No. S22A0531

In the

Supreme Court of Georgia

Santron Prickett,

Appellant,

v.

State of Georgia,

Appellee.

BRIEF OF APPELLEE BY THE ATTORNEY GENERAL

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Statement of the Case

Appellant Santron Prickett was indicted with Jaquavious Reed[1] by a Fulton County grand jury on June 15, 2010, for malice murder (count 1), felony murder predicated on aggravated assault (count 2), aggravated assault with a deadly weapon (count 4), and possession of a firearm during the commission of a felony (count 5), in connection with the shooting death of Antwan Curry. (R. 3-6).[2] Appellant was also indicted for felony murder predicated on possession of a firearm by a convicted felon (count 3) and possession of a firearm by a convicted felon (count 6). *Id*.

Appellant and Reed were tried together on May 2-10, 2011, and the jury found Reed guilty of all counts and Appellant guilty of all counts except malice murder. (R. 475-77, T. 85, 1731-32). On May 11, 2011, the trial court sentenced Appellant to life for felony murder (counts 2-3) and five years consecutive to count 2 for possession of a firearm during the commission of a felony (count 5); aggravated assault with a deadly weapon (count 4) and

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[1] Reed's direct appeal is pending before this Court in *Reed v. State*, No. S22A0530.

[2] Citations to the clerk's record (docket volume 1-3) are "R." followed by the page number(s); citations to the pre-trial hearings (docket volume 4) are "HT" followed by the page number(s) on the bottom center; citations to the trial transcript (docket volumes 4-10) are "T" followed by the page number(s) on the bottom center; and citations to the motion for new trial hearings (docket volumes 11-12) are "MNT" followed by the page number(s) on the bottom center.

possession of a firearm by a convicted felon (count 6) merged into count 2. (R. 467-70; T. 1742-43).

On May 19, 2011, Appellant, through trial counsel, filed a motion for new trial. (R. 485-86). Through new counsel, Appellant filed an amended motion for new trial and brief in support on January 10, 2020. (R. 524-27, 528-68).

The hearings on Appellant's and Reed's motions for new trial were conducted together. The trial court held the first motion for new trial hearing on February 18, 2020, where Atlanta Police Department (APD) Officers Major Dan Rasmussen, Sergeant Ronald Paxson, and Detective David Quinn testified. (MNT. 2064, 2068, 2084, 2095). The trial court held a second hearing on July 21-23, 2021, at which Appellant's trial counsel Dennis Francis, Reed, Reed's trial counsel Tasha Rodney, and Reed's pre-trial counsel Edward Chase, all testified. (MNT. 2114, 2125, 2158, 2193, 2220). The trial court denied the motion for new trial as amended on October 21, 2021. (R. 687-707).

On October 28, 2021, Appellant timely filed a notice of appeal. (R. 1-2). This appeal follows.

Statement of Facts

On March 15, 2010, co-defendant Reed (also known as "Quay") killed Antwan Curry ("the victim") after the victim and Appellant (also known as "Ton" or "Twan") had a physical fight over the loss of a drug sale. (T. 629, 721-25, 1353-57).

The 34-year-old victim went to 960 New Town Circle in Fulton County, also known as the Four Seasons apartments, to buy marijuana from Appellant. (T. 595-96, 599). The victim was familiar with this neighborhood, as he would spray for bugs and paint the apartments. (T. 596, 791, 809). However, he was unable to find Appellant, so he purchased marijuana from a third party. (T. 787-88, 791, 793, 834,1086-87). Shortly thereafter, Appellant confronted the victim about this purchase, and a fight ensued between them. (T. 624, 641, 655, 716, 791, 834, 1087). The victim appeared to be winning the fight when Appellant pulled out a gun and shot the victim in the leg. (T. 628, 718, 948, 1353). After being shot, the victim continued to fight and the two struggled over the gun. (T. 624, 627, 630, 644-45, 656). During the tussle, Appellant shot his finger and walked away, leaving a trail of blood. (T. 720, 791-92, 805, 813). After Appellant left, Reed came back to kill the victim. (T. 626, 629). While the victim was on the ground, Reed stood over him and shot him two times. (T. 721-23, 725, 747, 770, 1353,1357).

There were several eyewitnesses to this incident.

Lakeyta Smith ("Smurf") was returning from the barber shop when she saw people running and saying that someone had a gun. (T. 623-24). Smith testified that she was across the street when she saw Appellant talking to the victim and noticed that they started "tussling." (T. 624, 641, 655). Smith saw Appellant shoot the victim. (T. 628). She said that it looked like they were struggling over something and that she believed Appellant got a hold of it and fired the gun at the victim. (T. 644-45). After the victim was shot, he was still fighting with Appellant when another shot went off. (T. 624, 644-45, 656). Appellant took off running after that, and two other guys ran up and started shooting the victim, which caused the victim to fall to the ground. (T. 626, 629). Smith also told police that she saw Appellant pull out the gun and shoot the victim while they were fighting, that the victim continued fighting after he was shot, and that she did not see the victim with a gun. (T. 627, 630, 656). Smith was also able to identify Appellant whom she knew prior to this incident, in a lineup. (T. 620, 650-52, 1832).

