No. S22A0530

In the

Supreme Court of Georgia

Jaquavious Reed,

Appellant,

v.

State of Georgia,

Appellee.

BRIEF OF APPELLEE BY THE ATTORNEY GENERAL

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STATEMENT OF THE CASE

Appellant Jaquavious Reed was indicted with Santron Prickett 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. 4-7).[1] Prickett 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 Prickett were tried together on May 2-10, 2011, and the jury found Appellant guilty of all counts and Prickett guilty of all other counts except malice murder. (R. 547-49, T. 75, 1722). On May 11, 2011, the trial court sentenced Appellant to life for malice murder and felony murder (counts 1 and 2) 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) merged into counts 1 and 2. (R. 539-42; T. 1733).

[1] 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.

On May 13, 2011, Appellant, through trial counsel, filed a motion for new trial. (R. 556-57). Through new counsel, Appellant filed an amended motion for new trial on May 16, 2019. (R. 632-37). Current counsel entered an appearance on February 2, 2021, and filed an amended motion for new trial on April 6, 2021. (R. 735-36, 743-74).

The hearings on Appellant's and Prickett'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. 2054, 2058, 2074, 2084). The trial court held a second hearing on July 20-23, 2021, at which Appellant, his pre-trial counsel Edward Chase, his trial counsel Tasha Rodney, and Prickett's trial counsel Dennis Francis testified. (MNT. 2115, 2148, 2183, 2210). The trial court denied the motion for new trial as amended on October 21, 2021. (R. 816-41).

On October 28, 2021, Appellant timely filed a notice of appeal. (R. 1-3). This appeal follows.

STATEMENT OF FACTS

On March 15, 2010, Appellant (also known as "Quay") killed the victim, Antwan Curry, after the victim and Prickett (also known as "Ton" or "Twan") had a physical fight over the loss of a drug sale. (T. 619, 711-15, 1343-47).

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 Prickett. (T. 585-86, 589). The victim was familiar with this neighborhood, as he would spray for bugs and paint the apartments. (T. 586, 781, 799). However, he was unable to find Prickett, so he purchased marijuana from a third party. (T. 777-78, 781, 783, 824,1076-77). Shortly thereafter, Prickett confronted the victim about this purchase, and a fight ensued between them. (T. 614, 631, 645, 706, 781, 824, 1077). The victim appeared to be winning the fight when Prickett pulled out a gun and shot the victim in the leg. (T. 618, 708, 938, 1343). After being shot, the victim continued to fight and the two struggled over the gun. (T. 614, 617, 620, 634-35, 646). During the tussle, Prickett shot his finger and walked away, leaving a trail of blood. (T. 710, 781-82, 795, 803). After Prickett left, Appellant came back to kill the victim. (T. 616, 619). While the victim was on the ground, Appellant stood over him and shot him two times. (T. 711-13, 715, 737, 760, 1343,1347).

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. 613-14). Smith testified that she was across the street when she saw Prickett talking to the victim and noticed that they started "tussling." (T. 614, 631, 645). Smith saw Prickett pull out a gun and shoot the victim. (T. 618). She said that it looked

like they were struggling over something and that she believed Prickett got a hold of it and fired the gun at the victim. (T. 634-35). After the victim was shot, he was still fighting with Prickett when another shot went off. (T. 614, 634-35, 646). Prickett 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. 616, 619). Smith also told police that she saw Prickett 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. 617, 620, 646). Smith was also able to identify Prickett, whom she knew prior to this incident, in a lineup. (T. 610-11, 640-42, 1822).

Willie Wilson, who had lived in the neighborhood for 10 to 12 years, knew both Appellant and Prickett, and Appellant also used to date Wilson's daughter. (T. 699-702). On the day of the incident, Wilson was outside when he saw Prickett and the victim arguing. (T. 706). Wilson saw a gun when Prickett and the victim were fighting, but he did not know whose gun it was. (T. 706). Wilson testified that Prickett was losing the fight when he heard a pop and then heard Prickett say, "Get this F-N off of me, get him off me." (T. 708). Wilson saw the gun go off multiple times during the fight and that the victim was shot in the leg while Prickett was bleeding from his hand. (T. 709). He then saw Prickett running after he shot himself in the hand, and saw that the victim was still standing after being shot in the leg. (T. 710). A

few minutes after Prickett left, Wilson saw Appellant come around and shoot the victim twice. (T. 711-12, 737). The victim was on his knees saying he was shot when Appellant delivered the fatal shot. (T. 715). Wilson heard Appellant say, "Let the f***ing n***** die," as he shot the victim "like it was a joke." (T. 712, 760). Wilson saw Prickett walk past Appellant before Appellant killed the victim. (T. 713, 715).

Keon Burns, who knew the victim, Appellant and Prickett from the neighborhood, saw the victim come to purchase marijuana. (T. 777-78, 781, 783). Burns saw Prickett and the victim have words and begin to fight because the victim purchased marijuana from somebody else. (T. 781, 824). Prickett had a gun and they wrestled over it; Prickett shot the victim in the leg and shot himself in the hand. (T. 781-82, 795, 803). Burns then saw Appellant get a gun from Prickett and shoot the victim. (T. 781-83, 796).

Bianca Haney was a friend of Prickett's sister and knew both Appellant and Prickett from the neighborhood. (T. 928). She testified that she saw the victim and Prickett have a verbal altercation. (T. 936). Haney saw the victim essentially winning as he was on top of Prickett during the fight. (T. 938). She heard shots and everybody started running, including Prickett. (T. 938, 947, 956). Haney then heard more shots, but did not see Appellant. (T. 954).

Harriet Feggins, who was familiar with the neighborhood, was in the parking lot of the apartment complex when she saw the victim and Prickett

fighting. (T. 1341). Feggins testified that the victim was punching Prickett and getting the best of him. (T. 1353). Feggins heard a shot and saw Prickett run away. (T. 1342). She then saw Appellant shoot the victim while the victim was trying to get up off of the ground. (T. 1343). While Appellant was unloading his gun, Feggins heard Appellant say, "P**** a** n*****, you ain't do shit" while he stood over the victim. (T. 1347).

Zakkiah Robinson, the mother of one of Prickett's children, knew both Prickett and Appellant from the neighborhood. (T. 893-94). Prickett arrived at her home around 7:00 to 8:00 p.m. on the day of the incident. (T. 899). Prickett had shot his finger and did not seek medical attention. *Id.* Prickett also told her that he got into an altercation at the Four Seasons apartments and that the victim was shot. (T. 912). Prickett told her that he was shot and took off running when he heard shots afterwards. *Id.*

Latasha Bigby, mother of another one of Prickett's children, testified that she told detectives that Prickett said he was scuffling over a gun and shot himself. (T. 1076). Bigby further told detectives that Prickett said he got mad because the man would not purchase marijuana from him and that they got into an altercation. (T. 1077). Prickett 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. 1077). Prickett also told her he said, "That n***** shot me," and, "Y'all kill that p**** n*****." (T. 1078).

