properly authenticated. The trial court overruled this objection and instructed the jury regarding the 9-1-1 recording, as follows:

[Y]ou're about to hear an audio recording of a telephone **call** of the alleged victim in this case. As you hear the audio recording, you will hear the interviewing **911** operator make certain statements to the alleged victim. I caution you that the declarations or statements of the **911** operator are not evidence, and you should not consider such statements as evidence, unless such statements are proven to you by other competent evidence.

Gregory did not raise any objection to the wording of this instruction at trial, but on appeal he argues that the judge's reference to the caller as the "alleged victim" relieved ****374** the **State** of its affirmative burden to prove that Karen Andrews placed the 9-1-1 **call**. We disagree.

[10] OCGA § 17-8-57 governs commentary by the trial court regarding the evidence before the jury and what has or has not been proven in the case. Because this case came to trial in June 2015, a prior ***420** version of this statute was in effect¹² and provided, in relevant part:

It is error for any judge in a criminal case, during its progress ... to express or intimate his opinion as to what has or has not been proved.... Should any judge violate this Code section, the violation shall be held by the ... Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the ... Court of Appeals may lawfully give.

See Ga. L. 1985, p. 1190, § 1. Under this version of the statute, a judge's commentary on the evidence constitutes plain error, and counsel's failure to contemporaneously object to such comment, as occurred here, does not preclude appellate review. **State v. Gardner**, 286 Ga. 633, 634, 690 S.E.2d 164 (2010).

[11] In order to violate former OCGA § 17-8-57 and necessitate reversal, the trial court's comments must pertain to a disputed issue of fact in the case. **Gardner**, 286 Ga. at 634-35, 690 S.E.2d 164. Here, we note that at no point in the entirety of these proceedings has **Gregory** disputed that Andrews was the alleged victim in this case. Rather than arguing that Andrews did not suffer the injuries alleged by the **State**, **Gregory's** theory of the case was that someone else (or some cause other than a physical attack by him) was the cause of her injuries. Although Andrews' status as the alleged victim in the case is not in dispute, **Gregory** invites this Court to believe that the identity of the caller is a fact at issue such that the judge's identification of the voice on the **call** as that of the victim was an impermissible comment upon the evidence. We decline this invitation.

[12] **Gregory's** argument that, by identifying the caller as the alleged victim, the trial court impermissibly relieved the **State** of its burden to establish facts authenticating the caller's voice is also baseless. The trial judge had already ruled on the admissibility of the recording (a ruling which did not necessitate any further action by the **State** to make the **call** admissible). See Division 4(a), *supra*. **Gregory** cannot now attack that prior ruling by suggesting that the judge's comment on a fact which is not in dispute—that Andrews was the alleged victim in the case or that she was the caller on the 9-1-1 recording—is an "opinion as to what has or has not been proven." The purpose of OCGA § 17-8-57 is to prevent the trial court from invading the ***421** province of the jury, either by expressing its views on the credibility of a witness¹³

or by indicating what facts it believes have or have not been established by the evidence.¹⁴ *Callaham v. State*, 305 Ga. App. 626, 627 (1), 700 S.E.2d 624 (2010). In this case, neither occurred. The judge's statement did not express an opinion as to the veracity of the statements made in the **call** or as to Andrews' credibility, nor did the judge's statement indicating that the alleged victim (which, by that point, was known by the jury to be Andrews)¹⁵ was the person who placed the 9-1-1 **call** resolve any factual dispute that would aid the jury in determining whether **Gregory** had committed the charged offense. The only dispute seems to have been whether the **State** had laid the proper evidentiary foundation in order to admit the recording. As this is a question for the judge, not the jury to resolve, OCGA § 17-8-57 does not ****375** apply. We thus find no error in these statements by the trial court.

[13] 6. **Gregory** finally argues that the trial court erred by publishing the redacted version of the 9-1-1 **call** recording to the jury. Here, the record makes clear that the redactions were made at the trial court's instruction so as to eliminate from the recording any extraneous statements made by Andrews that impermissibly addressed **Gregory's** character. The Georgia Supreme Court has made clear that, where the proper foundation for a business record has been laid and the court has deemed it admissible as such, portions of the original version of the business record containing information which the court deems to be inadmissible can be redacted at the court's direction so that only the admissible portions are presented to the jury as evidence. *See Turner v. State*, 273 Ga. 340, 344 (4), 541 S.E.2d 641 (2001) (allowing introduction of redacted version of report where full report was deemed admissible as a business record). No additional authentication of the record, as redacted, is required. Accordingly, we find no error in the trial court's decision to publish a redacted version of the 9-1-1 **call** to the jury.