Willie Wilson, who had lived in the neighborhood for 10 to 12 years, knew both Appellant and Reed, and Reed also used to date Wilson's daughter. (T. 709-12). On the day of the incident, Wilson was outside when he saw Appellant and the victim arguing. (T. 716). Wilson saw a gun when Appellant and the victim were fighting, but he did not know whose gun it was. (T. 716). Wilson testified that Appellant was losing the fight when he

heard a pop and then heard Appellant say, "Get this F-N off of me, get him off me." (T. 718). Wilson saw the gun go off multiple times during the fight and that the victim was shot in the leg while Appellant was bleeding from his hand. (T. 719). He then saw Appellant running after he shot himself in the hand, and saw that the victim was still standing after being shot in the leg. (T. 720). A few minutes after Appellant left, Wilson saw Reed come around and shoot the victim twice. (T. 721-22, 747). The victim was on his knees saying he was shot when Appellant delivered the fatal shot. (T. 725). Wilson heard Reed say, "Let the f***ing n***** die," as he shot the victim "like it was a joke." (T. 722, 770). Wilson saw Appellant walk past Reed before Appellant killed the victim. (T. 723, 725).

Keon Burns, who knew the victim, Appellant and Reed from the neighborhood, saw the victim come to purchase marijuana. (T. 787-88, 791, 793). Burns saw Appellant and the victim have words and begin to fight because the victim purchased marijuana from somebody else. (T. 781, 824). Appellant had a gun and they wrestled over it; Appellant shot the victim in the leg and shot himself in the hand. (T. 791-92, 805, 813). Burns then saw Reed get a gun from Appellant and shoot the victim. (T. 791-93, 806).

Bianca Haney was a friend of Appellant's sister and knew both Appellant and Reed from the neighborhood. (T. 938). She testified that she saw the victim and Appellant have a verbal altercation. (T. 946). Haney saw

the victim essentially winning as he was on top of Appellant during the fight. (T. 948). She heard shots and everybody started running, including Appellant. (T. 948, 957, 966). Haney then heard more shots, but did not see Reed. (T. 964).

Harriet Feggins, who was familiar with the neighborhood, was in the parking lot of the apartment complex when she saw the victim and Appellant fighting. (T. 1351). Feggins testified that the victim was punching Appellant and getting the best of him. (T. 1363). Feggins heard a shot and saw Appellant run away. (T. 1352). She then saw Reed shoot the victim while the victim was trying to get up off of the ground. (T. 1353). While Reed was unloading his gun, Feggins heard Reed say, "P**** a** n*****, you ain't do shit" while he stood over the victim. (T. 1357).

Zakkiah Robinson, the mother of one of Appellant's children, knew both Appellant and Reed from the neighborhood. (T. 903-04). Appellant arrived at her home around 7:00 to 8:00 p.m. on the day of the incident. (T. 909). Appellant had shot his finger and did not seek medical attention. *Id*. Appellant also told her that he got into an altercation at the Four Seasons apartments and that the victim was shot. (T. 922). Appellant told her that he was shot and took off running when he heard shots afterwards. *Id*.

Latasha Bigby, mother of another one of Appellant's children, testified that she told detectives that Appellant said he was scuffling over a gun and

shot himself. (T. 1086). Bigby further told detectives that Appellant said he got mad because the man would not purchase marijuana from him and that they got into an altercation. (T. 1087). Appellant then told her that he shot the man in the leg and the man tackled him, so they started scuffling over the gun and that was how he shot himself in the hand. (T. 1087). Appellant also told her he said, "That n***** shot me," and, "Y'all kill that p**** n*****." (T. 1088).

The medical examiner determined the victim was shot three times and sustained six wounds, including to the leg, chest, and left shoulder. (T. 1295-97, 1302-03). The cause of the death was a gunshot wound to the torso. (T. 1305-06, 1313).

Appellant's medical records were admitted at trial, which indicated he was treated for gunshot to his left hand in March 2010. (1191, 1895-1954).

In addition, a certified copy of Appellant's prior guilty plea conviction for possession of cocaine with intent to distribute was admitted into evidence. (T. 1420-21, 1867-68).

Further facts will be established as needed to address Appellant's three enumerations of error.

Argument and Citation of Authority

I. The trial court properly determined that trial counsel rendered effective assistance of counsel.

In his first enumeration of error, Appellant alleges that trial counsel rendered ineffective assistance when he did not stipulate that Appellant was a convicted felon, thereby exposing Appellant's criminal history to the jury. (Appellant's Brief, pp. 11-18). Appellee submits that the trial court properly determined this claim lacks merit under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland v. Washington sets forth a two-pronged test, both of which must be proven by a defendant in order to prevail on a claim of ineffective assistance:

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

Strickland, 466 U.S. at 687. A defendant has the burden of proof to overcome the "strong presumption" that counsel's conduct falls within the range of reasonable professional conduct and affirmatively show that the purported deficiencies in counsel's performance were indicative of ineffectiveness and

not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222, 227, 564 S.E.2d 192 (2002).