The medical examiner determined the victim was shot three times and sustained six wounds, including to the leg, chest, and left shoulder. (T. 1285-87, 1292-93). The cause of the death was a gunshot wound to the torso. (T. 1295-96, 1303).

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

ARGUMENT AND CITATION OF AUTHORITY

I. The evidence is sufficient to authorize the convictions.

In his first enumeration of error, Appellant contends that the evidence was insufficient to authorize the jury to find him guilty of the crimes of which he was convicted. (Appellant's Brief, pp. 15-17). Appellee submits that the evidence was sufficient to authorize the jury's verdict under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979).

The test established by *Jackson v. Virginia* is the proper standard of review when the sufficiency of the evidence is challenged, whether arising from the overruling of a motion for directed verdict or from the overruling of a motion for new trial. *Stansell v. State*, 270 Ga. 147, 148, 510 S.E.2d 292 (1998); *Humphrey v. State*, 252 Ga. 525, 527, 314 S.E.2d 436 (1984). When evaluating the sufficiency of the evidence, this Court does not reweigh the evidence or resolve conflicts of testimony. *Caldwell v. State*, 263 Ga. 560, 562, 436 S.E.2d 488 (1993). Resolving evidentiary conflicts and

inconsistencies, and assessing witness credibility, are the province of the factfinder, not this Court. *Hampton v. State*, 272 Ga. 284, 285, 527 S.E.2d 872 (2000). Instead, this Court is to review the evidence in a light most favorable to the verdict and defer to the jury's assessment of the weight and credibility of the evidence. *Jackson v. Virginia*, 442 U.S. at 326.

Appellee submits that the facts as set forth in Part II above authorized the jury to find Appellant guilty beyond a reasonable doubt of the crimes for which he was convicted. Multiple eyewitnesses testified that they saw Prickett and the victim in a physical fight over a marijuana sale, that Prickett shot the victim in the leg when he was losing the fight, and that Prickett left after he accidentally shot himself in the hand while tussling over the gun with the victim. Multiple witnesses further testified that they saw Appellant shoot and kill the victim while the victim was on the ground after Prickett left. Moreover, the medical examiner determined the victim died as a result of the gunshot to his torso, which wound was inflicted by Appellant, and that the wound in the leg, which was inflicted by Prickett, was nonfatal.

While Appellant argues that some of the witnesses that identified him as the shooter, such as Wilson and Feggins, were not credible, it is the jury's role "to resolve conflicts in the evidence and to determine the credibility of witnesses, and the resolution of such conflicts adversely to the defendant does

not render the evidence insufficient." *Jones v. State*, 304 Ga. 320, 323(2), 818 S.E.2d 499 (2018).

To the extent that Appellant contends that the verdict of the jury is contrary to the evidence and the principles of justice and equity, pursuant to O.C.G.A. §5-5-20, and that the verdict is decidedly and strongly against the weight of the evidence, pursuant to O.C.G.A. § 5-5-21 (Appellant's Brief, p. 15), "[t]his Court does not sit as an arbiter of the general grounds, which are 'solely within the discretion of the trial court.'" *Wilson v. State*, 302 Ga. 106, 109, 805 S.E.2d 98 (2017); *Smith v. State*, 300 Ga. 532, 534, 796 S.E.2d 671 (2017). Further, the trial court found that this is not an exceptional case in which the evidence preponderates heavily against the verdict, and declined to exercise the "Thirteenth Juror" discretion to grant a new trial. (R. 817).

Based on the foregoing, Appellee submits that the evidence is constitutionally sufficient to sustain Appellant's convictions. As such, this enumeration lacks merit.

II. Appellant was not prejudiced by the delay in his appeal.

In his second enumeration of error, Appellant contends that he was "denied due process because there was an inordinate delay in the appellate process, which has denied him the right to a speedy appeal." (Appellant's Brief, pp. 17-24). Appellee submits that the trial court properly found that Appellant was not prejudiced by the post-trial delay in his appeal.

Though Appellant contends his "right to a speedy appeal" was violated, there is no Sixth Amendment right to a speedy appeal in a state criminal case. *See Chatman v Mancill*, 278 Ga. 488 n.2, 604 S.E.2d 154 (2004); *Owens v. McLaughlin*, 733 F.3d 320, 329 (11th Cir. 2013) ("The Supreme Court has never held that there is a constitutional right to a speedy direct appeal in a state criminal case."). Rather, the issue is one of due process.

"[S]ubstantial delays experienced during the criminal appellate process implicate due process rights." *Hyden v. State*, 308 Ga. 218, 223-24, 839 S.E.2d 506 (2020) (quoting *Chatman v. Mancill*, 280 Ga. 253, 256(2)(a), 626 S.E.2d 102 (2006)). In resolving claims which allege due process violations based on "inordinate appellate delay," this Court has adopting the four-factor analysis of *Barker v. Wingo*, 407 U.S. 514 (1972), for speedy trial claims, to this situation. *Chatman*, 280 Ga. at 257. These factors are "(1) [the] length of [the] delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) [the resulting] prejudice to the defendant." *Chatman*, 280 Ga. at 256(2)(a) (quoting *Barker*, 407 U. S. at 530). This Court explained that the prejudice necessary to establish a due process violation "is prejudice to the ability of the defendant to assert his arguments on appeal" and held that the appropriate test is one "akin to the second prong of" *Strickland v. Washington*, 466 U. S. 668 (1984):

> appellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different. A reasonable probability 'is a probability sufficient to undermine confidence in the outcome."

Chatman, 280 Ga. at 260-61 (cit. omitted).

In evaluating a trial court's decision to deny a post-trial delay claim, this Court will accept the trial court's fact findings unless they are clearly erroneous and will accept the trial court's conclusion unless it is an abuse of discretion. *Hyden*, 308 Ga. at 224.

In ruling on this issue, the trial court applied the *Chatman v. Mancill* test and determined that the 10-year delay has been lengthy; that while the reason for the delay was unclear and there was no showing of strategic or intentional delay by the State, the delay was caused by the negligence of the State; and that Appellant attempted to move the process by writing pro se letters to the trial court. (R. 817-19). While the trial court determined that the first three factors weighed in favor of Appellant, it concluded Appellant has not shown he was prejudiced by the delay for the two reasons he had asserted, i.e., trial counsel's "lack of memory" by the time she testified at the motion for new trial hearing and the "missing" portions of the trial transcript. (R. 819-22).