Judgment affirmed.

McFadden, P. J., and Branch, J., concur.

All Citations

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Footnotes

- 1 This statement was admitted over the defense's hearsay objection. The trial court ruled that Andrews' statement to the neighbor could be admitted as an excited utterance.
- 2 The contents of this 9-1-1 **call** are discussed in more detail in Division 1(a) of this opinion.
- 3 See OCGA § 16-5-24.

- 4 The record indicates that Andrews passed away in December 2014 from causes unrelated to the incident giving rise to this criminal action and appeal.
- 5 Portions of the redacted 9-1-1 call were also played to the jury as part of the State's closing argument and again during deliberation upon request by the jury.
- 6 At the hearing on Gregory's motion for a new trial, the State admitted to the trial court that it did not provide separate notice to the defense that it planned to introduce the 9-1-1 recording as a business record. The State argued to the trial court that, by failing to object to introduction of the recording on that basis, Gregory had waived the notice requirement. At the same hearing, Gregory's trial counsel indicated that he could not think of a strategic reason for why he would not have moved to exclude the recording of the 9-1-1 call pursuant to Rule 902 (11). Gregory's trial counsel also indicated at the motion hearing that he did not have a strategic reason for failing to object to the admission of the 9-1-1 recording on the grounds that it contained inadmissible hearsay and that the State failed to authenticate the caller's voice.
- 7 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
- 8 547 U.S. 813, 826-27, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).
- 9 562 U.S. 344, 360 (II)(A), 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).
- 10 *Cf. Pitts v. State*, 272 Ga. App. 182, 187 (2), 612 S.E.2d 1 (2005), where we upheld the admission of a 9-1-1 call in which the victim called the police to request that they come to her home to remove the defendant, who had broken in. This Court ruled that the victim's statements "were made while the incident was actually in progress ... were not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was *actually occurring*." *Id.* (emphasis supplied). *Thomas* appears to extend *Pitts* by suggesting that information provided by the victim that is relevant to the assailant's capture as he flees in the immediate aftermath of a physical attack is not testimonial in nature.
- 11 466 U.S. 668, 688 (III) (A), 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
- 12 *See Smart v. State*, 299 Ga. 414, 423 (4), 788 S.E.2d 442 (2016) (applying former version of OCGA § 17-8-57 because that version of the statute was in effect at the time of defendant's trial).
- 13 *See, e.g., Murphy v. State*, 290 Ga. 459, 460-61 (2), 722 S.E.2d 51 (2012) (finding plain error under OCGA § 17-8-57 where trial court referred to witness as a "good detective" who used his "best efforts" in the case).
- 14 *See, e.g., Patel v. State*, 282 Ga. 412, 414-15 (2), 651 S.E.2d 55 (2007) (finding plain error under OCGA § 17-8-57 where trial court indicated that venue was proper in the prosecuting county even though that was disputed by the defendant).
- 15 After some brief pleasantries, the State began its opening argument in the case by saying, "The victim in this case is Karen Andrews."

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

v.

RICHARD LEE GREGORY

Defendant.

Indictment # 15-B-00856-10

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS 911 CALL

Defendant's "Motion to Suppress" in the above-styled case having regularly come before the Court, and the same having been read, heard and considered, it is HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

Defendant, Richard Lee Gregory is currently charged with one count of Aggravated Battery against Karen Andrews related to an incident that occurred on August 17, 2014. Ms. Andrews made a 911 call for help related to this incident. In December 2014, Ms. Andrews passed away in a manner completely unrelated to this incident and this Defendant.

In Crawford v. Washington, the United States Supreme Court held that the admission of out-of-court statements that are testimonial in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. 36 (124 S.Ct. 1354, 158 LE2d 177) (2004). When the statement at issue is non-testimonial in nature, however, the State's normal rules regarding the admission of hearsay apply. Id.

FILED
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA

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RICHARD ALEXANDER, CLERK

Subsequent to the Supreme Court's ruling in Crawford, the courts have held statements are non-testimonial when made under circumstances objectively indicating that the primary purpose of the communication is to enable police assistance to meet an ongoing emergency. Davis v. Washington, 547 U.S. 813 (2006); Thomas v. State, 284 Ga. 540. (668 SE2d 711) (2008).