As to the prejudice prong:

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

Strickland, 466 U.S. at 694.

This Court accepts a trial court's fact-findings on a claim of ineffective assistance unless clearly erroneous, but applies the legal principles to the facts de novo. *Powell v. State*, 309 Ga. 532, 527, 847 S.E.2d 338 (2020).

Here, Appellant contends that his trial counsel was deficient because he did not stipulate to his status as a convicted felon and did not seek an order redacting that charge from the indictment. (Appellant's Brief, p. 13). The trial court concluded Appellant had not shown deficient performance and prejudice from the alleged error.

Appellant's indictment included a count for possession of a firearm by a convicted felon (count 6), which alleged that he had been "convicted of a felony on indictment number 05SC34439, Superior Court of Fulton Count, charge of possession of cocaine with the intent to distribute on August 20, 2007." (R. 5). See O.C.G.A § 16-11-131 (b) (making it a felony for a person who has been convicted of a felony to possess any firearm). (R. 5). He was

also charged with a count of felony murder based on the felon-in-possession-of-a-firearm offense (count 3). (R. 4). See O.C.G.A § 16-5-1 (felony murder statute).

Shortly before the State rested its case, the prosecutor tendered State's Exhibit 93 for the purpose of proving the element of a prior felony conviction. The prosecutor described the exhibit to the court simply as "a certified copy of indictment number 05SC34439, the certified conviction on Santron Prickett for possession of cocaine with intent to distribute." (T. 1420). The exhibit included Appellant's August 2005 accusation possession of cocaine with intent to distribute, which he pled guilty to two years later. (T. 1867-68). The trial court admitted the exhibit without objection. (T. 1421).

During jury instructions the trial court charged the jury to consider Appellant's prior conviction for a limited purpose:

> Sometimes evidence is admitted for a particular limited purpose. Such evidence may be considered by the jury for the sole issue or purpose for which the evidence is admitted and not for any other purpose.
>
> In that connection, you have received in evidence which purport to be copies of prior convictions of [Appellant] and multiple witnesses. You may consider this evidence only insofar as it may relate to the issue of impeachment and the required element of conviction of a felony for the offense in Counts 3 and Count 6 and not for any other purpose or count.

(T. 1707). The trial court further charged that "[a] person commits the offense of possession of a firearm by a convicted felon when the person who –

when the person who has been convicted of a felony by a court of this state receives, possesses or transports any firearm. Under our law possession of cocaine with intent to distribute is a felony… (T. 1718).

At the motion for new trial hearing, trial counsel testified that, while he could not recall why he did not stipulate to Appellant's felony conviction, he explained that "any conviction would be concerning for your client. But I thought the facts were in [Appellant's] favor and I still do. But any conviction would be concerning." (T. 2228). Trial counsel went on to explain that

> I don't remember how it was indicted but probably should have asked for the redaction. But the stipulation, I'm still not sure. It would depend. It would all depend on what we thought was helpful to the client at the time and what we thought about the facts of the case and – so it is hard to say.
>
> ***
>
> [s]o, I mean, in this situation, you know, you've got to --you are focused on trying to, you know, do what is best for the client. So it's hard to say. Again, looking at it in hindsight it's like, okay, they hear that it is a drug felony and this is a drug case. It could have been where we thought the facts were so much in our favor that we wanted to look like we're not trying to hide anything from the jury, and I believe in gaining credibility with the jury so it could have been that.
>
> It could have been a number of different factors. It could have been, like, okay, so what, he had a drug conviction, bad neighborhood, so what. This guy shot him.
>
> I don't have a specific recollection of why I would have not worried about it.

(T. 2230-31).

In ruling on this claim, the trial court determined that trial counsel's performance was not deficient because he made a reasonable, strategic decision to not stipulate to Appellant's prior conviction:

> [C]counsel testified at the motion for new trial hearing that he carefully considered and performed a cost/benefit analysis before he decided to not stipulate to the prior conviction. Although he couldn't remember the exact reasons why he did not stipulate, he unequivocally testified that he had a strategic reason for his actions. Trial counsel explained that possibly he believed the facts were in his client's favor and likely wanted to show the jury that [Appellant] was not hiding anything. Therefore, counsel believed his action would help bolster [Appellant's] credibility with the jury.

(R. 691-92) (transcript citations omitted). The trial court further determined Appellant had not established prejudice because the evidence of Appellant's guilt was overwhelming, and the court provided clear instruction strictly limiting the jury's consideration of the prior felony conviction evidence. (R. 692).