On appeal Appellant reasserts that he has been prejudiced from the post-trial delay in two ways: (1) his trial counsel could not remember what

occurred at the bench conferences or why she did or did not object at trial, and (2) the missing 26 bench conferences cannot be recreated. (Appellant's Brief, p. 23). However, "any prejudice which results merely from the passage of time cannot create the requisite prejudice." *Roebuck v. State*, 277 Ga. 200, 205(4), 586 S.E.2d 651 (2003). And here, Appellant has not demonstrated any prejudice which would not be expected due to the passage of time. "After all, the possibility that memories will fade, witnesses will disappear and evidence will be lost are inherent in any extended delay." *Henderson v. State*, 272 Ga. 621, 623, fn. 3, 532 S.E.2d 398 (2000).

In this case, the trial court found that Appellant had not shown actual prejudice as a result of trial counsel's lack of memory:

> [Appellant] had to show that but for the delay, his trial counsel would have not suffered from the lack of memory and would have testified differently which would have led to a different result in his appeal. [Appellant] completely failed to make this necessary showing. [Appellant] failed to demonstrate that his trial counsel would have had better memory if the hearing had been held sooner. Likewise, [Appellant] failed to explain what his trial counsel would have remembered or testified differently if the hearing had happened sooner. Moreover, [Appellant] did not provide any explanation as to how different testimony would have affected the appeal.

(R. 820-21).

Appellee submits that the trial court properly determined that Appellant failed to offer the specific evidence required to show that the delay has prejudiced his appeal or that the result of the appeal would have been

different but for the delay. Appellant's "generalized speculation about the delay's effect on witness memories and evidence is not the kind of 'specific evidence' required to show prejudice in the appellate-delay context." *Whitaker v. State*, 291 Ga. 139, 144-45, 728 S.E.2d 209 (2012) (quoting *Payne v. State*, 289 Ga. 691, 695(2), 715 S.E.2d 104 (2011); *Loadholt*, 286 Ga. at 406 ("Loadholt's only claim of prejudice is the bare assertion that by the passage of time counsel and witnesses' memories as to the events of the crimes are less clear. Thus, he has failed to offer the specific evidence required to show that the delay has prejudiced his appeal[.]").

Moreover, as shown above and below, the errors that Appellant raises on appeal "are without merit [and] there can … be no prejudice in delaying a meritless appeal." *Loadholt*, 286 Ga. at 406. *See also Davis v. State*, 307 Ga. 625, 633, 837 S.E.2d 817 (2020). Thus, the trial court properly found that Appellant's due process rights were not violated by the delay between his trial and appeal. Accordingly, Appellee submits this enumeration lacks merit.

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

In his third enumeration of error, Appellant argues that the trial court improperly denied him his right to be present at every critical stage of his trial when the trial court conferred with trial counsel and co-defendant's counsel outside his presence during 26 bench conferences. (Appellant's Brief,

pp. 24-33). 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 Appellant, joined by Prickett, filed a motion to recreate the record (R. 616-27, 718-34), Appellant, Prickett, and the State filed a stipulation saying that the prosecutor, Appellant's trial counsel, and Prickett'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. 639-41). 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. 815).

Out of the 26 bench conferences listed in the stipulation, five occurred during the jury selection stage (T. 167, 192, 194, 195, 504), four occurred either directly before or after a witness took the stand (T. 592, 608, 1043, 1271), fourteen appeared to relate to objections or the admissibility of evidence such as witness testimony, prior convictions, photographs, and tapes (T. 673, 742, 752, 766, 912, 973, 975, 980, 1182, 1228, 1253, 1328, 1433, 1516), one was during the State's closing argument (T. 1662), and two were during the trial court's charge to the jury. (T. 1707, 1715).

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. 24-33). 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. 823-24). 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 further 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. 825). 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. 824; T. 167, 192, 194, 195, 504). 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. 825; T. 309-16, 492-502).

The trial court alternatively found that assuming these conferences dealt with jury selection, there was not a "reasonable substantial relation" between Appellant's presence at the bench conferences during the jury selection stage 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":

> [a]t the motion for new trial hearing, [Appellant] testified that he had active discussions with his trial counsel during the jury selection, and he was able to voice his opinion as to who he wanted to strike as potential jurors.
>
> [Appellant] further testified that there was only one thing he could contribute to his trial that he believed would make difference: telling his trial counsel that he was not involved in the murder. [Appellant] testified he was able to convey this information to his trial counsel. [Appellant] unequivocally testified that he did not possess any other knowledge that would have made a difference in the trial.
>
> Finally, [Appellant's] trial counsel testified that she would have sought out information from [Appellant] if she thought [Appellant] possessed information that would be helpful for her argument at the bench conferences.
>
> ***
>
> After careful review of the record and the evidence presented at the hearing, [the trial court found] that [Appellant's] presence at the bench conferences would have been useless.

(R. 825-26, 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 the bench conferences that occurred during the jury selection stage.

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*, 219 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*, 2019 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. 29-33). 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, p. 32). 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. 827, 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).

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.

IV. The Fulton County District Attorney's Office was not disqualified from prosecuting Appellant's case.

In his fourth enumeration of error, Appellant asserts that the Fulton County District Attorney's Office should have been disqualified, due to the fact that Appellant's former attorney Edward Chase left for the same entity that was prosecuting Appellant. (Appellant's Brief, pp. 33-35). Specifically, Appellant argues that a conflict of interest was created when Chase never formally moved to withdraw as counsel of record as required by Uniform Superior Court Rule 4.3(1)-(3), and did not execute a waiver of conflict with the client as required by Georgia Bar Rule 1.7. *Id.* Appellee submits that the trial court properly found that the Fulton County District Attorney's office was not disqualified from prosecuting Appellant since Chase did not participate the prosecution and did not consult with any persons in the District Attorney's office regarding this case.

Chase, while working for the Fulton County Public Defender's Office, represented Appellant for a short period in 2010. (MNT. 2115). Chase filed an entry of appearance, discovery requests and notice, motion to set bond, and consolidated motions on July 2, 2010. (R. 360, 363-75). Chase also represented Appellant in court appearances for arraignment on that same day, and for a bond hearing on July 16, 2010. (HT. 1-26). At the motion for new trial hearing, Chase testified that he did "very little" work on this case, as he only filed a few preliminary motions and made two court appearances. (MNT. 2115-16). Chase could not recall doing any trial preparation or having extensive conservations with Appellant. (MNT. 2116, 2141).

On February 2, 2011, Chase joined the Fulton County District Attorney's Office. (MNT. 2115-17, 2120). Once at the District Attorney's Office, Chase had no further involvement in Appellant's case. (MNT. 2117-19, 2136, 2138). Chase explained that he was initially assigned to training in the complaint room for about two weeks, and then was assigned to the trial division, which is completely separate from the major case division, which handled the prosecution of Appellant. (MNT. 2117, 2131). Chase testified that he did not participate in Appellant's prosecution and that he did not talk to anyone about Appellant's case, including Fani Willis, the prosecutor who tried the case. (MNT. 2118-19, 2136, 2138). He also stated that he was not

allowed to speak about his previous cases and that no conversation or inquiry was made with him regarding this case. (MNT. 2132-33, 2138).

