

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

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vs.

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CASE NO: SU-19-CR-0429-S

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GEORGE H. MAXWELL,
Defendant.

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ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND

AMENDED MOTION FOR NEW TRIAL

On November 11, 2021, Defendant was convicted by a jury of the offenses of conspiracy to commit aggravated assault and criminal solicitation. On December 3, 2021, Senior Superior Court Judge Richard Winegarden, sentenced the Defendant to ten (10) years with the first five (5) years to be served in confinement.

On December 10, 2021, Defendant filed a Motion for New Trial. The trial transcript was filed on March 22, 2023 and the sentencing transcript was filed on April 26, 2023. On April 28, 2023, Defendant filed an Amended Motion for New Trial.

The Court held a hearing on May 11, 2023, at which counsel for Defendant presented oral argument in support of the request for new trial. On that date, the Court permitted the State an additional two weeks to file a brief in response in lieu of oral argument. On May 23, 2023, the State filed a response in opposition to Defendant's request for new trial. Defendant filed a Response to the State's filing on June 2, 2023.

Defendant moves for a new trial for the following reasons:

- (1) the State failed to prove guilt beyond a reasonable doubt;
- (2) even if the State proved Defendant's guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the Court to exercise discretion to grant a retrial;
- (3) the Court committed an error of law;
- (4) the State failed to prove venue generally;
- (5) the State failed to prove venue specifically pertaining to the charge of conspiracy to commit a felony;
- (6) the Court erred in permitting Valerie Maxwell to testify regarding threats from the Defendant to her and the named victim Kevin Westover;
- (7) the Court erred in permitting text messages that were allegedly made between Defendant and an unnamed, unindicted co-conspirator into evidence; and
- (8) the State failed to prove identification of Defendant.

Based upon a review of the pleadings, transcripts, and argument of counsel, the Court finds as follows:

The verdict was not contrary to the evidence and was not without evidence to support it.

The verdict was not decidedly and strongly against the weight of the evidence.

The verdict was not contrary to the law nor was the verdict contrary to the principles of justice and equity.

As to venue, the evidence testified to at trial was that Kevin Westover was living at 162 North Bluff Road in Athens,

Georgia with his mother. He heard a sound during the night in question and later observed that bullets were shot into the home. Detective Tim Stewart of the Athens-Clarke County Police Department testified that he gathered crime scene evidence from 162 N. Bluff Road. Detective Paul Johnson of the Athens-Clarke County Police Department testified that he investigated the case. After the State rested, the Defense moved for a directed verdict stating that the State did not prove that the incident occurred in Athens-Clarke County.

Upon reviewing the trial transcripts, the Court finds that there was testimony that the offense occurred in Athens, but no witness testified that the offense occurred in Athens-Clarke County. "The Georgia Constitution requires a criminal case to be tried in the county where the crime was committed. . . . 'venue may be proven by circumstantial evidence and it generally is a question for the jury.'" Faust v. State, 303 Ga. 731, 735 (2018) (internal citations omitted). Both detectives testified that they were employed with the Athens-Clarke County Police Department. "Public officials are believed to have performed their duties properly and not to have exceeded their authority unless clearly proven otherwise." Id. at 736 (internal citations omitted). The jury was authorized to infer that the police investigation was done by officers acting within the scope of their jurisdiction.

Additionally, the jurors were charged by the presiding judge as follows:

Venue, that is, the crime was committed in Athens-Clarke County, is a jurisdictional fact that must be proved by the State beyond a reasonable doubt as to each crime charged in the indictment just as any element of the offenses. Venue must be proved by direct or circumstantial evidence or both. I charge you that in a prosecution for the separate offense of conspiracy to commit the crime of aggravated assault as alleged in this indictment, venue is proper and may be proved in any county in which an overt act was committed to further the conspiracy.

After the totality of the charge was read by the presiding judge, the jury deliberated and found the Defendant guilty of both offenses. Based on the foregoing, the Court finds that there was sufficient evidence for the jury to find beyond a reasonable doubt that the State proved that the offense occurred in Athens-Clarke County.

The Defendant further argues that venue specifically as to the conspiracy charge was not proven. "Venue in a conspiracy prosecution is properly laid either in the jurisdiction where the conspiracy was formed or in any jurisdiction wherein a conspirator committed an overt act in furtherance of the

conspiracy." Davis v. State, 225 Ga. App. 564, 566 (1997). The conspiracy alleged in this case was between Defendant and an unnamed, unindicated co-conspirator. The conspiracy involved text messages between Defendant and the unnamed, unindicted co-conspirator. After a series of text messages, the unnamed, unindicted co-conspirator is believed to be the person who shot into Kevin Westover's home. Based upon the circumstantial evidence that Kevin Westover's home was in Athens-Clarke County as outlined above, the Court finds that the overt act in the conspiracy occurred in Athens-Clarke County. Therefore, the Court finds that it was proper for the jury to conclude beyond a reasonable doubt that the State proved venue for the conspiracy count of the indictment.

Defendant contends that the presiding trial judge erred in permitting Valerie Maxwell to testify regarding threats and violence toward her and Kevin Westover by the Defendant. O.C.G.A. § 24-4-404(a) provides, in part, "[e]vidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, . . ." The statute sets forth certain exceptions for permitting character evidence to be admitted.