On appeal, Appellant argues that trial counsel performed deficiently because the trial court would have been required to accept such a stipulation under the holding in *Old Chief v. United States*, 519 U. S. 172 (1997), and this Court's adoption of that holding in *Ross v. State*, 279 Ga. 365, 614 S.E.2d 31 (2005). (Appellant's Brief, pp. 12-14).

> The question presented in *Old Chief* was whether a trial court, in a case involving a federal charge of possession of a firearm by a convicted felon, abuses its discretion under Federal Rule of Evidence 403 by rejecting the defendant's offer to stipulate to the fact of his prior felony conviction and instead allowing the

> admission of the full record of the prior judgment of conviction. See 519 U. S. at 174. The Supreme Court held that when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction, a trial court abuses its discretion under Rule 403 by spurning the defendant's offer to stipulate and instead admitting the evidence of the earlier conviction. See *Old Chief*, 519 U. S. at 174, 191-192.
>
> This Court later adopted *Old Chief*'s reasoning in *Ross*, in which we held:
>
> > [W]hen (1) a defendant's prior conviction is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations, and (2) the purpose of the evidence is solely to prove the defendant's status as a convicted felon, then it is an abuse of discretion for the trial court to spurn the defendant's offer to stipulate to his prior conviction and admit the evidence to the jury. 279 Ga. at 368.

Bentley v. State, 307 Ga. 1, 6-7, 834 S.E.2d 549 (2019).

As the trial court found, trial counsel had strategic reasons for not stipulating to felon status, explaining that he believed the facts were in his client's favor and likely wanted to bolster Appellant's credibility with the jury by showing he not hiding anything. *See Pruitt v. State*, 282 Ga. 30, 644 S.E.2d 837 (2007) (trial counsel's act of entering into a stipulation is a valid trial strategy which does not amount to the ineffective assistance of counsel).

Moreover, Appellee submits that Appellant has not shown prejudice, i.e., a reasonable probability of a different result had trial counsel entered a stipulation. To begin, during the entire trial the prior offense was identified

only in passing. As noted above, when the prosecutor tendered State's Exhibit 93, she briefly described the exhibit as "a certified copy of indictment number 05SC34439, the certified conviction on Santron Prickett for possession of cocaine with intent to distribute." (T. 1420). And during closing argument, the prosecutor discussed the law prohibiting convicted felons from possessing firearms and noted that Appellant was a convicted felon. (R. 1659, 1693). Trial counsel also admitted that Appellant was a convicted felon during his closing argument. (R. 1620, 1624). While the indictment included the prior offense, the name and nature of Appellant's conviction was not emphasized by the State or his trial counsel at trial; rather, the prior offenses were properly used only to establish the convicted-felon element of Appellant's charges for possession of a firearm by a convicted felon (count 6) and felony murder based on that underlying crime (count 3).

In addition, Appellant's prior conviction for possession of cocaine with intent to distribute is not of the nature likely to inflame the passions of the jury. *See, e.g.*, *Stephens v. State*, 307 Ga. 731, 838 S.E.2d 275 (2020) ("Applying the *Old Chief* standard to the facts of this case, the name or nature of [appellant's] prior offense, possession of cocaine with intent to distribute, did not raise the risk that his verdict for the murder of [the victim] was tainted by improper considerations."); *Chavez v. State*, 307 Ga. 804, 809,

837 S.E.2d 766 (2020) ("[P]rior convictions involving firearms and minor drug offenses are not likely to inflame the jury's passions in a murder case.").

The trial court gave an extensive instruction strictly limiting the jury's consideration of Appellant's prior conviction "only insofar as it may relate to the issue of impeachment and the required element of conviction of a felony for the offense in Counts 3 and Count 6 and not for any other purpose or count." (T. 1707). "Qualified jurors under oath are presumed to follow the instructions of the trial court." *Favors v. State,* 305 Ga. 366, 370, 825 S.E.2d 164 (2019) (quoting *Allen v. State*, 277 Ga. 502, 504 (3) (c), 591 S.E.2d 784) (2004)). Thus, the disputed evidence was only a minor consideration at the trial.

By contrast, the evidence of Appellant's guilt was compelling. Five eyewitnesses, i.e., Smith, Wilson, Burns, Haney, and Feggins — all identified Appellant as a shooter and testified that they saw Appellant shoot the victim and his own hand during a physical fight with the victim. Several witnesses testified that Appellant told and/or gave Reed the gun to shoot and kill the victim. Appellant himself also admitted to Robinson and Bigby that he shot the victim and his hand, and he later sought medical attention at Grady for a gunshot wound to his hand. While Appellant did not fire the fatal shot, he was at the very least a party to the crime when Reed fired the fatal shot. Thus, Appellant has also failed to demonstrate prejudice based on the

overwhelming evidence of his guilt. See *Bentley*, 307 Ga. at 8-9 (holding that even assuming that defense counsel performed deficiently by failing to offer to stipulate to prior convictions under *Old Chief*, defendant could not prove that the alleged error affected the jury's guilty verdicts because the prior offenses were identified only twice in passing during the entire trial and the trial court gave an instruction limiting the jury's consideration of the evidence as to those counts); *Ross*, 279 Ga. at 368 (3) ("due to the overwhelming evidence of the defendant's guilt, however, we find it highly probable that the improper evidentiary admission did not contribute to the verdict, and thereby constitutes harmless error"); *Curry v. State*, 283 Ga. 99, 100-01 (2), 657 S.E.2d 218 (2008) (any error in failing to permit appellant to stipulate to prior convictions harmless due to overwhelming evidence of guilt).