Following Chase's departure from the Public Defender's office, Tasha Rodney was immediately reassigned to his cases, including Appellant's. (MNT. 2122, 2149, 2158). While Chase did not file a formal withdrawal as counsel of record in Appellant's case, he testified that Rodney "immediately" took over the case. (MNT. 2120, 2122). Chase explained that attorneys constantly move around at the public defender's office and "very rarely," if ever, file a formal withdrawal of counsel when they leave the office. (MNT. 2121). The record also indicates that Rodney began receiving discovery in this case on April 13, 2011 (R. 450), filed a witness list on behalf of Appellant on April 22, 2011 (R. 458), met with Appellant prior to trial (MNT. 2188), and represented him at the May 2011 trial.

In ruling on this issue, the trial court found that Chase did not participate in prosecuting Appellant in any way, directly or indirectly, and that he did not consult with any person in the District Attorney's office regarding this case following his departure from the Public Defender's office:

> The evidence showed that Attorney Chase's involvement in [Appellant's] case, before he was employed by Fulton County District Attorney's Office, was minimal. Further, once he was employed with Fulton County District Attorney's Office, he was assigned to a different division than the division that handled the prosecution of [Appellant]. At the motion for new trial hearing, Attorney Chase unequivocally testified that he did not discuss or

> disclose any information regarding [Appellant] or any of his prior clients to any of the members of Fulton County District Attorney's Office.

(R. 838, citing *Arnold v. State*, 253 Ga. App. 387, 389, 559 S.E.2d 131 (2002)).

O.C.G.A. § 15-18-5(a) provides that a district attorney's office may be disqualified from engaging in prosecution of a case due to a relationship or interest. "A conflict of interest has been held to arise where the prosecutor previously has represented the defendant with respect to the offense charged, or has consulted with the defendant in a professional capacity with regard thereto; such conflict also has been held to arise where the prosecutor has acquired a personal interest or stake in the defendant's conviction." *Williams v. State*, 258 Ga. 305, 314, 369 S.E.2d 232 (1988).

The reversal of a conviction due to a conflict of interest requires an actual conflict. See *Lamb v. State*, 267 Ga. 41, 42, 472 S.E.2d 683 (1996) ("[T]he conflict must be palpable and have a substantial basis in fact. A theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence."). An actual conflict does not arise simply because an attorney seeks employment with an adversary's firm, but rather arises if a defense attorney were to "switch sides" and prosecute his former client. *See Lamb*, 267 Ga. at 42.

However, this Court has noted that "a number of appellate decisions have recognized that when one assistant district attorney in an office is

disqualified from acting, certain procedures may be employed to screen that assistant from the prosecution and it is not necessary that the entire district attorney's office be disqualified from prosecuting the case." *McLaughlin v. Payne*, 295 Ga. 609, 612 n.3, 761 S.E.2d 289 (2014). *See, e.g.*, *Ferguson v. State*, 294 Ga. 484, 485(2), 754 S.E.2d 76 (2014); *Sealey v. State*, 277 Ga. 617, 619(4), 593 S.E.2d 335 (2004) (overruled in part on other grounds); *Billings v. State*, 212 Ga. App. 125, 128-29(4), 441 S.E.2d 262 (1994).

> [u]nlike in the private sector where no partner or associate of a firm may represent a client with whom any of the other attorneys have a conflict of interest, *an entire government office is not necessarily disqualified from a case due to the conflict of an individual attorney*. Vicarious disqualification of a government department is neither necessary nor wise, and *we instead look to the individual attorney to screen for any direct or indirect participation in the case.*

Arnold, 253 Ga. App. at 389 (quoting *Billings*, 212 Ga. App. at 128-129) (emphasis added).

Thus, Appellee submits that the trial court properly determined that the Fulton County District Attorney's Office was not disqualified from prosecuting Appellant. *See Arnold*, 253 Ga. App. at 389 (finding that the entire district attorney's office was not disqualified from prosecuting the case based on conflict of an individual assistant district attorney when two days before trial the defendant's attorney joined the district attorney's office since the attorney did not participate in the case in any way following his

departure from the public defender's office); *Ferguson*, 294 Ga. at 485 (finding the entire district attorney's office was not disqualified from participating in defendant's motion for new trial hearing because there was no evidence that the attorney who had previously represented the defendant on a bond issue in connection with an unrelated arrest had any involvement with the case after being hired by the district attorney's office, or that the attorneys who worked on the case at the district attorney's office ever discussed any aspect of the case with the defendant's former attorney); *Sealey*, 277 Ga. at 619 (2004) (finding that the entire district attorney's office was not disqualified because the assistant district attorney who previously represented the defendant in two unrelated criminal cases was properly "screened from any direct or indirect participation" in the prosecution of defendant.)

Appellee submits that this enumeration of error is without merit.

V. Appellant was not prejudiced when the bench conferences were not transcribed.

In his fifth enumeration of error, Appellant alleges that he was denied due process when the State failed to preserve a true and correct copy of the trial transcript, including the 26 unrecorded bench conferences, which he argues denied him the ability to properly appeal his convictions. (Appellant's Brief, pp. 35-40). Appellee submits that the trial court properly found that

Appellant has not shown any prejudice resulting from the lack of transcription of the 26 bench conferences.

The only portion missing from the record is the 26 bench conferences. These bench conferences were not transcribed, and the parties involved all stipulated that they were unable to recreate or recall the substance of what occurred during those bench conferences. (R. 639-41). As a result, the trial court ordered, pursuant to O.C.G.A. § 5-6-41(g), that despite good faith efforts by all parties, the record of these 26 bench conferences was unable to be recreated. (R. 815). While the contents of the bench conferences were not recorded, they are noted in the trial transcript when they occurred and the rest of Appellant's trial was transcribed, including the portions immediately before and after each bench conference, jury selection, the parties' closing arguments, witness testimony, and jury charges.

This Court has held that "the failure of the state to file a correct transcript, through no fault of appellant, can effectively deprive the defendant of his right of appeal." *Wade v. State*, 231 Ga. 131, 133, 200 S.E.2d 271 (1973). But the loss of a transcript does not automatically mandate the grant of a new trial. *Smith v. State*, 244 Ga. 814, 819, 262 S.E.2d 116 (1979).

> Where, as here, an otherwise complete record "is missing only one or a few parts of the trial, the appellant is not entitled to a new trial unless he alleges that he has been harmed by some specified error involving the omitted part and shows that the omission prevents proper appellate review of that error."

