IN THE SUPERIOR COURT OF TATNALL COUNTY
STATE OF GEORGIA

GEODONALD WRIGHT, **GDC NO: 0001149218,** Plaintiff-Petitioner, -vs- STATE OF GEORGIA, AND TERENCE KILPATRICK, WARDEN OF SMITH STATE PRISON Defendants-Respondents.	)	Civil Case No._____ Charlton County Case No: 537674

MEMORANDUM IN SUPPORT OF GEORGIA PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO O.C.G.A § 9-14-1, ET SEQ.,
FOR GEODONALD WRIGHT, A PERSON IN STATE CUSTODY WITH ALTERNATIVE EXTRODINARY MOTION FOR NEW TRIAL

COMES NOW, the Petitioner, GEODONALD WRIGHT, by and through undersigned counsel, and hereby submits this Petition for Writ of Habeas Corpus pursuant to O.C.G.A. § 9-14-1, et. seq., as well as an ***Alternative*** Extraordinary Motion for New Trial, because he is confined under a prison sentence in violation of his right to effective assistance of counsel under the Georgia Constitution and the Sixth Amendment to the United States Constitution.

JURISDICTION AND VENUE

1. Petitioner seeks relief from a Judgment entered against him in Charlton County Superior Court, pursuant to a trial, convicting him of violation of Kidnapping, Influencing a Witness, and Aggravated Battery. He was sentenced to a term of imprisonment of 50 in Prison.

2. Petitioner is currently in the custody of State Prison in Smith State Prison, pursuant to the aforementioned Judgment of Conviction. Venue lies in this Court because Petitioner is being detained under the authority and jurisdiction of the State of Georgia in the above-named correctional facility in and for Tattnall County.

3. Petitioner was represented by trial counsel.

4. This action arises under the laws and Constitution of the United States. This Court has jurisdiction to grant writs of habeas corpus pursuant to O.C.G.A. § 9-14-1, et seq., and the Sixth and Fourteenth Amendments of the United States Constitution. Mr. Holt is in custody under color of the authority of the State of Georgia, in violation of the Constitution and laws of the United States and the State of Georgia.

EXHIBITS ATTACHED TO THIS MOTION

5. The following Exhibits are attached to this Petition:

a. Affidavit of Geodonald Wright (Ex. A).

b. Affidavit of Joshua Winn. (Ex. B).

STATEMENT OF FACTS

6. Petitioner proceeded to trial following an indictment for Malice Murder.

7. Petitioner submits that he was denied the effective assistance of

counsel guaranteed to him under the Georgia and U.S. Constitutions and that the resulting trial and appeal was the result of this deficient representation.

8. After a jury trial in Charlton County Superior Court, Wright was convicted of armed robbery, four counts of kidnapping, five counts of aggravated assault, possession of a firearm during commission of a crime, and two counts of influencing a witness.

9. The Georgia Court of Appeals affirmed Wright's convictions on February 6, 2006. *Wright v. State*, 627 S.E.2d 116, 277 Ga. App. 499 (Ga. Ct. App. 2006). Wright did not petition for certiorari in the Georgia Supreme Court.

10. Wright filed an application for writ of habeas corpus in the Telfair County Superior Court on May 8, 2009. The Telfair County Superior Court denied Wright's application by order on February 1, 2011. The Georgia Supreme Court dismissed Wright's application for a certificate of probable cause to appeal the denial of his state habeas corpus petition on March 5, 2012.

11. Wright then filed a 28 USC 2254, Writ of Habeas Corpus in federal court. Wright executed his Section 2254 Petition on April 20, 2016, and it was filed in the Southern District of Georgia on June 2, 2016.

12. As far as the factual background presented at trial, Wright appealed a judgment by the trial court (Georgia) that convicted them of armed robbery, kidnapping, aggravated assault, possession of a firearm during the commission of a

crime, and/or of influencing a witness; defendants claimed that the trial court erred by denying their respective motions for new trial and that the evidence was insufficient.[1]

13. The prosecution sought to prove that at approximately 10 p.m., three armed, masked black males ran through the front entrance of a restaurant, and while one of the perpetrators exhibited a gun and ordered the employees to various locations, the other two took money from the cash register and its change compartment. A K-9 handler attempted to track the perpetrators using a bloodhound. The dog led the officers to items that had been dropped by the perpetrators, including a pistol that was traced to two of the defendants. However, the dog eventually lost the track. When an informer implicated two of the defendants as perpetrators of the crime, the first defendant allegedly threatened the informer, in violation of O.C.G.A. § 16-10-93(a). The first and second defendants also fled the jurisdiction.

[1] Sidney L. Johnson, Jr., Geodonald Wright, and Willie Chambers were jointly indicted and convicted of one count of armed robbery (Count 1), four counts of kidnapping (Counts 2-5), five counts of aggravated assault (Counts 6-10), and one count of possession of a firearm during the commission of a crime (Count 11). Wright also was indicted and convicted on two counts of influencing a witness (Counts 12-13). On appeal, Johnson, Wright, and Chambers contend that the trial court erred by denying their respective motions for new trial on several grounds. After reviewing the evidence of record, the Georgia Court of Appeals affirmed Wright's conviction.

14. The appellate court held, *inter alia*, that there was sufficient evidence to authorize convictions of the first and second defendants. However, no eyewitnesses saw the third defendant participating in the alleged crimes. Neither co-defendant implicated him, he did not confess, and did not flee the jurisdiction. Therefore, the evidence was insufficient to convict the third defendant.

15. Many years later, during December 2017, Wright gained knowledge that main witness, Joshua Winn, recanted his in-court trial testimony.

16. According to the Affidavit of Mr. Winn, attached hereto and incorporated herein:

A. Winn was questioned by police detectives prior to the arrest of Wright.

B. Winn was questioned and pressured for about 20 minutes by the police to implicate Wright in the alleged crimes. While this questioning transpired the tape recorder of Winn's statement was turned off by police so Wright would not be able to use the same statements during trial.

C. Winn, in fact, knew nothing about the robbery or Wright's alleged role.

D. The detectives harassed and threaten Winn to implicate Wright in the crimes.

E. Winn, in fact, never saw Wright with checks and cash.

F. He fabricated the story because the police threatened him to implicate Wright.

G. Finally, Winn was forced to testify by police against Wright.

17. The Affidavit of Winn clearly contradicts and recants his in-court testimony. During trial, Winn testified that, sometime after 10:00 p.m., Smith and Winn encountered Wright on a nearby basketball court. Wright was carrying a bag. After they began talking with Wright, defendants Johnson and Chambers walked up, and then all five of them decided to go to Chambers' home. After all five went into Chambers' bedroom, Wright allegedly stated that "he had done a lick." Winn testified that Wright then pulled a large amount of cash and several checks out of the bag he had been carrying.

18. During trial, Winn also added that Wright counted the money in the presence of the others and then placed the money in his pocket. He did not give anyone else in the room any of the money. Smith and Winn then departed for Smith's home, where they spent the rest of the night.

19. During trial, Winn was the main witness against Wright. The State presented the following evidence to support Wright's conviction: Winn testified that when they were talking to Wright on the basketball court later that same night, Johnson and Chambers walked up and joined them.

20. Winn was the main witness against Wright implicating him in any crime. Winn now recants such testimony which is newly discovered evidence.

ARGUMENTS

21. Petitioner presents two arguments as part of this petition:

Argument One:

Petitioner has a newly discovered evidence claim in the form of Winn's Affidavit which exonerates Wright.