The 911 recording at issue in this matter was introduced and published to this Court during the motion to suppress hearing. Upon review of this 911 recording, Ms. Andrews is clearly making the 911 call to seek assist for an on-going emergency; she begins the call by telling the 911 operator the Defendant's license plate number. She indicates that she is afraid the Defendant may return. She makes several statements during the call that indicate that an incident between her and the Defendant had just occurred. During the recording, Ms. Andrews can be heard breathing heavily and crying. Ms. Andrews further appears to be under the influence of the event as her statements and/or thoughts appear to be rambling in nature. The Court finds Ms. Andrews 911 call for help is non-testimonial in nature.

Once a determination is made that a statement is non-testimonial in nature, "normal rules regarding the admission of hearsay apply. Thus, the statements were admissible if they qualified under one of Georgia's hearsay exceptions. Thomas v. State, 284 Ga. 540. Under O.C.G.A. §24-8-803(2), a statement relating to a startling event or condition made while declarant was under the stress of excitement cause by the event or condition shall not be excluded by the hearsay rule.

Although Ms. Andrews did expressly say how long of a delay occurred between incident and making the call, the comments she made throughout the call suggest that

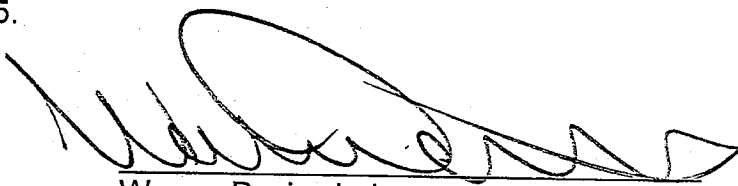
this incident just occurred or that the delay was minimal. Further, as discussed previously, Ms. Andrews clearly made the statement while under the stress of the startling event. As such, this Court finds this phone call qualifies under the excited utterance hearsay exception set out in O.C.G.A. 24-8-803(2).

Also, as Ms. Andrews has died, her non-testimonial statements are admissible under O.C.G.A. 24-8-804(a) as an unavailable witness.

However, Ms. Andrews does make improper statements that place Defendant's character into evidence. For example, Ms. Andrews informs the 911 operator that Defendant is currently on probation. This statement as well as any other statements which improperly place Defendant's character into evidence shall be redacted prior to trial.

For the foregoing reasons, Defendant's Motion to Suppress is HEREBY DENIED.

So Ordered, this ⁵⁻¹¹⁻¹⁵ 5/8/2015.



Warren Davis, Judge,
Gwinnett Superior Court

Copies to:
Gwinnett County District Attorney's Office
75 Langley Drive
Lawrenceville, GA 30046

Larry Owens, Attorney for Defendant
229 W. Pike Street
Lawrenceville, GA 30046

APPENDIX C: Pet. App. 19a
IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

2016 JUL 20 PM 1:22

STATE OF GEORGIA

v.

RICHARD GREGORY,
Defendant.

*
* Indictment No.
* 15-B-00856-10
*
*
*
*
*

RECEIVED JUDGE GREGORY

AMENDED ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Pending before this Court is the Defendant's motion for new trial. The Court, having read and considered Defendant's motion, having held an evidentiary hearing on the matter and considering the transcript and the record, said motion, as amended, is hereby DENIED.

FINDINGS OF FACT

Defendant was indicted for one count of Aggravated Battery on March 11, 2015. This charge stems from incident which occurred on August 17, 2014 where Defendant punched and kicked victim, Karen Andrews which caused injuries to her face. In December 2014, Ms. Andrews died in a manner completely unrelated to this incident. Defendant filed a statutory demand for speedy trial under O.C.G.A. 17-7-170 on March 30, 2015.

On the same day, trial counsel for Defendant filed a motion to suppress asking this Court to suppress the recording of victim's 911 call. This Court held a hearing on April 23, 2015 whereupon the approximately 14 minute 911 recording at issue was admitted into evidence and played for this Court. This Court issued an order denying Defendant's Motion to Suppress on May 11, 2015.

Defendant was subsequently tried and convicted of Aggravated Battery on June 5,

2015. A presentence investigation report was ordered and Defendant was subsequently sentenced to twenty years with the first seven years to be served in confinement.

Trial counsel filed Defendant's "Motion for New Trial" on December 14, 2015. Appellate Counsel subsequently filed "Defendant's Amended Motion for New Trial" on March 8, 2016. This Court held a hearing on March 24, 2016 with Defendant present. The parties were given until April 22, 2016 to submit written briefs. After the hearing, counsel filed "Defendant's Second Amended Motion for New Trial" on March 29, 2016.

