IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Indictment:
V.	*	CR 2000433
	*	
TRAVIS MCMICHAEL	*	
GREG MCMICHAEL	*	
WILLIAM R BRYAN	*	

STATE'S REPSONSE TO
3.2 SECOND SPECIAL DEMURRER TO THE INDICTMENT (COUNT 9)

Defendants Travis McMichael and Greg McMichael filed a Special Demurrer to Count 9, the Criminal Attempt to Commit A Felony (False Imprisonment) count, of Indictment CR-2000433, and Defendant William R Bryan adopted their motion.

Introduction: Summary of the Argument

The defendants assert that Count 9 of the indictment should be quashed because it fails to be perfect in form and substance in that it charges two crimes in one count, making it duplicitous. Defendants are contending that Count 9 alleges both a completed crime and an attempted crime. However, Court 9 is not duplicitous, as it only charges the crime of Criminal Attempt to Commit A Felony (False Imprisonment) under O.C.G.A. §§ 16-4-1 and 16-5-41, and the complained of two crimes are merely the two different ways, presented in the alternative, that the State may prove the element of performing "acts which constitute a substantial step toward the commission of said crime."

Demurrer Overview

A special demurrer merely objects to the form of an indictment and seeks more information or greater specificity about the offense charged. *State v. Wilson*, 318 Ga. App. 88, 91-92 (2012). Most defendants like to cite to the magic words, that "[o]nce a defendant has timely filed a special demurrer, he or she is entitled to an indictment perfect in form and substance. *State v. Corhen*, 306 Ga. App. 495, 498 (2010). However, the use of the word "perfect" is misleading. "In adopting the "perfect" indictment standard from the Court of Appeals, this Court recognized that the ultimate goal in requiring "perfect" indictments is to provide trials free of harmful defects." *Bailey v. State*, 280 Ga. 884, 884-885 (2006).[1] Language describing the "substantial steps" that were taken toward the commission of the crime of False Imprisonment is required in an indictment that alleges criminal attempt and is not a "harmful defect" nor a "material defect."

Defendants are complaining that Count 9 of the indictment is duplicitous because it lists two separate ways that the defendants took substantial steps toward the commission of the crime of False Imprisonment. Count 9 may list both "substantial steps" in one charge of an indictment as long as the State is able to prove at least one of "substantial steps" at trial. See *Kall v. State*, 257 Ga. App. 527, 528 (2002)("It has long been established that a defendant may be accused of methods of committing a crime in the conjunctive…")

At a minimum, all that is required in an indictment is that the charge contain the elements of the offense. *Brown v. State*, 322 Ga. App. 446, 453-454 (2013); *State v. English*, 276 Ga. 343, 346 (2003). This is so that the defendant is sufficiently apprised of what he must be prepared to meet and defend against. Id. See also *Dunn v. State*, 263 Ga. 343 (1993) ("Due process is satisfied where the indictment puts the

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[1] Overturned in part by *Wagner v. State*, 282 Ga. 149, 150-151 (2007)(Holding "to the extent that *Bailey* can be construed to hold that a material defect that is not prejudicial to the defendant does not require the quashing of a defective count of an indictment, it is disapproved").

defendant on notice of the crimes with which he is charged and against which he must defend.") As the Georgia Supreme Court recently stated, "when a court considers whether an indictment is sufficient to withstand a special demurrer, it is useful to remember that a purpose of the indictment is to allow a defendant to prepare his defense intelligently." *Bullard v. State*, 307 Ga. 482, 487 (2019).

The other purpose is to ensure that the record reflects the crime, date, victim and county, so that a defendant may defend against any other proceedings that may constitute double jeopardy. "A special demurrer, with its demand for greater specificity, may be used to address procedural double jeopardy concerns, given that a vague or ambiguous charge, if carried through trial, may not sufficiently inform the defendant of the specific crime of which he was acquitted or convicted." *Williams v. State*, 307 Ga. 778, 782-783 (2020). See also *Green v. State*, 292 Ga. 451, 452 (2013) ("The purpose of an indictment is to inform the accused of the charges against him and to protect the accused against another prosecution for the same offense.").