Alternative Argument Two:

Petitioner files an Alternative Extraordinary Motion for New Trial based on the fact that Petitioner recently obtained this new evidence and there is no time limit on filing such a motion for new trial.

LEGAL AUTHORITY

22. Under the Georgia habeas statute, a prisoner can bring a habeas corpus action to challenge a criminal conviction and sentence on the ground that "there was substantial denial of his rights under the Constitution of the United States or of this state in the "proceedings which resulted in his conviction." O.C.G.A. § 9-14-42(a), (c).

23. Properly raised allegations of ineffective assistance of counsel present cognizable claims for habeas relief. *Hicks v. Scott*, 273 Ga. 358, 359 (2001).

24. To establish ineffective assistance of counsel, a defendant must demonstrate that:

a) his trial counsel's performance was deficient; and that 2) counsel's deficiency so prejudiced his defense that a reasonable probability exists that the result of the trial would have been difference but for that deficiency. *Strickland v. Washington*, 466 U.S. 688 (1984).

25. The defendant must overcome the presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. *Boyd v. State*, 275 Ga. 774 (2002).

26. Petitioner seeks this writ of habeas corpus alleging the following grounds:

(a) **Count One**: Counsel's failure to file a timely notice of appeal on a life in prison charge and sentence constitutes ineffective counsel.

(b) **Count Two**: Alternatively, Petitioner files a Motion for Leave to File Appeal Out of Time on the grounds he was misled to believe that an appeal would be filed by Trial Counsel.

COUNT ONE
COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A TIMELY NOTICE OF APPEAL

A. Failure to File a Timely Appeal Constitutes Ineffective Assistance of Counsel.

27. In the context of failure to file a timely notice of appeal the Court in *Dowling v. State*, 669 S.E.2D 198 (2008), set forth the criteria to be considered in context of a plea rather than a trial. However, such case law is instructive:

> An out-of-time appeal is available only when an appellant can show first, that he actually had a right to file a timely direct appeal; and second, that the right to appeal was frustrated by the ineffective assistance of counsel. A defendant who pleads guilty to

> a crime has no unqualified right to a direct appeal. In order to show entitlement to a direct appeal from a judgment of conviction and sentence entered on a guilty plea, [a defendant] must establish that his claims can be resolved solely by reference to the facts contained in the record. Id.

28. Petitioner believed an appeal was taken by Trial Counsel.

29. The failure to file a timely direct appeal was not attributable to Petitioner's own actions.

30. In *Butts v. State of Georgia*, 536 S.E.2d 154 (2000), the Court stated:

> A convicted party may, by his own conduct or in concert with his counsel, forfeit his right to appeal by sleeping on his rights. The disposition of a motion for out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal. When the delay in attempting to appeal a conviction is attributable to the defendant's conduct, either alone or in concert with his trial attorney, a trial court properly denies the motion for an untimely appeal. Id.

31. In other words, ineffective assistance of counsel must be the sole reason for the failure to file the appeal; "[a]n out-of-time appeal ... is not authorized if the delay was attributable to the appellant's conduct, either alone or in concert with counsel." *Franz v. State*, 208 Ga. App. 677 (1993).

32. Here, Petitioner contends that following the entry of the jury trial, and following the court's informing him of his right to appeal which had to be exercised within 30 days, he asked his trial counsel to put in a timely appeal.

33. Trial Counsel never informed the Petitioner that he did not have grounds to appeal

34. Petitioner did not pursue an appeal on his own because he believed Trial Counsel was in the process of appealing his case.

B. Petitioner Could Have Won His Appeal but For Counsel's Errors.

35. Petitioner did not pursue an appeal on his own because he believed Trial Counsel was in the process of appealing his case.

36. Petitioner had an absolute right to appeal his case.

37. For example, during the trial graphic images were displayed that tainted the jury.

38. The Petitioner would have appealed the jury questions that occurred during trial as well as other legal objections.

39. The Supreme Court held that a motion for an out-of-time appeal should be denied "unless [the defendant] had a right to file a timely direct appeal which was frustrated by the ineffective assistance of his counsel."

40. In this case Petitioner demonstrates that he possessed a right to file a direct appeal.

C. An Evidentiary Hearing Is Required To Resolve Whether Counsel Was Ineffective for Failing to Appeal.

41. In this case, Petitioner asserts that his trial attorney had told him that he would file a direct appeal, but neither filed an appeal nor told the Petitioner he did not have an appeal until **years** after the conviction.

42. Petitioner claims that he had lost the right to file a timely direct appeal as a result of the ineffective assistance of his trial counsel. Petitioner seeks an evidentiary hearing on his motion.

43. A criminal defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence entered after a jury or bench trial. When the defendant loses that right as a result of the ineffective assistance of his counsel, he is entitled to an out-of-time appeal. It is the remedy for a frustrated right of appeal. *See, Hudson v. State*,603 S.E.2d 242 (2004).

44. Moreover, the defendant's right to effective assistance of counsel includes the right to be informed of the right to appeal and the right to counsel on appeal, including the right to appointed counsel for indigent defendants. Defendants in criminal cases have both a federal and a state constitutional right to be represented by counsel. This right extends to every indigent accused who indicates his desire to appeal. *Floyd v. State*, 279 Ga.App. 21, 23, 630 S.E.2d 168 (2006); *Ray v. State*, 287 Ga.App. 492, 652 S.E.2d 165 (2007).

45. "When the movant alleges deprivation of the right to direct appeal due to trial counsel's ineffective assistance, judicial inquiry must be made whether appellant was responsible for the failure to pursue a timely direct appeal. A trial court abuses its discretion when it fails to make such a factual inquiry." *Ray*, supra.

46. In the case at bar, there is nothing to show that Petitioner failed to

pursue a direct appeal.

47. Therefore, this Court should conduct the requisite inquiry as to who ultimately bore the responsibility for the failure to file a timely appeal. If, after conducting the hearing, the trial court finds that [Petitioner] lost his right to a direct appeal as the result of the ineffectiveness of his trial counsel, it should grant his Petition.

COUNT TWO

ALTERNATIVE EXTRODINARY MOTION FOR NEW TRIAL

48. Petitioner seeks relief from a Judgment entered against him in Walton County Superior Court, pursuant to a Petition for Writ of Habeas Corpus. This Motion for Leave to File an Out of Time Appeal is filed alternatively to the Petition for Habeas Corpus.

49. Petitioner was represented by trial counsel.

50. Following the Trial, the Petitioner was sentenced to Life in Prison.

51. Petitioner believed he would receive an appeal and that trial counsel was perfecting the appeal by putting in a timely notice as required by Georgia Law.

52. Between the Sentencing date and September 2017, Petitioner believed that his case would be subject to the motion for new trial and eventually a full appeal.

"The standard for granting a new trial on the basis of newly discovered evidence is well established. 'It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the [***7] witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.' Emmett v. State, 232 Ga. 110, 117 (205 SE2d 231) (1974); Bell v. State, 227 Ga. 800, 805 (183 SE2d 357) (1971); Burge v. State, 133 Ga. 431, 432 (66 SE 243) (1909); Berry v. State, 10 Ga. 511, 527 (1851); see Code Ann. § 70-204. All six requirements must be complied with to secure a new trial. Offutt v. State, 238 Ga. 454, 455 (233 SE2d 191) (1977); Corn v. State, 142 Ga. App. 798, 799 (237 SE2d 203) (1977)." Timberlake v. State, 246 Ga. 488, 491 (271 SE2d 792) (1980).
Pretermitting the question of whether the "newly discovered evidence" meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that HN2 a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 SE2d 597) (1981); Sutton v. State, 238 Ga. 336, 338 (232 SE2d 569) (1977); Fowler [***8] v. State, 187 Ga. 406 (1 SE2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 SE2d 672) (1974); Code Ann. § 70-204.