CONCLUSIONS OF LAW

1. Sufficient evidence was presented at trial to sustain the jury's finding of guilt.

Defendant first states the jury verdict is contrary to the law and evidence, and requests a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. The Court, having considered the evidence and weighed it accordingly, hereby DENIES the motion on this basis because the Court finds that the evidence presented at trial was sufficient to sustain the jury's finding of guilt. The Court has applied the standard of acting as the "thirteenth juror;" the Court finds that the evidence presented at trial was sufficient to sustain the jury's finding of guilt. See Hartley v. State, 299 Ga. App. 534 (2009).

2. This Court did not err in failing to suppress the 911 call pursuant to Defendant's "Motion to Suppress."

Defendant's remaining nine enumerations of error involve the 911 call made by victim, Karen Andrews which was admitted at trial over objection. First, Defense contends this trial court erred in denying Defendant's "Motion to Suppress." On March 30, 2015, Defendant filed his "Motion to Suppress" which sought to suppress "any and all

recordings or transcription of recordings of 911 calls.”

In his “Motion to Suppress,” Defendant alleged the “statements Karen Andrews made during the 911 call do not qualify as admissible under any exception to the hearsay rule relying on the unavailability of the witness due to death. He further moved to suppress the 911 call as it violated Defendant’s Sixth Amendment right to confrontation. He finally alleged the 911 call was testimonial and inadmissible under Crawford v. Washington, . 541 U.S. 36 (124 S.Ct. 1354, 158 LE2d 177) (2004).

This Court held a hearing on April 23, 2015 and listened to the 911 recording at issue. This Court subsequently denied Defendant’s motion by an order filed in the Gwinnett County Clerk’s Office on May 11, 2015. This Court found Ms. Andrews’s 911 call for help was non-testimonial in nature as she was clearly making the 911 call to seek assistance for an on-going emergency. Further, this Court found that the call for help was properly admitted under two exceptions to hearsay. The call qualified for an exception under the excited utterance exception under O.C.G.A. § 24-8-803(2) and the unavailable witness exception under O.C.G.A. §24-8-804(a) as Ms. Andrews had died prior to trial.

Defendant has presented no new evidence or case law to support his contention that this 911 call should have been suppressed. Defendant’s motion as to this enumeration is DENIED.

3. Trial Counsel was not ineffective for failing to object to the introduction of the 911 call under O.C.G.A. §24-9-902(11) or O.C.G.A. §24-8-803.

Defense next contends trial counsel was ineffective for failing to object to the admission of the 911 recording on the grounds that the State failed to file a notice of intent

to introduce the 911 recording as a business record pursuant to O.C.G.A. § 24-9-902, the statute which address self-authentication. To establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984), the defendant must show that trial counsel's performance was deficient and there is a reasonable probability that the trial result would have been different if not for the deficient performance. Hill v. State, 284 Ga. 521 (668 SE2d 673) (2008).

Under O.C.G.A. §24-9-902(11), "extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required if the original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section §24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record: (A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters; (B) Was kept in the course of the regularly conducted activity; and (C) Was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration."

The State provided defense with a certification from Carol Palmer, from Gwinnett County 911 communications which certified the 911 in question "(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters; (B) Was kept in the course of the regularly

conducted activity; and (C) Was made by the regularly conducted activity as a regular practice." This certification further stated "in accordance with Official Code of Georgia Annotated 24-8-803(6) and §24-9-902(11) I declare, certify, verify, under penalty of perjury, that the foregoing is true and correct. The State introduced this certification at trial prior to the playing of the 911 recording. (Transcript of the Jury Trial conducted on June 1st, 2nd, and 3rd of 2015, hereinafter referred to as T., page 389-391, State Exhibit Number 8).

Although no evidence has been presented to this Court as to when State provided this certification to the Defense, it is clear from the record defense was aware that State intended to introduce this 911 call at trial from the prior motion to suppress and other pleadings of record. Further, although trial counsel did not specifically object under O.C.G.A. §24-8-803(6), trial counsel did object to the playing of this tape without the 911 operator laying the foundation for the recording. (T. 390). As such, this Court finds Defendant has failed to prove the first prong under Strickland, that trial counsel's performance was deficient.

Further, had trial counsel objected to the notification he received, the State could have still admitted this recording by calling the 911 operator who took the call or Carol Palmer, the individual who provided the certification for the 911 call. As such, this Court finds Defendant has failed to prove the second prong under Strickland, that a reasonable probability exists that the trial result would have been different if trial counsel would have objected to playing of the 911 call due to the lack of notification under O.C.G.A.

§24-8-803(6). As such, the Court HEREBY DENIES Defendant's motion as to this enumeration.