Pursuant to O.C.G.A. § 24-4-404(b):

Evidence of other crime, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

Defendant argues that the Valerie Maxwell's testimony regarding difficulties between her and the Defendant was improperly admitted because she was not the named victim in the case charged and proper notice was not provided by the State. The State contends that Ms. Maxwell was a victim in the case despite not being named in the indictment and that the prior difficulties between her and the Defendant were admissible.

O.C.G.A. § 17-17-3(11)(A) defines a victim as "a person against whom a crime has been perpetrated or has allegedly been perpetrated, . . ." This definition comes from the Georgia Crime Victims' Bill of Rights. Here, the named victim in the indictment against whom the offense was committed was Kevin Westover. The evidence presented at trial was Valerie Maxwell was not at Kevin Westover's home when the incident occurred. Since Ms. Maxwell was not a named victim, nor was she at the home when the shots were fired, the presiding trial judge erred in permitting her to testify regarding prior difficulties between her and the Defendant. However, the evidence of any other acts between the Defendant and Ms. Maxwell was cumulative and did not likely influence the jury's verdict in light of the other evidence presented at trial.

Additionally, the presiding trial judge permitted Ms. Maxwell to testify to threats made by the Defendant to her about her and Mr. Westover. Defendant asserts this testimony was admitted in error in absence of prior notice and a hearing. Any threats made regarding Mr. Westover by Defendant would generally be admissible whether made to Mr. Westover directly or a third party. See Cawthon v. State, 289 Ga. 507, 509 (2011) ("threats of violence regarding the victim but made to others are admissible to show motive and intent"). Even if the trial judge erred in admitting the threats made by Defendant to Ms. Maxwell

regarding her and Mr. Westover, the Court finds that the admission was cumulative of other evidence and did not likely influence the jury's verdict.

Defendant contends that the trial judge erred in admitting text messages between Defendant and an unnamed, unindicted co-conspirator. The text messages admitted included both outgoing messages made by Defendant and incoming messages of the unnamed, unindicted co-conspirator. Defendant asserts that the incoming messages are hearsay as they were offered for the truth of the matter asserted. The State contends that the incoming messages that were admitted were done so to provide context to the outgoing text messages. "[T]he outgoing text messages on the cell phone may be considered [Defendant's] own statements, as the facts of this case indicate that [Defendant] send the messages. The incoming text messages, however, are not statements by [Defendant]. As such they do not fall under this hearsay exception." Glispie v. State, 300 Ga. 128, 131 (2016) (discussing code section O.C.G.A. § 24-8-801(d)(2)(A)).

In the trial of this case, the Detective Johnson testified as to the content of the incoming and outgoing messages. During the recitation of the text messages by Detective Johnson, the State asked the Detective his opinion regarding what some of the text messages meant. During closing argument, the State read several of the text exchanges to the jury and discussed what

they meant. It is clear to the Court that the State was not seeking to introduce the incoming text messages for mere context as to the outgoing text messages. The text messages introduced were used to prove the truth of what was said in the incoming text messages. "[A]n incoming text message is admissible as context to the extent it is non-hearsay offered to prove its effect on the person receiving the message." Johnson v. State, 347 Ga. App. 831 (2018). Here, the admission of the numerous text messages between the Defendant and the unnamed, indicted co-conspirator included hearsay and the admission was in error.

Lastly, Defendant argues that the State failed to prove identification of Defendant beyond a reasonable doubt. The only witness who was asked to identify Defendant was Detective Paul Johnson. Detective Johnson had not met Defendant nor had any in person contact with Defendant prior to trial. Detective Johnson testified at trial that he identified the Defendant through a review of the Defendant's state issued identification.

The identity of the offender is an essential element of criminal offenses that the State must prove beyond a reasonable doubt. But '[i]n-court identification is not the only way to prove that the defendant is the person who committed the crime charged.' Rather, 'identity may be proven in other ways so long as the State meets its burden of proof.'

Bell v. State, 366 Ga. App. 743, 744-745 (internal citations omitted). Here, both Kevin Westover and Valerie Maxwell identified the Defendant by name and the Defendant answered the call of the case of State v. George Maxwell. Therefore, the Court finds that the jury was within its authority to determine that the Defendant was properly identified at trial.

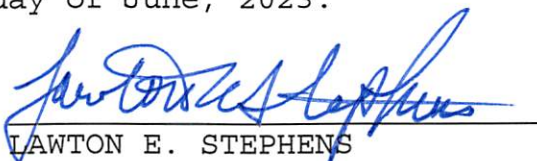
Based on the foregoing, the Court finds that the error in admission of the text messages of the unnamed, unidentified co-conspirator merits a new trial for Defendant.

Accordingly, Defendant's Motion for New Trial as filed and amended is GRANTED.

The case will be placed on the July 24, 2023 trial week.

Let a copy of this Order be served upon Deborah Gonzalez, District Attorney; Jason Hasty, Assistant District Attorney; and Alfred E. Fargione, III, counsel for Defendant as provided by law.

SO ORDERED this 5th day of June, 2023.



LAWTON E. STEPHENS
Judge Superior Courts
Western Judicial Circuit

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