The standard for granting a new trial on the basis of newly discovered evidence is well established. "It is incumbent on a party who asks for a new trial on the [***7] ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be [**796] procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness." Emmett v. State, 232 Ga. 110, 117 (205 SE2d 231) (1974); Bell v. State, 227 Ga. 800, 805 (183 SE2d 357) (1971); Burge v. State, 133 Ga. 431, 432 (66 SE 243) (1909); Berry v. State, 10 Ga. 511, 527 (1851); see Code Ann. § 70-204. All six requirements must be complied with to secure a new trial. Offutt v. State, 238 Ga. 454, 455 (233 SE2d 191) (1977); Corn v. State, 142 Ga. App. 798, 799 (237 SE2d 203) (1977). Implicit in these six requirements is that the newly discovered evidence must be admissible as evidence. The evidence offered here is not admissible, as will be seen below.

It is correct that "a new trial will not be granted if the *only* effect of the evidence [***13] will be to impeach the credit of a witness" (emphasis **[*897]** supplied), such as a "**newly discovered**" witness who says "I wouldn't believe the state's witness under oath." However, when the state's eyewitness **recants** his trial testimony, the effect is not "only" to impeach his credibility; it casts doubt on the proof used to convict and the correctness of the guilty verdict. Therefore, in my view (and from the majority's reliance on Campbell's credibility and the trial judge's discretion, I assume in their view) the trial judge was correct in conducting the hearing so as to hear Campbell's testimony, rather than refusing to hear the matter on the ground that "a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial."

This statement as to post-trial declarations of the state's witnesses is necessarily wrong. Assume that in a trial for rape the victim testified that the defendant entered her home, threw her on the bed, raped her, and fled as her husband returned home. The husband testified he saw the defendant fleeing from the house as he arrived. The defendant claimed consent but the jury found him guilty. After conviction [***14] and appeal, the state's key witness (the victim) says under oath that she was not raped, that she had been having an affair with the defendant, that the defendant fled when they heard her husband approaching, and that she concocted the rape story to cover up the affair she was having with the defendant. Would a court hold that "a post-trial declaration by a state's witness that her former testimony was false is not ground for a new trial"? Would a court hold that a trial judge who granted an extraordinary motion for new trial in such a case was without authority to do so? I doubt it.

In the case before us, I agree that it has not been shown that the trial judge, after hearing Campbell's testimony, abused his discretion in denying the extraordinary motion for new trial. I therefore concur in the judgment.

LEGAL AUTHORITY

53. In order to have an out-of-time appeal on the basis of ineffective assistance of counsel, the defendant must have had the right to file a direct appeal, and a direct appeal from a judgment of conviction and sentence entered following a jury trial is guaranteed.

54. The Georgia Supreme Court expressly recognized that "[a]n out of time appeal occasionally is appropriate where, due to ineffective assistance of counsel, no appeal has been taken.)" Hunter v. State, 260 Ga. 762 (1991).

55. In this case the Petitioner is entitled to an out-of-time appeal on the basis of ineffective assistance claims.

56. Because Petitioner makes a substantive or technical claim of ineffectiveness, this Court should grant the right to appeal his trial and sentence.

CONCLUSION

Petitioner received ineffective assistance of counsel where trial counsel failed to file an appeal and led Petitioner to believe an appeal was filed. None of these failures can be said to have been the result of any reasonable strategic decision and thus deprived Petitioner of his right to effective assistance of counsel.

REQUEST FOR RELIEF

WHEREFORE, Petitioner, respectfully requests that this Court:

A. Grant this writ and order Petitioner's release;

B. Declare Petitioner's Judgment of Conviction and Sentence to be in violation of the Georgia and United State constitutions;

C. Enjoin Respondents from executing Petitioner's remaining sentence, or in the alternative;

D. Grant an evidentiary hearing in his matter; and

E. Grant any such other and further relief that this Court may deem necessary and proper.

Respectfully submitted, this 12th day of January 2018.

/s/ Robert L. Sirianni, Jr., Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January 2018, the forgoing has been furnished via U.S. First Class Mail to the following:

Gregory McLaughlin, Warden
Macon State Prison
2728 South 49 Hwy
Oglethorpe, GA 31068

The State of Georgia
Attorney General of the State of Georgia
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30034

/s/ Robert L. Sirianni, Jr., Esq.

Robert L. Sirianni, Jr., Esquire
GA Bar No. 216624

have been thinking about this case. There are real problems.

First, I was doing some research, and I reminded myself that I wrote you in Arnold that you can't file a freestanding claim of actual innocence in a state habeas corpus petition in Georgia. It's like a federal HC claim. A claim of actual innocence has to be tied into a claim of constitutional violation. So we need a constitutional violation.

There is absolutely no Georgia case law allowing freestanding claims of actual innocence in a state habeas corpus petition. The Georgia Supreme Court has held, "'It is not the function of the writ of habeas corpus to determine the guilt or innocence of one accused of crime." Bush v. Chappell, 225 Ga. 659, 660, 171 S.E.2d 128, 129 (1969).

Second, I read a law review article about Georgia HC procedure that suggests that claims of new evidence should never be raised in a HC petition. Rather, they should be raised in an extraordinary motion for new trial, which has no time limit. If the client wants to move forward, I would recommend that instead of an HC petition.

But, third, and most importantly, recantations have minimal value in Georgia. Basically, almost no value.

We just barely squeaked by with the recantation argument in Williams because Williams have given the recantation affidavit to his lawyer while his motion for new trial was pending. So I argued ineffective assistance of counsel because counsel should have just submitted it to the court as additional evidence to support the motion for new trial.

I wrote in Williams that it was true that, "[g]enerally, a recantation of a witness' trial testimony is merely impeaching of the trial testimony and does not establish a convicted defendant's right to a new trial, even if the witness states under oath that his prior trial testimony was false." Lewis v. State, 301 Ga. 759, 762 (2), 804 S.E.2d 82, 86 (2017), citing Davis v. State, 283 Ga. 438, 441 (3) (A), 660 S.E.2d 354 (2008), and Norwood v. State, 273 Ga. 352, 353 (2), 541 S.E.2d 373 (2001).

That is the best way to put the law on recantation.

The more common way that the Georgia courts discuss recantation is as follows:

> "A recantation, on the other hand, merely impeaches the witness' prior testimony. **a trial court should deny a motion for new trial which is based on statements,** even under oath, by a material witness for the State who gave inculpatory evidence at the trial that his trial testimony was false." Anderson v. State, 276 Ga.App. 216, 218, 622 S.E.2d 898, 900 (2005).
>
> "Further, we must reiterate that '[t]he law is settled that **a post-trial declaration by a State's witness that [her] former testimony was false is not a ground for a new trial.**'" Leon v. State, 237 Ga.App. 99, 104-105(3)(b), 513 S.E.2d 227 (1999).

That's pretty harsh, and that ends it. His claim of recantation would get him nowhere. It would have no chance. None.