Defendant next contends trial counsel was ineffective in "failing to object to the admission of the 911 recording on the grounds it was inadmissible as a business record." As discussed infra, the State introduced a certification from Carol Palmer which laid the foundation for the recording to be admitted under O.C.G.A. §24-8-803(6), (T. 389-391, State's Exhibit 8). As such this Court finds Defendant has failed to meet either prong under Strickland v. Washington and Defendant's motion as to this enumeration is HEREBY DENIED.

4. Trial Counsel was not ineffective for failing to object to the admission of the 911 calls on the grounds it contained inadmissible hearsay statements.

In Defendant fifth enumeration of error, he argues that trial counsel was "ineffective for failing to object to the admission of the 911 recording on the grounds that it contained inadmissible hearsay statements." However, in Defendant's "Motion to Suppress" filed by trial counsel on March 30, 2016, trial counsel contended "any statements made by Karen B. Andrews do not qualify as admissible under any exception to the hearsay rule . . ." However, this Court found the statements on the 911 recording were, in fact, admissible the excited utterance exception to hearsay under O.C.G.A. §24-8-803(2) and due to the witness being unavailable under O.C.G.A. §24-4-804(a). Further, at trial, this Court noted all of Defendant's prior objections for the record to preserve Defendant's objections. (T. 391). As such, this Court finds Defendant has failed to meet either prong under Strickland v. Washington Defendant's motion as to this

enumeration is HEREBY DENIED.

5. Trial Counsel was not ineffective for failing to object to the admission of 911 call based upon the State failed to authenticate the caller's voice nor did the Court err in admitting the recording.

In Defendant's sixth enumeration of error, Defendant contends trial counsel was ineffective for failing to object to the admission of the 911 recoding on the grounds that the State failed to authenticate the caller's voice." Similarly, in Defendant's seventh enumeration of error, Defendant contends this Court erred in "admitting the 911 recording and playing the recording because the State failed to authenticate the caller's voice." As the State notes and as discussed *infra*, the 911 call is self-authenticating under O.C.G.A. §24-9-902(11).

Further, under O.C.G.A. §24-9-923(b), "audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered. O.C.G.A. §24-9-923(a)(4) defines and "unavailable witness as (4) is unable to be present or to testify at the hearing because of death. . ."

Here, as discussed *infra* the State tendered Exhibit 8 which detailed that the 911 call, a business record was taken. Further, on the 911 recording, the caller identifies herself as Karen Britt Andrews at 355 Oak Springs Drive, Lawrenceville. (State's Exhibit 5). Within eight minutes of making the call, Officer Green with the Gwinnett County Police Department responds to 355 Oak Springs Drive, Lawrenceville, Georgia the address

referenced to this caller who identified herself as Karen Andrews. (T. 386, 396-397) There, the officer encounters a woman who then identifies herself as Karen Andrews. The officer observed Ms. Andrews facial injuries (T. 398). Specifically, there was blood all over her face; she had a cut under left eye and her lip was split which would be consistent with what was described on the 911 call. (T. 398). The officer described her demeanor as "very excited, very scared, crying" which was exactly how the individual sounded in the 911 recording. (T. 399). . This Court finds sufficient direct and circumstantial evidence exists to show Karen Britt Andrews, the named victim in the indictment was individual who placed the 911 call in evidence in this case.

The Court did not err in admitting the 911 call "because the State failed to authenticate the caller's voice." This recording was self-authenticating. Further, sufficient direct and circumstantial evidence exists to show the caller was, in fact, Karen Britt Andrews. Defendant has failed to meet either prong of the Strickland v. Washington test to show trial counsel was ineffective in failing object for the State's failure to authenticate Ms. Andrew's voice. There is no showing trial counsel's performance was deficient. Defendant has not shown the trial result would have been different if not for the deficient performance. If trial counsel would have objected, this Court would have properly overruled that objection as circumstantial evidence exists to show the caller was the named victim. As such, Defendant's motion as to enumerations six and seven are
HEREBY DENIED.

6. This Court did not improperly comment on the evidence by giving the jury a cautionary jury charge regarding the 911 call.

In Defendant's eighth enumeration of error, Defendant contends "the trial court improperly commented on the evidence as to what has or has not been proved when it instructed the jury about the 911 call during the trial and in its final charge to the jury, in violation of O.C.G.A. §17-8-57." Defendant contends this Court erred when it gave the jury charge for which the purpose was to instruct the jury to disregard certain statements made by the 911 operator unless such statements were proven by other competent evidence:

"You have heard an audio recording of a telephone call of the alleged victim in this case. As you heard the audio recording you heard the interviewing 911 operator make certain statements to the alleged victim. I caution you that the declarations or statements of the 911 operator are not evidence and you should not consider such statements as evidence unless such statements are proven to you by other competent evidence.