West v. State, 306 Ga. 783, 787(2), 833 S.E.2d 501 (2019). As such, the failure to record a bench conference does not constitute reversible error absent a showing of prejudice to the defendant. See *Bradford*, 299 Ga. at 882; *Ruffin v. State*, 283 Ga. 87, 88, 656 S.E.2d 140 (2008).

Appellant argues that because these bench conferences at issue were not recorded, cannot be recreated, and transpired 10 years ago, he has been unable to prepare a proper appeal. (Appellant's Brief, pp. 36-37). Appellant further alleges he is entitled to a new trial because he cannot review objections or motions made during the course of the trial, or the trial court's ruling on them. (Appellant's Brief, p. 40). It appears that Appellant's argument is that prejudice should be presumed because he cannot ascertain whether an error is harmless since the bench conferences are not transcribed.

However, as the trial court determined, Appellant's general assertion of harm is not sufficient to grant a new trial because he has failed to show how he was harmed or to raise any issues which the trial court was unable to adequately review due to the failure to record the bench conferences. (R. 834-35, citing *Smith v. State*, 251 Ga. 229, 230, 304 S.E.2d 716 (1983); *Gadson v. State*, 303 Ga. 871, 878 (3)(a), 815 S.E.2d 828 (2018)). While Appellant has argued that his right to be present at the bench conferences was violated, the trial court was still able to adequately review this claim despite there being

no transcription. As explained in Section III above, the trial court found that Appellant's right to be present claim lacked merit as the bench conferences did not implicate his right since they dealt with legal or logistical issues and, alternatively, he acquiesced in his absence from them.

Moreover, Appellant makes a passing reference in his brief that a bench conference on "TVol. 10, pg. 1665" was "vital to his ability to raise an error." (Appellant's Brief, p. 39). Upon review of the record, Appellee could not find a bench conference on such page. Appellee submits that it is not the job of this Court to cull the record on Appellant's behalf to find alleged errors. *Henderson v. State*, 304 Ga. 733, 739, 822 S.E.2d 228 (2018).

There is, however, a bench conference which occurred after Prickett's counsel asked to approach during the State's closing (T. 1662), and the trial court specifically found that the failure to record this bench conference did not harm or prejudice Appellant:

> Before co-defendant's trial counsel asked to approach the bench, and before the bench conference at issue occurred, the State was providing relevant facts regarding co-defendant's guilty of the crime, specifically, co-defendant's actions after the murder and co-defendant's jail calls after his arrest.

(R. 834-35). Appellee submits that the trial court properly found that the portion of the State's closing argument at issue, which pertained to co-defendant's guilt, did not affect the outcome of Appellant's trial.

Since Appellant has not shown prejudice, the failure to transcribe the bench conferences provides no basis to reverse his convictions. Appellee urges the Court to find that this enumeration lacks merit.

VI. There was no *Brady* violation.

In his sixth enumeration of error, Appellant claims he was denied the right to effectively confront his accusers when the State failed to turn over exculpatory evidence from Crime Stoppers in violation of *Brady v. Maryland*, 373 U.S. (1963). (Appellant's Brief, pp. 40-44). Appellee submits that the trial court properly found there was no *Brady* violation.

Specifically, Appellant alleges that three of the State's witnesses, Willie Wilson, Keon Burns, and Lakeyta Smith, received payments from Crime Stoppers regarding this case and that the State failed to turn over *Brady* material relating to these alleged payments. Prior to trial, Appellant filed a motion for *Brady* material regarding Crime Stoppers reward payouts (R. 488-91), and this issue was discussed at trial. (T. 97, 543). The State argued that Appellant was not requesting *Brady* material since Crime Stoppers was anonymous, and that the State did not have possession or knowledge of any payments made to the witnesses. (T. 543). Appellant objected and argued that it was *Brady* material and went to the witnesses' bias. (T. 544). The trial court acknowledged that the State did not have the information, but allowed Appellant to question the witnesses regarding any payments. *Id.*

At trial, Appellant cross-examined Wilson and Burns regarding the existence of the Crime Stoppers reward to attempt to impeach them. Wilson testified that he did not get paid by police but that he asked for bus fare money. (T. 712, 714). Burns testified that he asked about the reward money, but that he did not receive any payment. (T. 780, 802, 818-19). Moreover, Smith testified that she made a statement regarding this case because she saw a man get murdered. (T. 621).

In 2019, subsequent to trial, Appellant filed a "motion to require the prosecution to disclose evidence favorable to defendant under *Brady v. Maryland*." (R. 628-31). A hearing was held, where APD Major Crimes Commander Dan Rasmussen, Sergeant Ronald Paxson, who was a liaison between APD and Crime Stoppers, and Detective David Quinn testified regarding Crime Stoppers. (MNT. 2058, 2074, 2084). Major Rasmussen testified that Crime Stoppers is a private, non-profit entity and that APD has no control over the reward money. (MNT. 2066, 2069). Sergeant Paxson testified that in order to get information from Crime Stoppers, one would have to subpoena Atlanta Police Foundation (APF), and that APF is a separate organization from APD. (MNT. 2081-83). Detective Quinn, who was the main detective in this case, testified that he does not recall anyone getting paid in this case and that he does not usually know whether someone gets paid by Crime Stoppers. (MNT. 2085-86, 2089).

In addition, Appellant and Prickett subpoenaed Crime Stoppers for records of alleged payments, and Crime Stoppers' response to the subpoena was admitted at the hearing. (MNT. 2090, 2101). Courtney Collins, a vice president and chief financial officer of the Atlanta Police Foundation, indicated that Crime Stoppers is unable to provide any information as requested because it does not have anything to provide, and explained that:

> Crime Stoppers Atlanta is an anonymous program that provides rewards to citizens for tips on criminal cases. Citizens provide Crime Stoppers with the tips because their identity is guaranteed to be 100% anonymous. Crime Stoppers is 100% anonymous and therefore no information is collected or retained on the tipsters including name, reward payouts, or anything else related to the case. We have been served with subpoenas in the past and have provided the same information as well. The success of the Crime Stoppers program has been based on its anonymous nature and we hope that the court values its contribution to our city.
>
> Please also note that Crime Stoppers program is governed by a group of business and community leaders and the Atlanta Police Foundation simply provides the funding for the program.

(MNT. 2101).

In finding that there was no *Brady* violation, the trial court determined that Appellant failed to meet any of the elements of *Brady*. The trial court found that: no evidence presented at the hearing and/or at trial supports Appellant's claim that Crime Stoppers made payments to State's witnesses; even if there was such payment, Appellant failed to show that the prosecution was aware of such payment made to witnesses; Appellant was

made aware, through various witness statements and other discovery materials by the State before trial, of the fact that Crime Stoppers had offered a potential reward for information related to this incident, and Appellant made use of this information by cross-examining the relevant witnesses regarding the offered rewards; and even if this alleged payment was made to any witnesses, there was not a reasonable probability that the outcome would have been any difference had the information been provided to Appellant. (R. 835-36).