Thus, a special demurrer is actually a pretrial remedy when a defendant wishes to challenge the form of the indictment and ask for greater specificity or more information about the charges. *Williams v. State*, 307 Ga. 778, 782-783 (2020). See *Kimbrough v. State*, 300 Ga. 878, 880-881 (2017) ("By filing a special demurrer, the accused claims … that the charge is imperfect as to form or that the accused is entitled to more information." (Citation and punctuation omitted)); *State v. Wyatt*, 295 Ga. 257, 260 (2014) (a special demurrer "challenges the specificity of the indictment" and asks if it contains the elements of the offense charged, and adequately informs the defendant of what he must be prepared to meet); *Jones v. State*, 289 Ga. 111, 115 (2011) (A defendant "may file a special demurrer seeking greater specificity or additional information concerning the charges contained in the indictment."); *Falagian v. State*, 300 Ga. App. 187, 192-193 (2009) ("By special demurrer, an accused claims, not that the charge in an indictment is fatally defective

and incapable of supporting a conviction . . . , but rather that the charge is imperfect as to form or that the accused is entitled to more information.").

What is Duplicity?

"Duplicity is the technical fault of uniting two or more offenses in the same count of an indictment, and a duplicitous indictment is subject to demurrer." *Davis v. State*, 285 Ga. App. 460, 462-463 (2007). An example of this would be in *Wagner v. State*, 282 Ga. 149, 150-151 (2007), where the Supreme Court of Georgia determined that the trial court should have quashed a felony murder charge because it included the words "intentionally and with malice aforethought," mixing the elements of malice murder and felony murder, which was a material defect.

Davis v. State, 285 Ga. App. 460, 462-463 (2007) is not really comparable to Count 9 of this indictment. In *Davis*, the indictment charged the defendant with "intent to distribute and have under her control marijuana." Id. The Court of Appeals held that "[t]he test is whether the acts charged by the indictment relate to only one transaction." Id. But the Court went on to say that, "[w]hile it is true that separate and distinct offenses cannot be embraced in one count of an indictment, it is well settled that offenses of the same nature and differing only in degree may be joined in one count of the same indictment." This is not what we have in Court 9 of this indictment.

The defendants cite to *State v. Corhen*, 306 Ga. App. 495, 500-501 (2010), but the Georgia Court of Appeals determined there was no duplicity in the mortgage fraud count of the indictment. "The fact that the count refers to the use of more than one fraudulent document by the defendants does not render the count invalid and subject to demurrer on the basis of duplicity when the count itself charges only one offense." Similarly here, the only crime charged in Court 9 is Criminal Attempt to Commit A Felony (False Imprisonment). The State has not joined separate and distinct offenses in this count.

Defendants Assert that Court 9 Alleges Two Separate Crimes

The defendants assert that the count is duplicitous in that it alleges both a completed crime and an attempted crime, which in turn deprives them of due process "by appearing to charge a separate and distinct crime in a count that already alleges an attempt to detain and confine Arbery by "using" pickup trucks." (Defendant's Motion Page 7). That is simply not the case. Count 9 alleges two separate acts, both of which constitute a substantial step toward false imprisonment, and it does not matter if they are benign actions or completed crimes. *Dennard v. State*, 243 Ga. App. 868, 872 (2000) ("The phrase "inexplicable as a lawful act" does not mean that the act itself must be unlawful. Rather, it means that the act, in light of previous acts, constitutes a substantial step toward the commission of a crime."). Accord *Kohlmeier v. State*, 289 Ga. App. 709, 710 (2008). See also *Flanagan v. State*, 265 Ga. App. 122 (2004) (Holding that defendant may be convicted of criminal attempt to commit burglary, and possession of tools for the commission of a crime, when the underlying substantial step was using a crowbar to pry open a door.)

Recently, in *Daddario v. State*, 307 Ga. 179, 184-185 (2019), the Georgia Supreme Court explained that every crime has an actus reus and a mens rea and cited to OCGA § 16-2-1 (a). The Court went on to note that some crimes are defined in such a way as to require the presence of certain "attendant circumstances." Id. "The most obvious example is murder, which requires that the conduct result in death." Id. In a charge for criminal attempt, the State should lay out the substantial steps it intends to prove at trial, that show the attempt to commit the crime. But most importantly they noted that the elements of a crime are made up of the defendant's conduct, intent, any "attendant circumstances" and any specified result. Id.