Finally, I determined that a portion of the audio recording should not be played for you because it contains audio that is not proper for your consideration. You should make no assumptions and draw no inferences either for or against the State or for or against the Defendant regarding the removal of this audio or any portions that were 'fast-forwarded' through without audio. You should not speculate as to the reason for the removal or the content of the removed or fast-forwarded through portion and this removal or fast-forwarding through should have no bearing on your deliberations." (T. 391-392, 554).

Under the 1985 version of O.C.G.A. §17-8-57 which was in effect at the time of this trial, "it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilty of the accused."

First, the intent of this charge is to instruct the jury that they are to disregard

comments of the 911 operator unless the comments are proved by other evidence. In essence, the instruction is to disregard any improper evidence. Defendant's "Motion for New Trial" is denied as his eighth enumeration of error is denied as he cannot show this Court improperly commented on the evidence by giving a cautionary jury charge and any possible violation has been waived by his failure to object to the jury charge at trial.

However, in Defendant's enumeration of error number nine, Defendant contends trial counsel was ineffective for failing to object this jury instruction when the charge was first read to the jury prior to the State publishing the 911 tape to the jury. Similarly, in enumeration number ten, Defendant claims trial counsel was ineffective in failing to object to the trial court's final jury charge which contained an identical jury charge. Again, Defendant claims both in both the jury charges the "trial court improperly commented on the evidence as to what has or has not been proved in violation of O.C.G.A. §17-8-57."

At the motion for new trial hearing, Larry Owens, trial counsel for Defendant, testified that he had been an attorney since 1998 and since 2009 100 percent of his practice was criminal defense. (Transcript of the Motion hearing conducted on April 24, 2015, hereinafter "MT.", page 4). In that time period, he tried 24 criminal jury trials to verdict. (MT. 6).

Trial counsel discussed his trial strategy as the "Motion for New Trial" hearing. As both the responding police officer and Ms. Andrews's neighbor, Bonnie Pope, saw Ms. Andrew's injuries, counsel's trial strategy was not to argue that Ms. Andrews did not

sustain injuries or that it was not, in fact, her on the phone. (T. 363, 398). Instead, counsel's trial strategy was to argue that someone else caused these injuries to the victim or the victim sustained these injuries in some other matter than how the State alleged in the indictment. (MT. 26). His defense was "perhaps she had fallen down the stairs or hit her head on the banister or something." (MT. 26). In further support of counsel strategy to show that some other individual caused these injuries, Ms. Andrews merely referred to the perpetrator as "Ricky" during the 911 call and did not provide much identifying information to the 911 operator other than the first name of the individual who attacked her. (State's Exhibit 5, MT. 26).

Trial tactics and strategy, no matter how mistaken in hindsight, are almost never adequate grounds for finding trial counsel ineffective unless they are so patently unreasonable that no competent attorney would have chosen them." Gregoire v. State, 309 Ga. App. 309, 311, 711 S.E.2d 306, 308 (2011). Sufficient circumstantial evidence exists as discussed infra to show the individual who made the 911 call was the alleged victim in this case. Counsel's trial strategy to argue that the victim was either injured in some way inconsistent with the indictment or by another individual was a sound trial strategy. The Court further finds the failure to object to the Court's charge was a part of reasonable trial strategy based upon the evidence introduced in the trial. As such, Defendant's motion as to enumerations of error nine and ten are HEREBY DENIED.

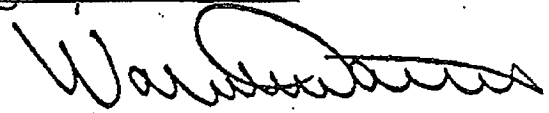
Trial court's comments must pertain to a disputed issue of fact in order to violate statute providing that it is error for any judge in any criminal case to express or intimate his

opinion as to what has or has not been proved or as to the guilt of the accused. Steed v. State, 309 Ga.App. 546, 710 S.E.2d 696 (2011). In Haygood v. State, 142 Ga.App. 627 (1977), a trial court gave an instruction to the jury in which the judge identified individuals as "victims." On appeal, the defendant argued that this this imputed to the jury that the court believed these witnesses for the State to be victims of a crim. However, no objection was made as to the use of the word "victims" during that trial. Regardless of the lack of objection, the Court considered the enumeration to be without merit. Id. 698. Likewise, here, this enumeration is without merit. Furthermore, in this case, the record is clear that the Court used the term 'alleged' victim.