Appellant analogizes his case to *Starling v. State*, 285 Ga. App. 474, 646 S.E.2d 695 (2007), in which the Court of Appeals concluded that trial counsel provided ineffective assistance by failing to offer to stipulate to the appellant's convicted-felon status in accordance with the holding in *Ross*. (Appellant's Brief, p. 14). But *Starling* is noticeably distinguishable from Appellant's case. In addition to failing to stipulate to the prior convictions, trial counsel and the prosecutor elicited testimony regarding the details of the earlier offenses, one of which was the same as an offense for which the

appellant was being tried; the prosecutor then emphasized those details during his closing; and the trial court failed to instruct the jury as to how to consider that evidence. *See Starling*, 285 Ga. at 476-479. In this case, while there was no stipulation of Appellant's status as a convicted felon, no testimony was elicited regarding his prior conviction; no closing remarks explicitly discussed the name or nature of his prior conviction; Appellant was not being tried for the same offense as he was not indicted for a felony drug offense in connection with the victim's death; and the trial court sufficiently instructed the jury to consider such evidence for a limited purpose.

As to the redacting issue, trial counsel's decision to not redact the indictment to eliminate references to Appellant's prior conviction also could not amount to ineffective assistance, as "[p]roof of [Appellant's] previous conviction was a necessary element of the state's proof" that Appellant was a convicted felon in possession of a firearm. *Prather v. State*, 247 Ga. 789, 790(2), 279 S.E.2d 697 (1981). *See also Ballard v. State*, 297 Ga. 248, 253, 773 S.E.2d 254 (2015). The trial court instructed the jury that the indictment was not evidence (T. 1700), and, as stated previously, trial counsel's failure to stipulate to Appellant's convicted felon status, which forced the State to have to prove Appellant's convicted felon status, did not amount to ineffective assistance in this case. *See Ballard*, 297 Ga. at 253 (holding trial counsel was not ineffective for failing to redact the indictment of the prior conviction and

to stipulate to a defendant's prior convicted felon status because a defendant's prior convictions for aggravated assault and burglary with the intent to commit aggravated assault were not of the nature likely to inflame the passions of the jury; and any error did not result in prejudice to the first defendant in light of the overwhelming evidence of the first defendant's guilt.).

Hence, Appellant has demonstrated neither that trial counsel performed deficiently, nor has he shown a reasonable probability of a different result had he stipulated to Appellant's status as a convicted felon and redacted the indictment. As such, Appellee submits this enumeration lacks merit as Appellant has not carried his burden under *Strickland*.

II. The bench conferences did not implicate Appellant's right to be present or, alternatively, Appellant acquiesced in his absence from them.

In his second enumeration of error, Appellant argues that the trial court denied him his right to be present when the trial court conferred with defense counsel out of the presence of Appellant 26 times during bench conference, which were a fundamental and critical part of his trial that he did not waive or acquiesce to his absence. (Appellant's Brief, pp. 18-29). Appellee submits that the trial court properly found that these 26 bench conferences dealt with logistical/procedural issues or questions of law, not jury selection issues, and that the trial court alternatively determined that Appellant's

presence would have been useless or the benefit but a shadow and that Appellant acquiesced in his absence from the conferences.

The 26 bench conferences at issue were not transcribed. After Reed, joined by Appellant, filed a motion to recreate the record (R. 506-1, 619-35), Appellant, Reed, and the State filed a stipulation saying that the prosecutor, Appellant's trial counsel, and Reed's trial counsel were unable to recreate the 26 unrecorded bench conferences, as they could not recall the substance of what occurred at them. (R. 520-22). Subsequently, the trial court ordered that despite good faith efforts by all parties, the record was unable to be recreated pursuant to O.C.G.A. § 5-6-41(g). (R. 524-27, 679).

Out of the 26 bench conferences listed in the stipulation, five occurred during the jury selection stage (T. 177, 202, 204, 205, 514), four occurred either directly before or after a witness took the stand (T. 602, 608, 1053, 1281), fourteen appeared to relate to objections or the admissibility of evidence such as witness testimony, prior convictions, photographs, and tapes (T. 683, 752, 762, 776, 922, 983, 985, 990, 1192, 1238, 1263, 1338, 1443, 1526), one was during the State's closing argument (T. 1672), and two were during the trial court's charge to the jury. (T. 1717, 1725).