I think that he's got nothing. It's unfortunately, but there is no basis for filing anything.

Johnson v. State, 277 Ga. App. 499
Copy Citation

Court of Appeals of Georgia

February 6, 2006, Decided

A05A1957. A05A1958. A05A1959.

Reporter

277 Ga. App. 499 * | 627 S.E.2d 116 ** | 2006 Ga. App. LEXIS 131 *** | 2006 Fulton County D. Rep. 478

JOHNSON v. THE STATE.**WRIGHT** v. THE STATE.CHAMBERS v. THE STATE.

Subsequent History: Magistrate's recommendation at, Habeas corpus proceeding at **Wright** v. Williams, 2016 U.S. Dist. LEXIS 89425 (S.D. Ga., July 11, 2016)

Prior History:

[***1] Armed robbery, etc. Charlton Superior Court. Before Judge Jackson.

Disposition:

Judgment reversed in Case No. A05A1957. Judgments affirmed in Case Nos. A05A1958 and A05A1959.

Core Terms

robbery, Counts, pistol, perpetrators, scene, convictions, reasonable doubt, communicated, guilt, witnesses, stolen, trial court, circumstances, co-defendants, confronted, indirect, inferred, compartment, defendants', punctuation, circumstantial evidence, commission of a crime, alibi defense, conversation, bloodhound, hypothesis, indictment, restaurant, register, Motel

Case Summary

Procedural Posture

Defendants appealed a judgment by the trial court (Georgia) that convicted them of armed robbery, kidnapping, aggravated assault, possession of a firearm during the commission of a crime, and/or of influencing a witness; defendants claimed that the trial court erred by denying their respective motions for new trial and that the evidence was insufficient.

Overview

At approximately 10 p.m., three armed, masked black males ran through the front entrance of a restaurant, and while one of the perpetrators exhibited a gun and ordered the employees to various locations, the other two took money from the cash register and its change compartment. A K-9 handler attempted to track the perpetrators using a bloodhound. The dog led the officers to items that had been dropped by the perpetrators, including a pistol that was traced to two of the defendants. However, the dog eventually lost the track. When an informer implicated two of the defendants as perpetrators of the crime, the first defendant threatened the informer, in violation of O.C.G.A. § 16-10-93(a) .

The first and second defendants also fled the jurisdiction. The appellate court held, inter alia, that there was sufficient evidence to authorize convictions of the first and second defendants. However, no eyewitnesses saw the third defendant participating in the alleged crimes. Neither co-defendant implicated him, he did not confess, and did not flee the jurisdiction. Therefore, the evidence was insufficient to convict the third defendant.

Outcome

The judgment was reversed as to one of the defendants; it was affirmed as to the others.

LexisNexis® Headnotes

- Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

• Evidence > Weight & Sufficiency

HN1 **Standards of Review, Substantial Evidence**

In evaluating the sufficiency of the evidence supporting a conviction, an appellate court must view the evidence in a light most favorable to the verdict. The presumption of innocence no longer applies, and the appellate courts do not weigh evidence or determine witness credibility. More like this Headnote

Shepardize - Narrow by this Headnote (1)

• Evidence > Weight & Sufficiency

HN2 **Evidence, Weight & Sufficiency**

Where the evidence against a defendant is entirely circumstantial, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of guilt of the defendant. O.C.G.A. § 24-4-6. More like this Headnote

Shepardize - Narrow by this Headnote (0)

• Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

• Evidence > Types of Evidence > Circumstantial Evidence

HN3 **Standards of Review, Substantial Evidence**

Appellate courts will not disturb a jury's finding on whether the circumstantial evidence was sufficient unless it is unsupportable as a matter of law. More like this Headnote

Shepardize - Narrow by this Headnote (1)

• Evidence > Types of Evidence > Circumstantial Evidence

HN4 **Types of Evidence, Circumstantial Evidence**

A defendant's conduct after the time when an alleged crime occurred is a circumstance from which one's participation in a crime may be inferred.

More like this Headnote

Shepardize - Narrow by this Headnote (1)

• Evidence > Types of Evidence > Circumstantial Evidence

HN5 **Types of Evidence, Circumstantial Evidence**

Evidence of a defendant's attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt. More like this Headnote

Shepardize - Narrow by this Headnote (0)

• Evidence > Types of Evidence > Circumstantial Evidence

HN6 **Types of Evidence, Circumstantial Evidence**

Evidence of a defendant's flight can serve as circumstantial evidence of guilt. More like this Headnote

Shepardize - Narrow by this Headnote (2)

• Evidence > Types of Evidence > Circumstantial Evidence

HN7 **Types of Evidence, Circumstantial Evidence**

In a circumstantial evidence context, criminal jurisprudence has not endorsed the doctrine of guilt by association. More like this Headnote

Shepardize - Narrow by this Headnote (0)

• Evidence > Types of Evidence > Circumstantial Evidence

HN8 **Types of Evidence, Circumstantial Evidence**

In a circumstantial evidence context, mere presence, association, or suspicion without any evidence to show further participation in the commission of a crime is insufficient to authorize a conviction. More like this Headnote

Shepardize - Narrow by this Headnote (2)

• Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Witness Tampering > Elements

HN9 **Witness Tampering, Elements**

A person violates O.C.G.A. § 16-10-93(a) when he or she, with intent to deter a witness from testifying freely, fully, and truthfully to any matter pending in any court, communicates, directly or indirectly, to such witness any threat of injury or damage to the person, property, or employment of the witness. More like this Headnote

Shepardize - Narrow by this Headnote (0)

• Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Witness Tampering > Elements

HN10 **Witness Tampering, Elements**

O.C.G.A. § 16-10-93 requires proof that a defendant: (1) acted with intent to deter a witness from testifying freely, fully, and truthfully in any matter pending in court, and (2) directly or indirectly communicated a threat to the witness. More like this Headnote

Shepardize - Narrow by this Headnote (1)

- Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN11 **Criminal Offenses, Acts & Mental States**

A defendant's intent may be inferred upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the defendant is prosecuted. More like this Headnote

Shepardize - Narrow by this Headnote (1)

- Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview
- Evidence > Inferences & Presumptions > Inferences

View more legal topics

HN12 **Juries & Jurors, Province of Court & Jury**

A defendant's words or conduct communicating an indirect threat to a witness may be inferred from the defendant's menacing presence or other surrounding circumstances that cast what otherwise could be perceived as innocuous conduct in a different, sinister light. Whether the evidence supports such inferences is normally a matter for the jury to decide. More like this Headnote

Shepardize - Narrow by this Headnote (1) 1

- Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Witness Tampering > General Overview

HN13 **Obstruction of Administration of Justice, Witness Tampering**

The plain language of O.C.G.A. § 16-10-93(a) shows that the crime of influencing a witness focuses solely on the conduct of the accused and is completed when a direct or indirect threat is communicated to the victim; the degree of fear that the victim experiences in response to the threat is not controlling. More like this Headnote

Shepardize - Narrow by this Headnote (0)

• Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Witness Tampering > General Overview

• Evidence > Types of Evidence > Circumstantial Evidence

HN14 **Obstruction of Administration of Justice, Witness Tampering**

In a witness tampering context, where there is at least some circumstantial evidence from which a jury could infer that an indirect threat was communicated to the victim, appellate courts will not second guess the jury and reverse the defendant's conviction. More like this Headnote

Shepardize - Narrow by this Headnote (1) 1

• Evidence > Admissibility > Character Evidence

HN15 **Admissibility, Character Evidence**

Whether to admit evidence is a matter resting in a trial court's sound discretion, and evidence that is relevant and material to an issue in the case is not rendered inadmissible because it incidentally places a defendant's character in issue.