Further, this Court charged the jury, "by no ruling or comment that the court has made during the progress of the trial has the court intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant." (T. 559). Any error made by this Court was mitigated by this limiting instruction. Defendant's motion as to this enumeration of error is HEREBY DENIED.

All other general grounds for a new trial are furthermore denied.

SO ORDERED, this 20th day of July, 2016.



WARREN DAVIS, Judge
Gwinnett Superior Court

cc:

Robert Wolf, Assistant District Attorney
Frances Kuo, Attorney for Defendant

Court of Appeals of the State of Georgia

ATLANTA, July 17, 2017

The Court of Appeals hereby passes the following order:

A17A0209. GREGORY v. THE STATE.

Appellant Richard Gregory filed a motion for reconsideration in this case based on the opinion issued by this Court on June 28, 2017. With regard to Enumerations I, III, IV, and V of his motion, his motion is denied. With regard to Enumeration II of his motion, after publication of our June 28, 2017, opinion regarding this case, this Court became aware of an error in regard to Division 2 of the opinion, namely an error in failing to address the substantive merits of Gregory's enumeration regarding the admission of certain testimony over his hearsay objection. The original version of that opinion has been recalled, and a substitute opinion has been issued in which this Court, in Division 2 of the opinion, reaches the substantive merits of Gregory's enumeration. As that action by the Court addresses the issue raised in Gregory's motion for reconsideration with regard to Division 2, we deem his Enumeration II to be moot.



Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, 07/17/2017

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

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

Stephen E. Carlton, Clerk.



SUPREME COURT OF GEORGIA
Case No. S18C0007

Atlanta, March 20, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

RICHARD GREGORY v. THE STATE

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur, except Peterson, J., disqualified.

Court of Appeals Case No. A17A0209

SUPREME COURT OF THE STATE OF GEORGIA

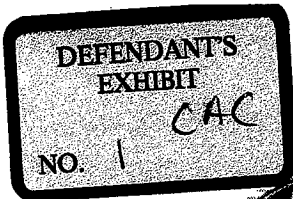
Clerk's Office, Atlanta

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.

A handwritten signature in cursive script, reading "Thine S. Barnes".

, Clerk



BUSINESS RECORD CERTIFICATION

STATE v. Richard Lee Gregory
Superior Court, Gwinnett County, Georgia
Indictment Number: 15-B-0856-10

Gwinnett County 911 Communications
Case No. 14073696
Records: 911 Call - P142290838 / F14051102

I, Carol H. Palmer, hereby certify that I have personal knowledge of the business filing record system of the business known as Gwinnett County 911 Communications, located at the following address: _____

770 Hi Hope Road - PD Annex

Lawrenceville, GA 30046

I have reviewed the attached business records, described as follows: 911 call and CAD History for P142290838 / F14051102, and certify that these business records were taken from the ordinary business records of the entity named herein.

I certify further that based upon my review of these records:

- A. The records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;
- B. The records were kept in the course of the regularly conducted activity of the above-named business entity; and,
- C. The records were kept in the course of the regularly conducted activity as a regular practice.

In accordance with Official Code of Georgia Annotated § 24-8-803(6) and § 24-9-902(11) I declare, certify, verify, under penalty of perjury, that the foregoing is true and correct.

Executed this 26th day of May, 2015.

Signature: Carol H Palmer

Title: ASA II Support Operations

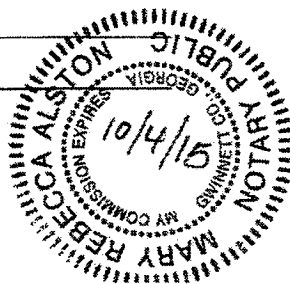
Date: 5-26-15

Telephone Number: 770-513-5770



8

Mary Rebecca Alston



IN THE COURT OF APPEALS

STATE OF GEORGIA

RICHARD GREGORY,	]	
Appellant,	]	
versus	]	CASE NO.: A17A0209
STATE OF GEORGIA,	]	
Appellee.	]	

BRIEF OF APPELLANT AND ENUMERATION OF ERRORS

Richard Gregory

Appellant

Incarcerated at:

Gwinnett County Detention Center

2900 University Parkway

Lawrenceville, GA 30046

Frances C. Kuo (430440)

Counsel for Appellant

214 Executive Building

125 East Trinity Place

Decatur, Georgia 30030

(404) 378-1241 (office)

State's failure to file the statutory pre-trial notice of its intent to introduce the 911 recording as a business record.

Additionally, the trial court erred in denying Gregory's motion to suppress the 911 recording. The admission of this evidence violated Gregory's Sixth amendment right of confrontation and was not harmless beyond a reasonable doubt. *See, Vaughn v. State*, 248 Ga. 127, 131 (2) (1981).