Appellant does not identify or explain which of the 26 bench conferences implicated his right to be present and how he could have meaningfully participated during those conferences. Instead, he generally

argues that the 26 bench conferences were critical stages and that he did not waive his right to be present nor acquiesce to his absence. (Appellant's Brief, pp. 18-29). He also argues that the trial court committed plain error when it denied this claim at the motion for new trial because none of the conferences were transcribed and made part of the record. *Id*. However, his right to be present was not implicated here.

"The right to be present attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. Thus, "a critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way." *Nesby v. State*, 310 Ga. 757, 758, 853 S.E.2d 631 (2021) (quoting *Huff v. State*, 274 Ga. 110, 111(2), 549 S.E.2d 370 (2001)). "It is well established that proceedings involving the selection of a jury are considered critical stages at which the defendant is entitled to be present." *Murphy v. State*, 299 Ga. 238, 240, 787 S.E.2d 71 (2016). *See also Zamora v. State*, 291 Ga. 512, 518, 731 S.E.2d 658 (2012).

However, the right to be present does not extend to situations where the defendant's presence "bears no relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," and thus "would be useless, or the benefit but a shadow." *Champ v. State*, 310 Ga. 832, 840, 854

S.E.2d 706 (2021), quoting *Heywood v. State*, 292 Ga. 771, 774, 743 S.E.2d 12 (2013). Such situations include bench conferences that deal with questions of law involving "essentially legal argument about which the defendant presumably has no knowledge," or with procedural or logistical matters. *Id.;* see also *Nesby*, 310 Ga. at 759. Mere "[s]peculation as to what may have been discussed at the conference cannot serve as the basis for the grant of a new trial." *Reeves v. State*, 309 Ga. 645, 648, 847 S.E.2d 551 (2020).

The trial court, who presided over both the trial and the motion for new trial hearings, reviewed the trial transcript, specifically in detail the portions immediately prior to and immediately after the 26 unrecorded bench conferences, as well as the testimony at the motion for new trial hearing, and found the 26 bench conferences dealt with either logistical/procedural matters or questions of law. (R. 695-96). Accordingly, the trial court properly found that Appellant's absence from these bench conferences did not violate his right to be present. *See Brewner v. State*, 302 Ga. 6, 10(II), 804 S.E.2d 94 (2017) ("[P]re-trial hearings and bench conferences pertaining to purely legal issues, such as the admissibility of evidence or jury instructions, ordinarily do not implicate the right to be present."); *Heywood*, 292 Ga. at 774(3) (rejecting defendant's right to be present claim where bench conferences involved only objections and trial procedure or logistical matters); *Bradford v. State*, 299 Ga. 880, 882, 792 S.E.2d 684 (2016) (the right to be present at unrecorded

bench conferences was not violated because the conferences concerned only questions of law/legal argument and/or logistical issues); *Parks v. State*, 275 Ga. 320, 324-325(3), 565 S.E.2d 447 (2002) (defendant's absence from conferences that discussed legal matters, such as objections and the admission of exhibits, did not violate his right to be present).

The trial court also reviewed the bench conferences which may have dealt with jury selection, such as hardships and strikes for cause, and found that these bench conferences did not actually concern jury selection. (R. 696-97). The trial court determined that a prospective juror's testimony regarding hardships and the trial court's dismissal of a juror due to the hardships were made in open court in front of Appellant, and not during an unrecorded bench conference. (R. 697; T. 177, 202, 204, 205, 514). Moreover, the trial court found that counsel's arguments and the trial court's ruling to strike potential jurors for cause were made at the conclusion of the voir dire process, which was done in open court where Appellant could hear all the arguments and ruling. (R. 697; T. 319-26, 502-512).

The trial court further found that there was not a "reasonable substantial relation" between Appellant's presence at the bench conferences during jury selection and his opportunity to defend the charges against him, and that Appellant's presence at these bench conferences would have been "useless" or the "benefit but a shadow":

> Importantly, [Appellant's] trial counsel testified that he always talks to his clients during jury selection so that he may be able to incorporate their opinions during jury selection. Therefore, even if [the trial court] were to assume, in arguendo, that the six bench conferences dealt with jury selection issues, [Appellant's] right to be present was still not violated.

(R. 697-98, citing *Parks*, 275 Ga. at 325; *Champ*, 310 Ga. at 840) (citations omitted). Thus, the trial court properly found that Appellant's right to be present was not violated by his absence from these bench conferences.