Appellee submits that the trial court's ruling was proper. To prevail on a *Brady* claim, Appellant must demonstrate that the prosecution willfully or inadvertently suppressed evidence favorable to the accused, either because it is exculpatory or impeaching. *Brady*, 373 U. S. at 87. However, "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U. S. 419, 436-437 (1995).

> *Brady* comes into play only when the suppressed evidence is material, i.e., "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

Young v. State, 290 Ga. 441, 443(2), 721 S.E.2d 839 (2012) (quoting *United States v. Bagley*, 473 U. S. 667, 682 (1985); *see also Chavez v. State*, 307 Ga. 804, 837 S.E.2d 766 (2020). Appellant must show that:

> (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

Anthony v. State, 302 Ga. 546, 552, 807 S.E.2d 891 (2017).

In this case, Appellant has not shown a *Brady* violation. To begin with, there is no evidence that the relevant witnesses actually received any reward money from Crime Stoppers. None of the relevant witnesses admitted to receiving such a payment. (T. 621, 712, 714, 780, 802, 818-19). In addition, Crime Stoppers is completely anonymous and therefore no information is even collected or retained on the tipsters, including name, reward payouts, or anything else related to the case. (MNT. 2101). Appellant's contention is purely based on speculation and conjecture.

Next, even if there was such a payment, there is no evidence that the State knew that Crime Stoppers made reward payments to the witnesses and as such failed to reveal it to the defense. The record indicates that the State has consistently maintained that it did not have possession or knowledge of any such payments made to the witnesses. (R. 668-99, 775-811, T. 543). Moreover, Crime Stoppers is not considered part of the "prosecution team."

> *Brady* and its progeny apply to evidence possessed by a district's "prosecution team," which includes both investigative and

> prosecutorial personnel." *Brady*, then, applies only to information *possessed by the prosecutor or anyone over whom he has authority*.

Brown v. State, 261 Ga. 66, 69, 401 S.E.2d 492 (1991) (emphasis added).

Crime Stoppers is a private entity, separate from the District Attorney's office and APD. (MNT. 2066, 2069). Crime Stoppers is governed by a group of business and community leaders that only receives funding from APF, which is unrelated to APD. As a result, the State has no authority over Crime Stoppers, and both Appellant and the State would have to subpoena APF in an attempt to receive such information. (MNT. 2081-83).

Next, the State did not suppress any favorable evidence. "Evidence is not regarded as 'suppressed' by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence." *James*, 292 Ga. at 442. Here, Appellant was made aware, through various witness statements and other discovery materials by the State before trial, of the fact that Crime Stoppers had offered a potential reward for information related to this incident. (R. 488-91; T. 97, 543-44). Appellant then made use of this information at trial by cross examining the relevant witnesses regarding payments from Crime Stoppers. (T. 712, 714, 780, 802, 818-19).

Lastly, Appellant merely speculates as to how payout records from Crime Stoppers would have aided him, and he offers no evidence that records

of payments from Crime Stoppers might have differed from the witnesses' testimony regarding reward money. As this Court has discussed,

> [t]he mere possibility that an item of undisclosed information might have helped the defense is not enough to establish the fourth *Brady* factor. Because [Appellant] presents no evidence in support of his speculation and conjecture about how the allegedly undisclosed evidence would have been favorable to him, he fails to establish a reasonable probability that the outcome of his trial would have been different had any such evidence been disclosed.

Burney v. State, 309 Ga. 273, 284, 845 S.E.2d 625 (2020) (quoting *Mitchell v. State*, 307 Ga. 855, 862(2)(b), 838 S.E.2d 847 (2020)).

Appellant also attempted to impeach Wilson and Burns about alleged payments, and the testimony of Wilson, Burns, and Smith, were all consistent and corroborated by other independent eyewitnesses to the murder. Thus, even if this alleged payment was made to any or all of the witnesses, Appellant has failed to show that a reasonable probability exists that the outcome of the trial could have been different had it been provided.

As such, the trial court properly determined that Appellant failed to establish the elements of a *Brady* claim. Appellee urges the Court to find that this enumeration lacks merit.

VII. The trial court did not abuse its discretion in denying Appellant's request for a continuance.

In his seventh enumeration of error, Appellant contends that "the trial court committed reversible error by refusing Appellant's request for a

continuance to allow Appellant time to investigate the State's surprise witness, Ms. Harriet Feggins." (Appellant's Brief, pp. 44-46). Appellee submits that the trial court did not abuse its discretion in denying Appellant's request for a continuance, as Feggins was not a surprise witness and Appellant was given sufficient time to interview her prior to her testimony.

Five days before trial, Prickett's counsel served a witness list that included Harriet Feggins. (T. 534, 836-37). On April 29, 2011, the State filed a supplemental certificate of discovery, which included the witnesses' letters and contact information from Prickett's witness list, as well as an April 28, 2011, email to Appellant's counsel that the State was served with several of Prickett's defense witnesses. (R. 477-84).

After the jury was selected, Appellant's trial counsel expressed that she felt ambushed if Feggins would testify. (T. 535-38). The State explained that they had Feggins under subpoena after learning about her from Prickett's witness list, and that depending on what happened at trial they may call her as a witness. (T. 534). The trial court reserved ruling on this issue for later depending on what evidence developed at trial. (T. 538).

After several witnesses testified, this matter was discussed again when the State indicated they intended to call Feggins as a witness. (T. 835-47). The State explained that Feggins was not initially a State's witness and that

Prickett's counsel served the State and Appellant's counsel a witness list five days before trial, which included Feggins, that two days later they interviewed Feggins and she gave exculpatory information for Prickett and damning information for Appellant, and that the State decided at that point to also serve Appellant regarding Feggins testifying at trial. (T. 836-37). Appellant affirmed that Prickett's counsel and the State had informed her about this witness but stated that they were both unsure whether they intended to call her. (T. 840). Appellant's counsel stated that they felt "ambushed" and this was a "sandbag" because they did not have time to seriously investigate Feggins as they did with the State's other witnesses and that "in the middle of trial, to allow a witness who exculpates [Prickett] and inculpate [Appellant]… is a "complete change of the game for us." (T. 840-41). However, the State argued that there was no discovery violation and that Appellant's counsel issue was because there were mutually antagonistic defenses. (T. 838, 841). The State also indicated that they were willing to provide the GCIC of the witness but that they were ready to try the case and still intended to call this witness. (T. 842). As a result, the trial court found no discovery violation and allowed Feggins to testify but gave Appellant the opportunity to interview the witness. (T. 842-48).