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

3-1

THE TRIAL COURT ERRED IN DENYING GREGORY'S MOTION TO SUPPRESS 911 RECORDING.

Prior to trial, Gregory filed a motion to suppress the 911 recording on the grounds that it contained testimonial evidence in violation of his Sixth amendment confrontation rights under the Georgia and United States constitutions. [R. 47-49]. The trial court held a hearing before trial, in which the State introduced a 911 recording into evidence. [Motion to suppress hearing or "MTS" -entire; State's Exhibit 1]. The State conceded that there were Crawford issues regarding

admission of the recording because Karen Andrews was deceased at the time of trial. [MTS at 4].

The trial court listened to the recording and after hearing argument from counsel, it denied the motion, finding that Andrews's statements in the recording were non-testimonial in nature as she was seeking assistance for an ongoing emergency. [MTS -entire; R. 54-56]. The trial court further found that the call was admissible under the excited utterance hearsay exception under O.C.G.A. § 24-8-803 (2) and the unavailable witness exception under O.C.G.A. § 24-8-804 (a). [R. 54-56].

Since the facts are essentially undisputed as set forth in the 911 recording admitted at the motion to suppress hearing, this Court “construes the evidence in a light most favorable to upholding the trial court’s judgment” and reviews the trial court’s application of the law to undisputed facts *de novo*. (Citation omitted.) Adkinson v. State, 322 Ga. App. 1 (2013).

The United States Supreme Court has held that in order for out-of-court testimonial statements to be admissible at a criminal trial, the Sixth amendment confrontation clause requires the declarant to be unavailable and the defendant

must have a prior opportunity to cross-examine the declarant. *See, Crawford v. Washington*, 541 U.S. 36 (124 S.Ct. 1354, 158 LE2d 177) (2004). It has defined testimonial statements to include those made “when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* Our Supreme Court has followed this position. *See, Hatley v. State*, 290 Ga. 480, 484-485 (II) (2012).

In pertinent part, the 911 recording contains the following information:

The caller states she was talkative and was getting on his nerves. He hit her so she hit him back. The caller said she thought they were friends. . . He hit me as hard as he could in the face. The caller reported that she said, “make sure you don’t hit me in the face because I bruise easily.” “He punched me in the face three more times and kicked me in the face.”

The caller says “his name is Ricky and [she] is going to find out his last name. He just left here.” The caller tells the radio operator where the man lives, the color of his house, and that he lives with his sister. The caller describes the man as a black male, 49, and is wearing a doo rag. The caller gives the license number of

the car the man is driving, describes the car as black and states he will take Scenic Parkway to Sugarloaf Parkway.

The caller says she “would like to call it attempted murder” because of the way he hit her. It happened 5-10 minutes ago. “He has my blood on his shirt. . . wearing light colored jeans, might have been gray.” They were “new friends.” The caller states she talks too much and tried to explain some stuff. . . When the radio dispatcher asks if she wants an ambulance, she states she doesn’t need one.

The caller gives the dispatcher her address and describes her house as yellow. She states that they have been “new friends for a couple of months. I thought he was looking for more than. . . get some.” [State’s Exhibit 1, MTS hearing; State’s Exhibit 8 (trial)].

The State argued that the 911 recording was non-testimonial and cited Pitts v. State, 272 Ga. App. 182 (2005) and Davis v. Washington, 574 U.S. 813 (2006) as authority. Neither case supports the State’s argument or the trial court’s conclusion.

In Pitts, the incident was actually in progress. 272 Ga. App. at 187 (2). The caller contacted police asking them to remove Pitts from her home, stating that

notice of the State's intent to introduce the 911 recording as a business record. [T. 390; R. entire; MNT. 32, 40].

The publication of State's Exhibit 5 to the jury affected Gregory's substantial rights as there was no direct evidence identifying Gregory as the person who committed aggravated battery against Andrews. There was a reasonable probability the playing of State's Exhibit 5 affected the outcome of the trial. Johnson, supra, 259 Ga. at 426 (3). A new trial is required.

CONCLUSION

Gregory's conviction must be reversed.

Respectfully submitted, this 21st day of September, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Brief of Appellant and Enumeration of Errors upon counsel for the State by mailing a copy of same in an envelope addressed to: Bobby Wolf, Assistant District Attorney, Office of the District Attorney, 75 Langley Drive, Lawrenceville, Georgia 30045, with sufficient postage affixed thereto to assure delivery.

This 21st day of September, 2016.

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