More like this Headnote

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• Criminal Law & Procedure > Trials > Jury Instructions > General Overview
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HN16 **Trials, Jury Instructions**

When reviewing a jury charge, appellate courts do not read the wording of isolated segments in a manner divorced from the context of the charge as a whole. More like this Headnote

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• Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

HN17 **Reversible Error, Jury Instructions**

Jury instructions that, when the jury is given credit for ordinary intelligence, are not confusing and prejudicial, are not reversible error. More like this Headnote

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Headnotes/Summary

Headnotes

Georgia Advance Headnotes

GA(1) (1) Criminal Law & Procedure. > Criminal Offenses. > Crimes Against the Person. > Robbery.

There was sufficient evidence to authorize a rational jury to find defendant guilty beyond a reasonable doubt of counts including armed robbery. The jury was authorized to conclude that defendant stole a pistol shortly before the robbery occurred and that the pistol was used in the armed robbery; the jury further was authorized to conclude that defendant was seen with the fruits of the crime shortly after the robbery had been committed and, at that time, admitted doing a "lick," or robbery; and, finally, the jury was authorized to infer defendant's guilt based on his attempts to influence and intimidate an individual, his flight from officers on a day, and his subsequent flight.

GA(2) (2) Criminal Law & Procedure. > Evidence. > Weight & Sufficiency.

While the facts and circumstances may have been sufficient to cast a grave suspicion upon defendant, there was insufficient evidence to authorize a rational jury to find defendant guilty beyond a reasonable doubt of counts. The State's evidence showed only that defendant was an associate of co-defendants and was present with co-defendants at some point before and after the time of the alleged crimes.

GA(3) (3) Criminal Law & Procedure. > Criminal Offenses. > Miscellaneous Offenses. > Witness Tampering.

There was sufficient evidence presented by the State entitling a rational jury to find defendant guilty beyond a reasonable doubt of a count involving influencing the State's witness based on a face-to-face encounter, as defendant's criminal intent and the indirect communication of a threat could be inferred by a reasonable jury. Also, there was sufficient evidence for a rational jury to convict defendant on a count predicated on a phone conversation; the

State's witness' testimony that he was unafraid was not dispositive of whether an indirect threat was communicated by defendant to the witness.

GA(4) (4) Criminal Law & Procedure. > Evidence. > Admission, Exclusion & Preservation.

Although it was contended that the trial court erred by allowing the State to elicit testimony regarding gang membership, testimony concerning membership in a group was admissible, despite the fact that it may have incidentally placed character in issue.

GA(5) (5) Criminal Law & Procedure. > Jury Instructions. > Particular Instructions.

There were no grounds for concluding that a jury was confused by a challenged instruction. Defendant had argued that the statement in the charge that “some” defendants contended that they were not present at a scene had

improperly led the jury to believe that he was conceding his presence at the scene.

Counsel: *McGee & McGee*, *James B. McGee III*, for appellant (case no. A05A1957).

Martin H. Eaves, for appellant (case no. A05A1958).

Joseph E. East, for appellant (case no. A05A1959).

Richard E. Currie, *District Attorney*, *Alexander J. Markowich*, *Assistant District Attorney*, for appellee.

Judges: BERNES, Judge. Blackburn, P. J., and Miller, J., concur.

Opinion by: BERNES

Opinion

[**118] **[*499]** BERNES, Judge.

Sidney L. Johnson, Jr., **Geodonald Wright**, and Willie Chambers were jointly indicted and convicted of one count of armed robbery (Count 1), four counts of kidnapping (Counts 2-5), five counts of **[*500]** aggravated assault (Counts 6-10), and one count of possession of a firearm during the commission of a crime (Count 11). **Wright** also was indicted and convicted on two counts of influencing a witness (Counts 12-13). In these companion appeals, Johnson, **Wright**, and Chambers contend that the trial court erred by denying their respective motions for new trial on several grounds. After reviewing the evidence of record, we conclude that there was insufficient evidence to convict Johnson on Counts 1-11, and so we reverse his convictions. We affirm in all other respects.

Viewed in the light most favorable to the verdict, the evidence reflects that on Friday, September 13, 2002, at approximately 10:00 p.m., three armed, masked

black males ran through the [***2] front entrance of Mikey's Pizza, a restaurant located in Charlton County. One of the perpetrators pointed a handgun to the head of an employee, jerked the employee from his seat and forced him to walk over and open the cash register. Another employee was ordered at gunpoint to stay seated and to place his head on the table where he sat. The female employees were forced at gunpoint to the back corner of the restaurant and ordered to crouch on the floor.

[**119] Moving quickly, the perpetrators seized approximately $ 650 in United States currency and $ 1,000 in checks from the cash register. They also removed the change compartment attached to the register. After pushing the register to the floor, the perpetrators fled the scene on foot with the stolen money and change compartment.

911 was called and local law enforcement officials arrived within minutes. Because the perpetrators had been masked, none of the employees was able to identify the perpetrators, other than as black males. Nor was the detective in charge of processing the scene able to obtain any identifiable fingerprints from the restaurant.

The detective contacted a K-9 handler, who came to the scene and attempted to track the [***3] perpetrators using a bloodhound. After picking up a track outside the restaurant, the bloodhound quickly led the law enforcement officers to a single check, dated September 13, 2002, payable to Mikey's Pizza, lying on the side of the road approximately two street blocks from the restaurant. In the same vicinity, the bloodhound led the officers to the change compartment that had been taken from the cash register, and to a black Ruger nine millimeter pistol, located approximately three to six feet from the change compartment. The bloodhound eventually lost the track and was unable to lead the officers to any particular suspects. No fingerprints were recovered from the check, the change compartment, or the pistol.

During the course of the subsequent investigation, detectives learned that a young woman by the name of Shannon Gibson had purchased the pistol in January 2002 but then had given it to her boyfriend, Fielding Dean, as a birthday present. Dean also had **[*501]** another nine millimeter pistol that had been purchased by Gibson, which Dean referred to as “the Luger.”

A week prior to the robbery, Dean decided he wanted to sell the Luger pistol. Dean contacted Brandon Smith, a high school [***4] classmate, to assist him in the sale.

After placing both pistols in his truck, Dean drove while Smith directed him to an area of Charlton County known as “the sticks.” Once there, Smith directed Dean to stop in front of a residence where Smith saw defendants **Wright** and Chambers standing outside. Smith knew **Wright** and Chambers because the three of them, along with defendant Johnson (who was not present in the yard), were members of the “Baby Gangsters,” a group led by **Wright**.

Wright and Chambers came over to the vehicle, and Smith informed them about Dean's two pistols. They asked if they could see the pistols, and Dean obliged. **Wright** and Chambers then went into the residence, each carrying one of the two pistols. Neither returned. Dean left the residence empty-handed, with Smith's assurances that Smith would get the two pistols back. Smith never recovered the pistols for Dean, even though he later saw Chambers with the stolen pistols at a basketball court.