At trial, Feggins' testimony inculpated Appellant, as Feggins testified that after she saw the victim and Prickett fighting and Prickett run away

after shots were fired, she then saw Appellant shoot the victim while the victim was trying to get up off the ground and Appellant stood over him. (T. 1342-43, 1347, 1353).

> The prosecuting attorney, not later than ten days before trial, and the defendant's attorney, within ten days after compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, shall furnish to the opposing counsel as an officer of the court, in confidence, the names, current locations, dates of birth, and telephone numbers of that party's witnesses, unless for good cause the judge allows an exception to this requirement, in which event the counsel shall be afforded an opportunity to interview such witnesses prior to the witnesses being called to testify.

O.C.G.A. § 17-16-8(a). The "witness list rule" set forth in this statute is "designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview." *Hines v. State*, No. S21A1079, 2021 Ga. LEXIS 727, at 5-7 (Dec. 14, 2021). Moreover, the trial court "may allow an exception to the rule where good cause is shown and counsel is afforded an opportunity to interview the witness." *Id.* See also *Gabriel v. State*, 280 Ga. 237, 239, 626 S.E.2d 491 (2006).

O.C.G.A. § 17-16-6 provides, in relevant part:

> If at any time during the course of the proceedings it is brought to the attention of the court that the state has failed to comply with the requirements of this article, the court may order the state to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances.

"All applications for continuances are addressed to the sound legal discretion of the court and … shall be granted or refused as the ends of justice may require." O.C.G.A. § 17-8-22. "Without a clear showing of abuse of this broad discretion, this Court will not disturb a trial court's decision to deny a motion for continuance." *Phoenix v. State*, 304 Ga. 785, 788, 822 S.E.2d 195 (2018). *See also Terrell v. State*, 304 Ga. 183, 185-86, 815 S.E.2d 66 (2018); *Johnson v. State*, 300 Ga. 252, 259(4), 794 S.E.2d 60 (2016). This Court has previously observed that trial judges "necessarily require a great deal of latitude in scheduling trials…Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same time, and this burden counsels against continuances except for compelling reasons." *Terrell*, 305 Ga. at 186.

In this case, the trial court made the following factual findings:

> Harriet Feggins was a witness first identified by [co-defendant] Prickett in [co-defendant] Prickett's witness list, five days prior to trial. The day after this witness list was filed, the State provided this witness list to [Appellant]. Within two business days of this disclosure, the State located Feggins, and filed a certificate of service of subpoena for witness Feggins. This filing included Feggins' home address where the State had found Feggins. Feggins' phone number was also provided to [Appellant] prior to Feggins' testimony. Feggins was also made available for [Appellant's] counsel to interview prior to Feggins' testimony. [Appellant] was also provided with a copy of Feggins' GCIC prior to trial Feggins' testimony. [The trial court] delayed the trial proceedings so that the trial counsel could adequately investigate Feggins.

(R. 839-41) (citations omitted).

Based on the transcript and the above fact findings, the trial court properly found that Feggins was not a surprise witness, that Appellant's counsel was afforded sufficient time to interview and investigate the witness, and that there was not a reasonable probability that the results of the trial would have been different if the continuance had been granted. (R. 840). Under these circumstances, the trial court did not abuse its discretion when it denied Appellant's request for a continuance. *See Hines*, 2021 Ga. LEXIS 727, at 5-7 (the trial court did not violate the witness list rule in O.C.G.A. § 17-16-8(a) as the State established good cause for not disclosing a witness at least 10 days before trial because the State previously was not aware of the witness's name or contact information and did not know that she had relevant information about the victim's murder, the State only learned of the potential witness when she came forward on the day of trial, and the trial court complied with § 17-16-8(a) by affording defendant an opportunity to interview the witness before she was called to testify).

Appellant has also failed to identify any testimony from Feggins which was a surprise or to show that, with a continuance, he would have uncovered helpful information which he did not already know. *See Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011); *Davis v. State*, 240 Ga. 763, 765(1), 243

S.E.2d 12 (1978) (no abuse of discretion in denying a continuance where no showing was made "as to how additional time would have benefited defendant or how the lack of time harmed him")

Moreover, in light of the overwhelming evidence of Appellant's guilt, any error was harmless, as it is highly probable that the denial of a continuance did not contribute to the jury's verdict. See *Norris*, 289 Ga. at 158-59; *Carter v. State*, 285 Ga. 394, 398 (6), 677 S.E.2d 71 (2009). Appellee urges this Court to find that this claim lacks merit.

VIII. Trial counsel rendered effective assistance of counsel.

In his eighth enumeration of error, Appellant alleges that trial counsel rendered ineffective assistance in three instances when she did not: (a) object to Appellant's absence at the bench conferences; (b) ensure a complete recordation of the bench conferences; and (c) object to the "presumption of truthfulness" pattern jury charge. (Appellant's Brief, pp. 46-49). Appellee submits that these claims lacked 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. 466 U.S. at 687.

> 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.

Since a defendant must satisfy both prongs of the *Strickland* test, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. If it is easier to dispose of the claim on the basis that no prejudice has been shown, a court may do so. *Id*.

Appellant's absence at the bench conferences

Appellant first asserts that trial counsel should have objected to Appellant's absence during all critical stages of the trial, including the 26 bench conferences. (Appellant's Brief, pp. 47-48). Appellee submits that this specific ineffective assistance claim is not preserved because Appellant did not raise it in his motion for new trial, as amended,[2] or at the hearings on that motion, nor did he obtain a ruling on such claim from the trial court. See *Denson v. State*, 307 Ga. 545, 548, 837 S.E.2d 261 (2019).

Alternatively, this claim lacks merit. When an alleged violation of the Georgia constitutional right to be present is raised not directly but rather in the context of a claim of ineffective assistance of counsel, the defendant must show both that his lawyer acted deficiently in not asserting his right and that this deficiency caused actual prejudice to the outcome of his trial. *Hardy v. State*, 306 Ga. 654, 661 (3), 832 S.E.2d 770 (2019). As explained in section III above, Appellant has failed to show that he had a right to be present at the

[2] Appellant raised in his last amended motion for new trial that "trial counsel failed to object to the 26 bench conferences being unrecorded in violation of Def. Reed's right to be present at trial." (R. 744). Whether trial counsel was ineffective in failing to record the bench conferences and/or failing to object to the Appellant's absence at the bench conferences are two different claims. Appellant, however, did not argue in his motions nor at the hearing that trial counsel was ineffective for failing to object to his absence at the bench conferences nor he did not question trial counsel specifically about this claim at the motion for new trial hearing. (MNT. 2275).

bench conferences in question, so it follows that Appellant cannot show that his trial counsel performed deficiently by failing to assert that right. See *Reeves*, 309 Ga. at 649. Moreover, Appellant has not shown that his absence from the bench conferences caused him any prejudice. See *Hardy*, 306 Ga. at 661-62 (3) (where defendant failed to show that he had a right to be present at the hearing or that his counsel's waiver of his presence caused him any prejudice, his ineffective assistance claim was meritless); *Mohamed v. State*, 307 Ga. 89, 834 S.E.2d 762 (2019) ("Assuming both that Mohamed had a right to be present at the conference and that trial counsel was deficient in failing to assert that right, Mohamed has not shown that his absence from the conference caused him any prejudice at all.").