Moreover, even assuming that his right to be present was implicated here, Appellant acquiesced in his own absence. "A defendant may personally waive his right to be present at a stage in trial, or counsel may waive this right for the defendant . . . for the waiver of counsel to be binding on the defendant, it must be made in his presence or by his express authority, or be subsequently acquiesced in by him." *Zamora*, 291 Ga. at 518; *Ward v. State*, 288 Ga. 641, 646, 706 S.E.2d 403 (2011)). Where a defendant fails to "voice any objection to his absence from [a] bench conference, either directly or through counsel," he acquiesces to counsel's waiver of his right to be present. *Haywood*, 292 Ga. at 775 (citing *Zamora*, 219 Ga. at 518). "Acquiescence . . . is a tacit consent to acts or conditions, [and] may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence." *Williams v. State*, 300 Ga. 161, 165, 794 S.E.2d 127 (2016).

Appellant argues that there was no valid waiver of his right to be present and that he did not acquiescence to his absence from the bench conferences. (Appellant's Brief, pp. 25-29). Specifically, Appellant claims that he did not know what had been presented during the bench conferences, nor was he brought up to have a meaningful participation. (Appellant's Brief, pp. 28-29). However, the trial court found that Appellant acquiesced in the waiver of his presence at the bench conferences when his trial counsel made no objection and Appellant remained silent:

> The record shows that [Appellant] sat at the defense table and observed all of the trial proceedings throughout the entirety of the trial. [Appellant] was present in the courtroom during each of the 26 bench conferences. The trial court's decision and counsel's argument relating to the jury selection were discussed and announced in open court. [Appellant's] own testimony shows that he had active discussion with his attorney, including during voir dire. Neither [Appellant] nor his trial counsel ever objected to his absence from the bench conferences. Therefore, [the trial court] finds that [Appellant] acquiesced in the waiver of his presence that was made by his counsel.

(R. 699-700, citing *Champ*, 310 Ga. at 841; *Young v. State*, 312 Ga. 71, 860 S.E.2d 746 (2021); *Jackson v. State*, 278 Ga. 235, 237, 599 S.E.2d 129 (2004); *Murphy*, 299 Ga. at 241; *Parks*, 275 Ga. at 325).

Appellee submits that the trial court properly determined that even assuming that Appellant's right to be present at the bench conferences was implicated, he acquiesced to the bench conferences occurring in his absence. See *Nesby*, 310 Ga. at 760 (defendant acquiesced because he was in the

courtroom during the bench conference; was present when the trial court confirmed the potential jurors would be removed; and neither defendant nor his counsel voiced a disagreement nor asked for any explanation); *Brewner*, 302 Ga. at 11-12 (defendant acquiesced in trial court's dismissal of a prospective juror in his absence where he was made aware of what had occurred, his trial counsel indicated no objection, and the defendant never voiced disagreement during trial with either the trial court's decision or his counsel's conduct); *Jackson*, 278 Ga. at 237 (defendants "acquiesced in the proceedings when their counsel made no objection and they thereafter remained silent after the subject was brought to their attention."); See also *Kennedy v. State*, 274 Ga. 396, 397, 554 S.E.2d 178 (2001) ("In the present case, because all of the bench conferences in question took place while Ms. Kennedy was in the courtroom, and she voiced no objection to them, she has waived appellate review of the alleged improper conferences.").

For all these reasons, Appellee urges the Court to find that this enumeration of error lacks merit.

III. The trial court properly found that the lack of curative instruction regarding the prosecutor's comment during closing argument was harmless and did not contribute to the verdict.

In his third enumeration of error, Appellant argues that the trial court failed to rebuke the prosecutor and declare a mistrial, or in the alternative,

give a curative instruction to the jury following defense counsel's objection to an improper comment by the prosecutor during closing arguments. (Appellant's Brief pp. 29-37). Appellee submits that the trial court properly found any purported error was harmless because the evidence against Appellant was overwhelming and the trial court gave a general instruction that an attorney's arguments are not evidence.

During the State's closing, the prosecutor mentioned redacted jail recordings where Appellant said he could not go to the doctor and had to go to CVS because he knew they were looking for him. (T. 1671-72). Appellant's trial counsel asked to approach and there was a bench conference between the parties and the trial court, which was not transcribed. (T. 1672). After the bench conference, the State finished its closing remarks. (T. 1672).

The jury was then excused, and the trial court heard Appellant's objection to the State's reference of Appellant's statement from a redacted jail phone recording. (T. 1694). The trial court determined that the State was making a comment on the argument and "she's not linking jail recordings to whatever. She is just saying in general: this is what we concluded." (T. 1695). The State agreed with the trial court and also stated Robinson's testimony referenced going to CVS for medical attention. (T. 1695). Trial counsel did not ask for a mistrial or a curative instruction but he asked for the objection to stand on the record. (T. 1695).

Later, in its instructions on the case in chief, the trial court generally charged the jury that evidence "does not include the indictment, the plea of guilty, the opening statements, or closing arguments by the lawyers, or questions asked by the lawyers. (T. 1700).

In ruling on this claim post-trial, the trial court found that, pretermitting whether the lack of curative instruction was an error, any error was harmless. (R. 702). The trial court also found that the lack of a curative instruction did not contribute to the verdict because it instructed the jury that closing arguments by lawyers are not evidence and the evidence of Appellant's guilt was overwhelming. (R. 702-03, citing *Holsey v. State*, 316 Ga. App. 801, 805, 729 S.E.2d 465, 468 (2012)).