As defendants partially outlined, the elements of Criminal Attempt to Commit A Felony[2] (False Imprisonment)[3] include the following and are included in Count 9 of the indictment:

1. A person (the three defendants listed in the indictment)
2. With Intent to commit a specific crime (False Imprisonment)
3. Performs any act (What act or acts were performed?)
4. Which constitutes a substantial step toward the commission of that crime – which in Count 9 is False Imprisonment:
   A. A person (the three defendants listed in the indictment)
   B. In violation of the personal liberty of another (Ahmaud Arbery)
   C. Arrests, confines or detains such person
   D. Without legal authority

Count 9 of the indictment lays all of this out:

> The Grand Jurors, aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse (1)(A) TRAVIS MCMICHAL, GREG MCMICHAEL and WILLIAM R BRYAN, individually and as parties concerned in the commission of a crime, with the offense of CRIMINAL ATTEMPT TO COMMIT A FELONY, O.C.G.A. 16-4-1, for that the said accused person, in the County of Glynn and State of Georgia, on or about the 23rd day of February, 2020, did KNOWINGLY AND INTENTIONALLY ATTEMPT TO COMMIT THE CRIME OF (2) False Imprisonment, in violation of Code section 16-5-41 of the Office Code of Georgia, in that the said accused did perform acts which constitute a substantial step toward the commission of said crime, to wit: said accused did, (B) in violation of the personal liberty of Ahmaud

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[2] O.C.G.A. § 16-4-1("A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime.")

[3] O.C.G.A.§ 16-5-41(a) ("A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.")

> Arbery, (3)(C)(D) unlawfully chase Ahmaud Arbery through the public roadways of the Satilla Shores neighborhood in pickup trucks and (3)(C)(D) did attempt to confine and detain Ahmaud Arbery without legal authority on Burford Drive using a Ford F-150 pickup truck and a Chevy Silverado pickup truck, contrary to the law of said State , the good order, peace and dignity thereof.

The State must inform the defendants of what acts they performed that were "substantial steps" in their attempt to "arrest, confine or detain" Ahmaud Arbery. Here the State has used the conjunctive "and" to place the two methods the defendants used in the indictment as is required by law. See *Cotman v. State*, 342 Ga. App. 569, 580-581 (2017). These consist of:

- "unlawfully chase Ahmaud Arbery through the public roadways of the Satilla Shores neighborhood in pickup trucks"
- "did attempt to confine and detain Ahmaud Arbery without legal authority on Burford Drive using a Ford F-150 pickup truck and a Chevy Silverado pickup truck"

As established by a mass of controlling authority,[4] "when a defendant is charged, as in this case, with the violation of a criminal statute containing disjunctively several ways or methods a crime may be committed, proof of any one of which is sufficient to constitute the crime, the indictment, in order to be good as against a special demurrer, must charge such ways or methods conjunctively if it charges more than one of them." *Cotman v. State*, 342 Ga. App. 569, 580-581 (2017). In other words, a count in an indictment may charge multiple ways or methods that the defendants committed the crime, and the State must use the conjunctive "and," not the disjunctive "or" in the wording of the indictment. Id. That is what the State did in Count 9.

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[4] *Chavers v. State*, 304 Ga. 887, 891 (2019); *Graham v. State*, 337 Ga. App. 193, 197-198, (2016) *Gipson v. State*, 332 Ga. App. 309, 317-318 (2015); *Cash v. State*, 297 Ga. 859, 861-862 (2015).

Pretermitting whether "unlawfully chase Ahmaud Arbery through the public roadways of the Satilla Shores neighborhood in pickup trucks" is a completed crime, or "some other unspecified crime altogether," (Defendant's Motion page 7) it does not matter, as a completed crime can be a substantial step in another crime. Examples include, in a criminal attempt to commit armed robbery charge (where no property was actually taken, thus making it an attempt), theft by taking a car to be used as the get-away car, theft by taking a gun that was then used in the attempted armed robbery, terroristic threats to the victim to open the store door or be killed, and aggravated assault by pointing the handgun at the victim. *Wilson v. State*, 344 Ga. App. 285, 288-289 (2018) (Holding that even when an indictment does not track the criminal attempt statute exactly, it is sufficient for the State to allege that the defendant performed some overt act toward its commission, and when read as a whole, the defendant committed a substantial step toward commission of armed robbery by pointing a gun at the victim and grabbing her person.)

In *Smith v. State*, 303 Ga. 643, 647 (2018), Smith claimed the murder charge was unconstitutionally vague because it alleged that the co-defendants killed Moore by "striking her with a hammer" and "stabbing her with a knife," without specifying which of them used the hammer and which one used the knife. The Georgia Supreme Court found the murder charge was clear enough to be easily understood by the jury and by the co-defendants because it tracked the language of the statute, alleged the essential elements of the offense charged, provided the date, the county of the offense and the identity of the victim. The Court found that because the indictment informed the defendant of the crimes with which he was charged so that he could prepare a defense and safeguard against double jeopardy, it was sufficient to satisfy due process and withstand a special demurrer, even though it listed two different sets of actions taken by the defendants that led to the victim's death.