Smith saw Chambers again on September 13, 2002, the day of the robbery at Mikey's Pizza. That evening, Smith met up with Chambers and the other two defendants, **Wright** and Johnson, and together they walked from “the sticks” to [***5] a nearby area known as “the projects.” The group split up at about 9:30 p.m., at which time Smith went to visit his friend Josh Winn, who lived in the projects. Later that night, sometime after 10:00 p.m., Smith and Winn encountered **Wright** on a nearby basketball court. **Wright** was carrying a bag. After they began talking with **Wright**, defendants Johnson and Chambers walked up, and then all five of them decided to go to Chambers' home.

After all five went into Chambers' bedroom, **Wright** stated that “he had done a lick.” **Wright** then pulled a large amount of cash and several checks out of the bag he had been carrying. **Wright** counted the money in the presence of the others and then placed the money in his pocket. He did not give anyone else in the room any of the money. Smith and Winn then departed for Smith's home, where they spent the rest of the night.

Smith ran into Chambers two days later, on September 15, 2002. Chambers told Smith that he had accidentally dropped his gun while taking part in the robbery of Mikey's Pizza. Chambers was worried because [**120] he believed that his fingerprints might be on the gun.

Smith was interviewed by a detective with the Charlton County Sheriff's Office [***6] on September 18, 2002. Later that same day, a warrant for Chambers' arrest was obtained based on the information provided by Smith. After

failing to locate Chambers at his home, **[*502]** officers drove to the residence where the pistols had been stolen from Dean. When they arrived, **Wright** and Chambers fled the residence on foot. The officers were unable to catch them.

On September 19, 2002, after **Wright** learned that Smith had spoken with the detective, he confronted Smith behind one of the buildings in an apartment complex known as "Pine Point." During the course of the 15-to-20-minute confrontation, **Wright** repeatedly demanded to know what Smith had told the detective. Smith denied ever speaking with the detective, and **Wright** responded, saying, "Don't lie to me, man, don't lie to me." Afraid for his own safety and worried that **Wright** "might do something" to him since he had been labeled a "snitch," Smith steadfastly denied speaking with the detective. Smith knew that the Baby Gangsters had a code of silence, and **Wright** had previously told members of the group that if they spoke to or cooperated with the police, "It's me and you." Smith felt that he could not freely leave or voluntarily end [***7] the encounter with **Wright**. Indeed, the confrontation ended only after Smith's mother drove up and took Smith home.

On September 20, 2002, Smith again spoke with the detective and, among other things, told him about the incident with **Wright** the previous day. As a result of their conversation, a warrant for **Wright**'s arrest on the charge of influencing a witness was obtained. Officers attempted to execute the warrant upon a room at the Star Motel where **Wright** had been residing, but were unable to locate **Wright** at the motel. Unbeknownst to them, **Wright** had left the state and headed to Jacksonville, Florida. However, ten days later, on September 30, 2002, a city sanitation worker located a firearm later identified as the Luger pistol stolen from Dean in a dumpster next to the Star Motel.

On November 3, 2002, **Wright** called Smith. During their telephone conversation, **Wright** again asked Smith what he had told the detective, and Smith denied having told the detective anything. The conversation then abruptly ended.

Wright and Chambers subsequently were arrested in adjoining rooms at a Jacksonville motel on November 12, 2002. In contrast, Johnson never left the state and was arrested in Charlton [***8] County.

1. Johnson and **Wright** contend that the evidence was insufficient to support their convictions on Counts 1-11. On appeal, neither defendant contests the fact that the State's evidence established that three black male perpetrators entered Mikey's Pizza on the night in question and committed armed robbery, kidnapping, and

aggravated assault. Rather, both defendants argue that there was insufficient evidence identifying them as the perpetrators.

HN1 "In evaluating the sufficiency of the evidence supporting a conviction, this court must view the evidence in the light most favorable **[*503]** to the verdict. The presumption of innocence no longer applies, and we do not weigh evidence or determine witness credibility." (Citations and punctuation omitted.) *Cobb v. State*, 275 Ga. App. 554 (1) (621 SE2d 548) (2005). ***HN2*** Where, as here, the evidence against the defendants is entirely circumstantial, "the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of guilt of the defendant[s]." *Haxho v. State*, 186 Ga. App. 393, 394 (1) (367 SE2d 282) (1988). See also OCGA § 24-4-6. [***9] ***HN3*** We will not disturb a jury's finding on whether the circumstantial evidence was sufficient unless it is unsupportable as a matter of law. *Matthews v. State*, 257 Ga. App. 886, 887 (1) (572 SE2d 391) (2002).

(a) ***GA(1)*** (1) Guided by these principles, we conclude that there was sufficient evidence to authorize a rational jury to find **Wright** guilty beyond a reasonable doubt of Counts 1-11. *Jackson v. Virginia*, 443 U. S. 307 (99 S. Ct. 2781, 61 LE2d 560) (1979). Based on the evidence at trial, the jury was authorized to conclude that **Wright** stole Dean's Ruger [**121] pistol shortly before the robbery occurred and that this pistol, discovered by bloodhounds in close proximity to Mikey's Pizza and to the stolen check and change compartment, was used in the armed robbery. The jury further was authorized to conclude that **Wright** was seen with the fruits of the crime, the cash and checks, shortly after the robbery had been committed and, at that time, admitted doing a "lick," or robbery. Finally, the jury was authorized to infer **Wright**'s guilt based on his attempts to influence and intimidate Smith, his flight from officers on September 18, 2002, and his subsequent flight to Jacksonville.

[***10] The jury's verdict finding that the circumstantial evidence excluded every reasonable hypothesis other than **Wright**'s guilt of the charged offenses is not insupportable as a matter of law. See *Collins v. State*, 273 Ga. 30, 31 (1) (538 SE2d 34) (2000) ***HN4*** (defendant's conduct after the time when an alleged crime occurred is a "circumstance[ ] from which one's participation in the [crime] may be inferred") (citation and punctuation omitted); *Ballard v. State*, 268 Ga. 895 (2) (494 SE2d 644) (1998) ***HN5*** (evidence of a defendant's attempt to influence or intimidate witness can serve as circumstantial evidence of guilt); *Renner v. State*,

260 Ga. 515, 517 (3) (a), (b) (397 SE2d 683) (1990) ***HN6*** (evidence of defendant's flight can serve as circumstantial evidence of guilt). 1

[***11] **[*504]** Although **Wright** asserts that there were conflicts in the testimony of some of the State's witnesses, including Dean and Smith, and that some of the State's witnesses made prior statements that were inconsistent with their testimony at trial, these conflicts went to the credibility of the witnesses, a matter for the jury to decide. *Miller v. State*, 273 Ga. 831, 832 (546 SE2d 524) (2001); *Turner v. State*, 270 Ga. App. 245 (1) (606 SE2d 296) (2004). And, the fact that **Wright** himself testified at trial to a different version of events does not change the result; "the jury here was entitled to disbelieve [**Wright**'s] version of the facts." *Harvey v. State*, 274 Ga. 350, 352 (2) (554 SE2d 148) (2001). Thus, we find no basis for reversing **Wright**'s convictions on Counts 1-11.

(b) ***GA(2)*** (2) In contrast, while the facts and circumstances may have been sufficient to cast a grave suspicion upon Johnson, there was insufficient evidence to authorize a rational jury to find Johnson guilty beyond a reasonable doubt of Counts 1-11. *Jackson*, 443 U. S. 307. The State presented the following evidence to support Johnson's conviction: First, Smith [***12] testified that on the night of the robbery, Johnson, **Wright**, Chambers, and Smith hung out together until they split up at approximately 9:30 p.m. Second, Smith and Winn testified that when they were talking to **Wright** on the basketball court later that same night, Johnson and Chambers walked up and joined them. Third, Smith testified that Johnson was present later at Chambers' home when **Wright** stated that he had done a "lick," poured the money out of the bag he was carrying, counted it, and placed it in his own pocket. Fourth, Smith testified that Johnson, along with Smith and the co-defendants, was a member of the Baby Gangsters.