On appeal, Appellant alleges that the trial court had a duty under O.C.G.A. § 17-8-75 to give a curative instruction or declare a mistrial as a result of the prosecutor's comment. However, "[a] trial court's error in not fulfilling its duty under O.C.G.A. § 17-8-75 is subject to harmless error analysis." *Stephens v. State*, 307 Ga. 731, 740, 838 S.E.2d 275 (2020); see also *Gobert v. State*, 311 Ga. 305, 312, 857 S.E.2d 647 (2021); *Dobbins v. State*, 309 Ga. 163, 168(3), 844 S.E.2d 814 (2020)[3].

[3] In *Dobbins*, the Court noted the "apparent tension" between cases recognizing that the statute does not require defense counsel to request additional remedies after interposing an objection and more recent cases

O.C.G.A. § 17-8-75 provides:

> Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.

"The question of whether a remedy for an improper comment during closing argument is sufficient depends on the degree of prejudice created by the comment. And assessing that degree of prejudice involves consideration of the weight of the evidence." *State v. Jackson*, 306 Ga. 626, 629, 831 S.E.2d 798, 801 (2019) (quoting *Jones v. State*, 292 Ga. 656, 662, 740 S.E.2d 590 (2013)). "The trial court is in the best position to judge the possible prejudicial impact of the State's argument." *Jackson*, 306 Ga. at 629. "When determining whether the trial court abused its discretion, [this Court will] consider [the allegedly improper statement], other evidence against the accused, and the actions of the trial court and counsel dealing with the impropriety." *Taylor v. State*, 303 Ga. 225, 229(3), 811 S.E.2d 286 (2018).

Here, the prosecutor's comment during closing argument was not particularly prejudicial and did not warrant any action by the trial court. This Court has determined that "a prosecutor is granted wide latitude in the

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holding to the contrary. 309 Ga. at 168 n.5. As in *Dobbins*, this Court does not have to resolve that "tension" because any purported error is harmless.

conduct of closing argument … ;within the scope of such latitude is the prosecutor's ability to argue reasonable inferences from the evidence. …" *Stephens*, 307 Ga. 737 (quoting *Scott v. State*, 290 Ga. 883, 885(2), 725 S.E.2d 305 (2012)). Considering the context of the comment at issue in this case, the prosecutor was allowed to argue reasonable inferences from the evidence – that Appellant did not seek medical attention because "they were looking for [him]." While the prosecutor referenced a redacted jail recording that was not in evidence, Robinson testified during cross examination that she got peroxide to treat Appellant's gunshot wound to his finger and she did not take Appellant to the hospital because she thought he would heal. (T. 920-21). In addition, records that Appellant eventually sought medical attention for his wound several days after the shooting was admitted at trial.

However, even assuming that the trial court erred in its duty under O.C.G.A. § 17-8-75 in not rebuking the prosecutor and giving curative instructions or declaring a mistrial, the trial court properly determined that any such error was harmless. As discussed above, the evidence of Appellant's guilt was strong. Moreover, the trial court instructed the jury after closing arguments that the lawyers' statements were not evidence. See *Gobert v. State*, 311 Ga. 305, 312, 857 S.E.2d 647 (2021) (explaining that even assuming that the trial court erred in not rebuking the prosecutor under O.C.G.A. § 17-8-75, any such error was harmless because of the strong

evidence against the defendant and the trial court's instructions that closing argument is not evidence); see also *Dobbins*, 309 Ga. at 168-169 (same); *Fleming v. State*, 306 Ga. 240, 243(2), 830 S.E.2d 129 (2019) (same); *Walker v. State*, 281 Ga. 521, 524(5), 640 S.E.2d 274 (2007) (trial court's failure to respond as required by O.C.G.A. § 17-8-75 was harmless based upon the innocuousness of the improper comment and the trial court's instruction that the argument of counsel was not evidence). As a result, "it is highly probable that the trial court's alleged error in failing to comply with O.C.G.A. § 17-8-75 did not contribute to the verdict." *Dobbins*, 309 Ga. at 169.

In addition, Appellant alleges prosecutorial misconduct for the first time on appeal relating to the prosecutor's comment during closing arguments. (Appellant's Brief, pp. 34-35). However, because this claim was not raised in or ruled upon by the trial court, it is not preserved for review on appeal. *See Kessler v. State*, 311 Ga. 607 n. 8, 858 S.E.2d 1 (2021); *Duvall v. State*, 290 Ga. 475, 476(2)(a), 722 S.E.2d 62 (2012)).

Accordingly, Appellee submits that the third enumeration of error provides no basis for reversal.

Conclusion

Wherefore, Appellee prays that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief electronically, with their prior consent, upon:

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This 3rd day of March, 2022.

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