Missing transcription of the bench conferences

Appellant next asserts that trial counsel should have ensured a complete recordation of Appellant's trial, in particular the 26 bench conferences. (Appellant's Brief, p. 48). This claim is without merit.

The trial court found that "the trial counsel's testimony at the motion for new trial hearing implied that she was not aware whether the bench conferences were excluded from transcription." (R. 832). Because it is not reasonable for a trial counsel to object to an event that happened without her knowledge, the trial court found that her failure to object was not deficient

performance. Moreover, as explained in section V above, Appellant failed to prove he suffered any prejudice due to the unrecorded bench conference.

"Presumption of truthfulness" pattern jury charge.

Lastly, Appellant asserts that trial counsel should have objected to the "presumption of truthfulness charge" because it had been disapproved prior to Appellant's trial by this Court in *Noggle v. State*, 256 Ga. 383, 349 S.E.2d 175 (1986). (Appellant's Brief, p. 49). Appellant specifically takes issue with the following charge by the trial court:

> When you consider the evidence in this case, if you find a conflict, you should settle this conflict, if you can, without believing that any witness made a false statement. If you cannot do so, then you should believe that witness or those witnesses whom you think are most – whom you think are best entitled to belief. You must determine what testimony you will believe and what testimony you will not believe.

(T. 1691-92). Appellant did not object to the jury charges. (T. 1550, 1717-18).

In denying this claim in Appellant's motion for new trial, the trial court determined that the trial transcript does not show that it provided the "presumption of truthfulness" jury charge from *Noggle* (R. 831), and further found that Appellant was not prejudiced even if such a charge was given:

> "[the trial court] fully charged the jury on determining the credibility of the witnesses. [The trial court] also properly instructed the jury to consider all the facts and circumstances of the case in deciding witness' credibility. Likewise, [the trial court] instructed on how to resolve conflicts in witnesses' testimony.

(R. 832).

Appellant argues that trial counsel should have objected to the charge at issue because the language of the charge in essence instructs the jury that they should believe a witness unless it was proven they were not worthy of belief, which shifts the burden upon Appellant to discredit a witness. (Appellant's Brief, p. 49). However, this Court's on-point precedent about the precise charge is squarely against Appellant. Indeed, "the charge given substantially tracked the language of the pattern jury instruction on this issue in effect at the time [of Appellant's 2011 trial]." *Rai v. State*, 297 Ga. 472, 481(8), 775 S.E.2d 129 (2015). *See* Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 1.31.20 (4th ed. 2007, updated Jan. 2008)[3]. As best that Appellee can determine, when given the opportunity to assess the instruction in question, this Court has held that the giving of this precise charge was not error and did "not invade the province of the jury to assess witness credibility or improperly shift the burden of proof." *Rai*, 297 Ga. at 481 (8) (citing *Smith v. State*, 292 Ga. 588, 590(3), 740 S.E.2d 129 (2013)); *See also Smith v. State*, 308 Ga. 81, 89, 839 S.E.2d 630 (2020); *Guyton v. State*, 281 Ga. 789, 791(2), 642 S.E.2d 67 (2007); *Sedlak v. State*, 275 Ga. 746, 748, 571 S.E.2d 721 (2002); *Mallory v. State*, 271 Ga. 150, 151(2), 517 S.E.2d 780

[3] Appellee notes that this charge was not included in the updated pattern jury charges that came into effect after Appellant's trial on the January 1, 2013, effective date of the new Evidence Code.

(1999). Nor was this charge "a 'presumption of truthfulness' charge" as contemplated and disapproved by *Noggle* because "[i]t did not require the jury to believe the testimony of . . . any . . . witness, whether impeached or unimpeached." *Guyton*, 281 Ga. at 791(2) (citing *Noggle*, 253 Ga. 383 and *Mallory*, 271 Ga. 150.

With respect to Appellant's argument about the *Noggle* warning in the pattern jury instructions, he fails to acknowledge this Court's conclusion that an instruction like the one at issue here is "distinctly different from the charge disapproved in *Noggle*" because that charge, unlike the one here,

> … established a presumption that witnesses speak the truth unless they are impeached, that is, that an unimpeached witness must be believed. By contrast, the charge involved here contains no suggestion that an unimpeached witness must be believed, but merely urges the jury to attempt to reconcile conflicting testimony before considering the credibility of witnesses.

Smith, 308 Ga. at 89; *see also Mallory*, 271 Ga. at 151(2).

Moreover, even though the updated Suggested Pattern Jury Instructions now states that "[t]here is no support for this former charge in current law" (citing *Noggle*, 256 Ga. at 383) — it cannot be said that trial counsel did not perform in an objectively unreasonable way by failing to object to a pattern jury instruction that had been approved by controlling case law at the time of Appellant's trial in 2011. See *Smith*, 308 Ga. at 89 ("we cannot say that Smith's counsel performed in an objectively

unreasonable way by failing to object to a pattern jury instruction that had been approved by controlling case law at the time of Smith's trial in 2010."); *Mallory*, 271 Ga. at 151 (approving charge in 1999); *Guyton*, 281 Ga. at 791 (approving charge in 2007); see also *Rai*, 297 Ga. at 481 (no error in giving charge that substantially tracked the pattern jury instruction on conflicts in testimony that was "in effect at [the] time" of the defendant's trial in 2008).

Hence, Appellant has demonstrated neither that his attorneys performed deficiently by not objecting to this charge, nor has he shown a reasonable probability of a different result had they made such an objection. *Beasley v. State*, 305 Ga. 231, 236(3), 824 S.E.2d 311 (2019).

As such, Appellee submits this enumeration lacks merit as Appellant has not carried his burden under *Strickland*.

IX. Felony murder should be vacated by operation of law.

In his ninth enumeration of error, Appellant argues that the trial court improperly sentenced him to both malice murder (count 1) and felony murder (count 2) when the felony murder count should have been vacated by operation of law. (Appellant's Brief, p. 50). Because the felony murder count involved the same victim as the malice murder count, Appellee agrees. See *Graves v. State*, 298 Ga. 551, 556, 783 S.E.2d 891 (2016); *Manner v. State*, 302 Ga. 877, 890, 808 S.E.2d 681 (2017). As such, Appellee concedes that the felony murder count should be vacated by operation of law.

CONCLUSION

Wherefore, Appellee prays that this Court affirm Appellant's convictions and sentences, with the exception of felony murder (count 2), which should be vacated.

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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