There were no eyewitnesses who saw Johnson participating in the alleged crimes. Neither co-defendant implicated Johnson, and Johnson did not confess to law enforcement or make any incriminating statements to any witnesses regarding the crimes. The State presented no forensic evidence linking Johnson to any of the stolen items or to the crime scene. In contrast to his co-defendants, there was no evidence linking Johnson to a stolen pistol used in the crimes, and there was no evidence that Johnson attempted to harass any potential witnesses or flee from the [***13] jurisdiction. Finally, there was no evidence that Johnson received any of the proceeds from the robbery.

The State's evidence showed only that Johnson (like Smith) was an associate of the co-defendants and was present with the co-defendants at some point before and

after the time of the alleged crimes. ***HN7*** "Our criminal jurisprudence has not endorsed the doctrine of guilt by association." *Mealor v.* [**122] *State*, 134 Ga. App. 564, 565 (1) (215 SE2d 272) (1975). ***HN8*** "Mere presence, association or suspicion, without any evidence to show further participation in the commission of the crime is insufficient to authorize a conviction." *Brookins v. State*, 202 Ga. App. 759, 760 **[*505]** (415 SE2d 674) (1992); *Mattox v. State*, 196 Ga. App. 64, 66 (3) (395 SE2d 288) (1990). Indeed, the evidence of presence and association with co-defendants **Wright** and Chambers at some point before and after the crimes would just as easily have supported the hypothesis that Smith, rather than Johnson, was the third perpetrator. 2 Under these circumstances, the State's evidence was insufficient to show Johnson's participation in the crime and failed to exclude every reasonable hypothesis [***14] except for Johnson's guilt. See, e.g., *O'Quinn v. State*, 153 Ga. App. 467, 471-472 (2) (265 SE2d 824) (1980); *Mealor*, 134 Ga. App. at 565 (1); *Coker v. State*, 42 Ga. App. 385 (156 SE 299) (1930). We reverse Johnson's convictions on Counts 1-11.

2. **Wright** also argues that the evidence was insufficient to support his convictions on Counts 12 and 13. Counts 12 and 13 of the indictment charged **Wright** with influencing the State's witness, Smith, in violation of OCGA § 16-10-93 (a). Specifically, Count 12 alleged that **Wright**violated the statute based on his face-to-face encounter with Smith behind Pine Point Apartments on September 19, 2002. Count 13 alleged that **Wright** violated the statute when he spoke with [***15] Smith by telephone on November 3, 2002.

HN9 A person violates OCGA § 16-10-93 (a) when he or she, "with intent to deter a witness from testifying freely, fully, and truthfully to any matter pending in any court, … communicates, directly or indirectly, to such witness any threat of injury or damage to the person, property, or employment of the witness." Thus, ***HN10*** OCGA § 16-10-93 requires proof that the defendant: (1) acted with intent to deter a witness from testifying freely, fully, and truthfully in any matter pending in court, and (2) directly or indirectly communicated a threat to the witness. See *Markowitz v. Wieland*, 243 Ga. App. 151, 155 (2) (c) (532 SE2d 705) (2000).

GA(3) (3) We conclude that there was sufficient evidence presented by the State entitling a rational jury to find **Wright** guilty beyond a reasonable doubt of Count 12. *Jackson*, 443 U. S. 307. The State presented ample evidence that when **Wright** confronted Smith behind Pine Point Apartments on September 19, 2002, at a time when criminal charges were pending against Chambers, he acted with the requisite criminal intent to deter Smith from [***16] properly testifying

against Chambers and indirectly communicated a threat to Smith. ***HN11*** The defendant's intent may be inferred "upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the [defendant] is prosecuted." (Citations and **[*506]** punctuation omitted.) *Carter v. State*, 237 Ga. App. 703, 708 (3) (b) (516 SE2d 556) (1999). In turn, that ***HN12*** the defendant's words or conduct communicated an indirect threat to the witness may be inferred from the defendant's "menacing presence" or other surrounding circumstances that cast what otherwise could be perceived as innocuous conduct in a different, sinister light. See id. at 708 (3) (c); *Thomas v. State*, 227 Ga. App. 469, 470 (3) (489 SE2d 561) (1997). Whether the evidence supports such inferences is normally a matter for the jury to decide. See *Carter*, 237 Ga. App. at 708 (3) (b).

Here, when the evidence is construed in the light most favorable to the verdict, **Wright**'s criminal intent and the indirect communication of a threat could be inferred by a reasonable jury from the following: (1) the fact that **Wright** confronted [***17] Smith face-to-face for an extended period in an unusual location, repeatedly quizzing him about what he had told the detective and refusing to accept Smith's answers; (2) Smith's testimony that he was scared for his own safety; (3) Smith's testimony concerning the Baby Gangsters' code of silence and the consequences [**123] of violating that code; and (4) Smith's testimony that he would have been unable to voluntarily leave and end the confrontation, had his mother not fortuitously driven up to the scene and picked him up. Furthermore, although **Wright**'s testimony at trial was aimed at showing that his intent in speaking to Smith was solely to gather information on behalf of co-defendant Chambers' newly retained defense attorney, the jury was entitled to accord little weight to this testimony and instead conclude that "the State's evidence tended to show far more." *Nguyen v. State*, 273 Ga. 389, 398 (3) (543 SE2d 5) (2001). See also *Harvey*, 274 Ga. at 352 (2). Hence, we find no basis for reversing **Wright**'s conviction on Count 12.

Count 13, which was predicated on the November 3, 2002 phone conversation, presents a closer question. Nevertheless, we conclude [***18] that there was sufficient evidence for a rational jury to convict **Wright** on this count. The phone conversation must be viewed in the context of the Baby Gangsters' code of silence discussed above, and in light of the fact that **Wright** had previously confronted Smith face-to-face and had attempted to intimidate him. In light of these surrounding circumstances, a reasonable jury was authorized to conclude that when **Wright**spoke with Smith on the phone, he acted with the requisite criminal intent and communicated an indirect threat to Smith. *Carter*, 237 Ga. App. at 708 (3) (c); *Thomas*, 227 Ga. App. at 470 (3).

It is true that Smith testified at trial that he was not afraid when he spoke with **Wright** on the phone. However, Smith's testimony that he was unafraid is not dispositive of whether an indirect threat was communicated by **Wright** to Smith. ***HN13*** The plain language of OCGA § 16-10-93 (a) shows that the crime of influencing a witness focuses **[*507]** solely on the conduct of the accused and is completed when a direct or indirect threat is communicated to the victim; the degree of fear that the victim experiences *in response to the threat* [***19] is not controlling. Cf. *Boone v. State*, 155 Ga. App. 937, 939 (2) (274 SE2d 49) (1980) (degree of fear experienced by victim not controlling in determining whether accused committed crime of terroristic threats). Thus, as we have held in a somewhat similar context, "testimony that the victim was not afraid of the defendant does not preclude conviction." (Citations and punctuation omitted.) *Lunsford v. State*, 260 Ga. App. 818, 821 (2) (581 SE2d 638) (2003) (aggravated assault). See also *Lemming v. State*, 272 Ga. App. 122, 125 (1) (612 SE2d 495) (2005)(aggravated assault). ***HN14*** Where, as here, there is at least some circumstantial evidence from which the jury could infer that an indirect threat was communicated to the victim, we will not second-guess the jury and reverse the defendant's conviction. Cf. id. at 125 (1).

