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
3.1 FIRST SPECIAL DEMURRER TO THE INDICTMENT (COUNT 1)

Defendants Travis McMichael and Greg McMichael filed a Special Demurrer to Count 1, the Malice Murder count, of Indictment CR-2000433, and Defendant William R Bryan adopted their motion.

Introduction: Summary of the Argument

The defendants assert that Count 1 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. Court 1 is not duplicitous, as it only charges the crime of malice murder under O.C.G.A. § 16-5-1(a), and the complained of "second crime" is actual descriptive language as to how the defendants committed the crime of Malice Murder, which easily survives a demurrer, as a demurrer is a demand for more information or specificity in an indictment.

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 how the defendants committed the crime of murder in an indictment is not a "harmful defect" nor a "material defect."

Most defendants challenge counts in an indictment claiming that they should be "more definite and certain," meaning the count should contain even more information than alleged, and thus it is imperfect. Here, however, defendants are complaining that Count 1 of the indictment contains too much information as to how the defendants committed the crime of Malice Murder.

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 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

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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").

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 this case. 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 1 of this indictment.

The defendants cite to *State v. Corhen*, 306 Ga. App. 495, 500-501 (2010), but there 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 1 is Malice Murder. The State has not joined separate and distinct offenses in this Count.

<u>Defendants Assert that Court 1 Alleges a Separate Crime from Malice Murder</u>

The defendants assert that the "grand jury alleges, therefore, two acts, one which appears to constitute the requisite proximate cause of Arbery's death – "shooting him with a shotgun" – the other a separate unspecified crime altogether – "Unlawfully chasing him…in pickup trucks." This is not the case, as Count 1 avers that the cause of death of Ahmaud Arbery was, in total, completed, "by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with a shotgun."

The State could have simply said, "shooting him with a shotgun." However, the State provided even more information on the method used by the defendants to cause the death of Ahmaud Arbery. Additional information in an indictment easily

survives a special demurrer, as stated in Footnote 7 of *State v. Wyatt*, 295 Ga. 257, 266 (2014), "The State may of course choose to allege the manner in which the [crime] was committed with greater specificity, and in such cases a special demurrer could be easily denied. See *English*, 276 Ga. at 347 (affirming the denial of a special demurrer where the indictment "detail[ed] how the aggravated battery was accomplished and the specific injuries that were sustained")."

In addition, the words "unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks" is not so vague and undefined that it would prevent persons of common intelligence, either the defendant or the jurors, from understanding the conduct alleged. 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.)

The State agrees that it must prove what is in the indictment beyond a reasonable doubt.[2] This includes proving all the elements under O.C.G.A. § 16-5-1(a), "[a] person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." 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. But most importantly they noted that the elements of a crime are made up of the

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[2] The State does take heed of the warning from Footnote 7 of *State v. Wyatt*, 295 Ga. 257, 266 (2014), that "[t]he State, however, must take care to allege only those details that it is prepared to prove at trial." However, fatal variance issues are the same as demurrer issues. 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.)

defendant's conduct, intent, any "attendant circumstances" and any specified result. Id.

As defendants partially outlined, the elements of malice murder include the following and are included in Count 1 of the indictment:

1. A person (the three defendants listed in the indictment)
2. Unlawfully
3. With malice aforethought
   - Express or
   - Implied
4. **Causes the death (How?)**
5. Of another human being (Ahmaud Arbery)

Count 1 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) TRAVIS MCMICHAL, GREG MCMICHAEL and WILLIAM R BRYAN, individually and as parties concerned in the commission of a crime, with the offense of MALICE MURDER, O.C.G.A. 16-5-1, 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 (2) unlawfully, (3) with malice aforethought, cause the death (5) of Ahmaud Arbery, a human being, **(4) by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with a shotgun**, contrary to the law of said State, the good order, peace and dignity thereof.

The State clearly informed the defendants of how they caused the death of Ahmaud Arbery, and Court 1: "by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with

a shotgun."[3] The defendant's attempt to parse out the use of the word "unlawfully" is a red herring as purported grounds that this portion of Count 1, that informs them of how they murdered Ahmaud Arbery, is a separate crime.

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. This is similar to *Corhen* at 500-501, where there was no duplicity when the count referred to the use of more than one fraudulent document by the defendants.

Count 1 of the Indictment Should Not be Quashed

The State is asking that Count 1 of the indictment not be quashed as it only charges the one crime of Malice Murder under O.C.G.A. § 16-5-1(a). The complained of duplicitous, the "second crime," is actually relevant language as to how the defendants committed the crime of malice murder, which easily survives a special demurrer, which is a demand for more information or specificity in an indictment.

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[3] The State is not going to argue at any point in time that this is a conjunctive/disjunctive issue where the State may prove Malice Murder in two ways. The State understands that it must prove everything alleged in "by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with a shotgun."

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).

In addition, assuming arguendo that the Court is considering quashing Count 1 of the indictment, either determining that the State erroneously alleged a second crime in Count 1 or determining that the complained of language is surplusage, the Court may simply strike out the complained of portion of Count 1. "Mere surplusage does not amount to duplicity; and where a count charges one offense, and defectively charges another, the latter charge may be rejected as surplusage." *Outz v. State*, 154 Ga. 542, 543 (1922). When language is not essential to charge an offense, when it is mere surplusage, it may be omitted without affecting the validity of the individual charges. *State v. Corhen*, 306 Ga. App. 495, 499-500 (2010).[4]

Conclusion

Count 1 of the indictment is clear enough to be easily understood by the jury and by the co-defendants because it tracks the language of the statute and alleges the essential elements of the offense charged. While defendants try to make this language, "by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks" an additional "unspecified" crime of which they have no notice, this language, in conjunction with "shooting him with a shotgun," is relevant language, putting the defendants on notice, as to how the defendants committed the crime of Malice Murder.

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[4] See also *Langlands v. State*, 282 Ga. 103, 106 (2007); *Striplin v. State*, 284 Ga. App. 92, 95 (2007); *Wagner v. State*, 282 Ga. 149, 150-151 (2007); *Green v. State*, 292 Ga. 451, 452 (2013); *Newham v. State*, 35 Ga. App. 391 (1926).

The only crime charged in Court 1 is Malice Murder. The State has not joined separate and distinct offenses in this count. Since a demurrer is a demand for more information or specificity in an indictment, the fact that the State provided more information about how the defendants committed Malice Murder, means Count 1 of the indictment should not be quashed. The defendants are on notice as to what they are to defend against and they are protected from double jeopardy as to the murder of 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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