In addition, these words are not so vague and undefined that it would prevent persons of common intelligence, either the defendant or the jurors, from understanding the conduct alleged: "unlawfully chase Ahmaud Arbery through the

public roadways of the Satilla Shores neighborhood in pickup trucks and did attempt to confine and detain Ahmaud Arbery without legal authority on Burford Drive using a Ford F-150 pickup truck and a Chevy Silverado pickup truck." See *State v. Marshall*, 304 Ga. App. 865, 866-868 (2010) (Holding that the words "indecent acts" are not so vague and undefined that they would prevent persons of common intelligence from recognizing the conduct.)

Thus, the State agrees that the language in Count 9 "is not some benign surplusage, or a colorful and inflammatory injection of commentary." (Defendant's Motion Page 7). The language lays out an actual substantial step toward falsely imprisoning Ahmaud Arbery and does provide due process to the defendants as it puts them on notice of what they must defend against. See *Brown v. State*, 307 Ga. 24 (2019); *Cooper v. State*, 286 Ga. 66 (2009) (Both holding that the indictment sufficiently informed the defendant of the charges so that he was able to put on a defense, there was no danger that he could be prosecuted again for the same offense and defendant did not show that he was surprised by any evidence at trial.)

Jury Charge Request

The State will be asking for the following jury charge in this case. See *Graham v. State*, 337 Ga. App. 193, 197-198 (2016).

> I charge you that where, as here, in Count 9 of the Indictment the State alleges that the Defendants committed a crime in more than one way, the State need not prove that the Defendants committed the crime in each way charged. Rather, it is sufficient if you, the Jury, should find, beyond a reasonable doubt, that the Defendants committed the crime in at least one of the ways alleged.

Count 9 of the Indictment Should Not be Quashed

The State is asking that Count 9 of the indictment not be quashed as it is not duplicitous, it only charges the crime of Criminal Attempt to Commit A Felony

(False Imprisonment) under O.C.G.A. §§ 16-4-1 and 16-5-41, and the complained of "two crimes" is merely the two ways in which the defendants attempted to commit false imprisonment, which easily survives a special demurrer, which is a demand for more information or specificity in an indictment.

However, to be thorough on this issue, the quashing of an indictment merely bars trial on the flawed indictment; it does not bar the State from reindicting the defendant. If this Court grants the defendant's special demurrer as to Count 1 of this indictment, there is nothing that will keep the State from reindicting and trying the defendants. *Chapman v. State*, 318 Ga. App. 514, 516-517 (2012); *Cuzzort v. State*, 307 Ga. App. 52, 56-57 (2010). Accord *Jackson v. State*, 316 Ga. App. 588 (2012); *White v. State*, 312 Ga. App. 421, 429 (2011).

Conclusion

Count 9 of the indictment is clear enough to be easily understood by the jury, and by the co-defendants (See page 4 of Defendant's Motion outlining the law on conjunctive/disjunctive charges), because it tracks the language of the statute and alleges the essential elements of the offense charged. So while the defendants try to make this language, "unlawfully chase Ahmaud Arbery through the public roadways of the Satilla Shores neighborhood in pickup trucks and did attempt to confine and detain Ahmaud Arbery without legal authority on Burford Drive using a Ford F-150 pickup truck and a Chevy Silverado pickup truck" into two separate crimes, in order to claim that they are not on notice as to what they must defend against, this language is plain to any person of common intelligence.

The only crime charged in Court 9 is Criminal Attempt to Commit A Felony (False Imprisonment). The State has not joined separate and distinct offenses in this count. The State has listed two separate and distinct ways in which the defendants took substantial steps toward arresting, detaining and confining Ahmaud Arbery.

Since a demurrer is a demand for more information or specificity in an indictment, the fact that the State alleged two distinct methods of the defendant's

attempts does not mean that Count 9 of the indictment should be quashed. The defendants are on notice as to what they are to defend against and they are protected from double jeopardy as to their attempt to falsely imprison Ahmaud Arbery.

This the 31st day of August, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above Motion via the Odyssey E-File System to:

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This the 31st day of August, 2020.

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