3. Johnson asserts that the trial court erred by denying his motion to sever his trial from that of the other defendants. We do not reach this enumeration of error since we already have held that Johnson's convictions must be reversed due to the insufficiency of the evidence.

4. **Wright** and [***20] Chambers contend the trial court erred by allowing the State to elicit testimony that the defendants and Smith were members of a gang called the "Baby Gangsters" from witnesses Dean and Smith. They claim that allowing such testimony improperly placed their character in issue and prejudiced their defense because the defendants' membership in the gang purportedly was not relevant to their commission of the robbery. We disagree.

HN15 "Whether to admit evidence is a matter resting in the trial court's sound discretion, and evidence that is relevant and material to an issue in the case is not rendered inadmissible because it incidentally places the defendant's character in issue." *Wolfe v. State*, 273 Ga. 670, 674 (4) (a) (544 SE2d 148) (2001). Here, the testimony concerning the defendants' membership in the Baby Gangsters was relevant to show how the defendants knew one another, and to provide a context and motive for the defendants' joint participation in the robbery. The testimony also was relevant to explain why **Wright** received all of the proceeds from the robbery, since the testimony established that **Wright** was the ringleader of the

Baby [**124] Gangsters. Finally, the testimony [***21] was relevant to show the motive for **Wright**'s questioning of Smith twice after the robbery and to show that the questioning communicated an indirect threat in violation of OCGA § 16-10-93 (a), given that the testimony showed that the Baby Gangsters had a code of silence enforced against group members by **Wright**. ***GA(4)*** (4) Therefore, Dean and Smith's testimony concerning Smith and the defendants' membership in the Baby Gangsters was admissible, despite the fact **[*508]** that it may have incidentally placed the defendants' character in issue. See *Billups v. State*, 272 Ga. 15, 16 (2) (a) (523 SE2d 873) (1999); *Mallory v. State*, 271 Ga. 150, 153 (6) (517 SE2d 780) (1999); *Johnson v. State*, 261 Ga. App. 98, 104 (6) (c) (581 SE2d 715) (2003); *Cyrus v. State*, 231 Ga. App. 71, 72-73 (2) (498 SE2d 554) (1998). **3**

[***22] 5. Finally, Chambers contends that the trial court gave an improper and confusing jury charge on the defense of alibi. As part of its jury charge, the trial court instructed the jury on the defense of alibi as follows:

The Defendants contend — some of the Defendants contend that they were not present at the scene of the alleged offense at the time of its commission. Alibi as a defense involves the impossibility of the accused's presence at the scene of the alleged offense at the time of its commission. The range of evidence and respective time and place must be such as to reasonably exclude the possibility of the presence of the Defendant at the scene of the alleged offense. Presence of the Defendant at the scene of the crime alleged is an essential element of the crime set forth in this indictment and the burden of proof rests upon the State to prove such beyond a reasonable doubt. Any evidence in the nature of alibi should be considered by you in connection with all the other evidence in the case and if, in doing so, you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit the Defendants.

Chambers argues that the [***23] statement in the charge that "*some* of the Defendants contend that they were not present at the scene of the alleged offense" improperly led the jury to believe that he was conceding his presence at the scene of the robbery, since he did not present an alibi defense.

We do not agree. As an initial matter, we note that the first sentence of the trial court's charge was properly "adjusted to the evidence admitted in court." (Citations and punctuation omitted.) *Brogdon v. State*, 270 Ga. App. 568, 569 (2) (607 SE2d 199) (2004). Both Johnson and **Wright** presented alibi defenses, while Chambers **[*509]** did not. Thus, the reference to "some" of the defendants was accurate and tailored to the evidence.

Nor do we believe that the reference confused the jury into believing that Chambers was conceding his presence at the scene of the robbery. ***HN16*** When reviewing a jury charge, we do not read "the wording of isolated segments" in a manner divorced from the context of the charge as a whole. *Watkins v. State*, 265 Ga. App. 54 (592 SE2d 868) (2004). See also *Cody v. State*, 275 Ga. App. 140, 141 (2) (619 SE2d 811) (2005). ***HN17*** "Instructions which, when the jury [***24] is given credit for ordinary intelligence, are not confusing and prejudicial, are not reversible error." (Citations and punctuation omitted.) *Williams v. State*, 273 Ga. App. 42, 43 (1) (614 SE2d 146) (2005).

After instructing the jury on the defense of alibi, the trial court went on to provide a separate instruction on the question of identity:

Identity is a question of fact for determination by the jury. … It is for you to say whether, under the evidence in this case, [**125] the testimony of witnesses and the facts and circumstances of the case sufficiently identify these Defendants as the perpetrators of the alleged crime beyond a reasonable doubt. It is not necessary that the Defendant show that another person committed the offense. It is sufficient, if there are facts and circumstances in this case which would raise a reasonable doubt as to whether these Defendants are, in fact, the persons who committed the crimes. If you do not believe that the Defendants have been sufficiently identified as the persons who committed the crimes, if any, or if you have any reasonable doubt as to such, then it would be your duty to acquit the Defendants. The burden of proof [***25] rests upon the State to prove beyond a reasonable doubt the identity of these Defendants as being the persons who committed the crimes alleged in this bill of indictment.

Furthermore, the trial court provided proper instructions to the jury on the burden of proof, on the presumption of innocence, and on the fact that the jury was required to consider the evidence separately for each defendant. ***GA(5)*** (5) Given these combined instructions, in conjunction with the fact that the identity of the perpetrators was hotly contested at trial by all three defendants and was the focal point of all three defendants' closing arguments, we find no grounds for concluding that the jury was confused by the challenged instruction. See *Williams*, 273 Ga. App. at 43-44 (1); *Watkins*, 265 Ga. App. at 56-57 (4).

Judgment reversed in Case No. A05A1957. Judgments affirmed in Case Nos. A05A1958 and A05A1959. Blackburn, P. J., and Miller, J., concur.

Footnotes

- 1
  Because the evidence set forth above was sufficient to sustain **Wright**'s convictions on Counts 1-11, we need not resolve whether the State presented sufficient evidence linking the stolen Luger firearm found outside the Star Motel to the robbery and to **Wright**.
- 2

  Johnson's theory at trial was that Smith – who was also a member of the Baby Gangsters – was the third perpetrator, and that his alibi, supported by witnesses at trial, rather than that of Smith's, was more believable.

- 3
  Although unclear, **Wright** also appears to contend that Dean's testimony about the Baby Gangsters was inadmissible because his testimony was not based on his own personal knowledge. However, **Wright** failed to object to the testimony on this ground at trial, and so he waived the right to assert this argument on appeal. *Putman v. State*, 270 Ga. App. 45, 46 (3) (606 SE2d 50) (2004); *Turner v. State*, 241 Ga. App. 431, 435 (4) (526 SE2d 95) (1999). In any event, admission of Dean's testimony on this issue – even if improper because of a lack of personal knowledge – was harmless because it was merely cumulative of Smith's testimony. *Copprue v. State*, 279 Ga. 771, 773 (4) (621 SE2d 457) (2005).