

Russell M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

V.

GREG MCMICHAEL
TRAVIS MCMICHAEL
WILLIAM R. BRYAN

*
* Indictment:
* CR 2000433
*
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*

STATE'S REQUEST TO CHARGE

Comes now the State of Georgia, by and through Assistant District Attorney Pro Tempore Linda Dunikoski and requests the Court to charge the jury as set forth in the Requests to Charge attached hereto and numbered 1 through 79.

Each of said numbered Requests to Charge is a separate request to charge and wholly independent of the remaining requests. The State does, therefore, request that the Court instruct the jury on each request individually.

Those listed in **BOLD** below are also attached, as they have been modified to conform to the specific facts of this case.

Respectfully submitted this 7th day of July, 2021.

/S/ Linda J. Dunikoski
Linda J. Dunikoski
State Bar # 233887
Senior Assistant District Attorney
District Attorney Pro Tempore
Cobb Judicial Circuit

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 State's Request to Charge via the Odyssey E-File System to:

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This the 7th day of July, 2021.

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State's Request to Charge 23

SPECIAL STATE CHARGE: Bruton Charge

Members of the jury, this Court is responsible for determining the admissibility of certain evidence. Sometimes, audio and/or video recordings cannot be played for you for legal reasons. You are not to make any inferences for or against either party in the case about the fact that the law does not allow the playing of certain recordings by the parties in this case.

State's Request to Charge 26

1.34.20 Prior Difficulties Between Parties (Witness) (or lack thereof)

Modified for this case:

Evidence of prior difficulties or lack thereof between the defendant and the alleged victim has been admitted for the sole purpose of illustrating, if it does, the state of feeling between the defendant and the alleged victim, and the reasonableness of any alleged fears by defendant or alleged victim.

Whether this evidence, or lack thereof, illustrates such matters is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

1.35.20 Fingerprints

Modified for this case:

Certain evidence of fingerprint comparison has been admitted by the court for your possible consideration.

Identification by fingerprint comparison is opinion evidence and is dependent upon the credibility (or believability) and accuracy of the expert witness(es) called for that purpose as well as the following factors:

- 1) the validity of the theory of identification by fingerprint comparison,
- 2) the credibility of the witness who performs other necessary functions in making the comparison such as inked finger impressions and latent lifts, and
- 3) the accuracy of procedures in identifying, preserving, recording, and maintaining integrity of the physical evidence, all of which are questions for the jury.

Fingerprint evidence is also governed by the rules on circumstantial evidence.

If you believe that fingerprints corresponding to those of THE VICTIM were found and identified, their evidentiary value, if any, would be diminished to the extent that they could reasonably have been left on the article(s) alleged at a time or under circumstances that would be consistent with THE INNOCENCE OF THE DEFENDANTS.

A verdict of guilty may not rest upon fingerprint identification alone, unless you are satisfied beyond a reasonable doubt that fingerprints left by THE VICTIM were in fact found and that they could only have been impressed by THE VICTIM ON THE PICK-UP TRUCK OF DEFENDANT BRYAN at the time of the commission of the crime and that such identification under all of the facts and circumstances of the case is sufficient to satisfy your mind of the guilt of the accused to the exclusion of any other reasonable theory and beyond a reasonable doubt.

State's Request to Charge 37

2.02.10 Conspiracy; Offense of; Definition

Modified for this case:

A person commits conspiracy to commit a crime when that person, together with one or more other persons, conspires to commit any crime and any one or more of such persons does any overt act to bring about the object of the conspiracy.

Aggravated Assault, False Imprisonment and Criminal Attempt to Commit False Imprisonment are defined later in this charge.

State's Request to Charge 42

2.10.20 Felony Murder; Defined

Modified for this case:

A person also commits the crime of murder when, in the commission of a felony, that person causes the death of another human being. Under the laws of Georgia,

Aggravated Assault, Fales Imprisonment and Criminal Attempt to Commit False Imprisonment

are all felonies and are all defined later in this charge.

State's Request to Charge 43

2.10.30 Murder; Felony, during Commission of

Modified for this case:

If you find and believe beyond a reasonable doubt that the defendants committed the homicide alleged in this bill of indictment at the time the defendants were engaged in the commission of the felony of Aggravated Assault or Fales Imprisonment or Criminal Attempt to Commit False Imprisonment, then you would be authorized to find the defendants guilty of murder, whether the homicide was intended or not.

Aggravated Assault, Fales Imprisonment and Criminal Attempt to Commit False Imprisonment are defined later in this charge. In order for a homicide to have been done in the commission of any one of these particular felonies, there must be some connection between the felony and the homicide.

The homicide must have been done in carrying out the unlawful act and not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed.

There must be such a legal relationship between the homicide and the felony so as to cause you to find that the homicide occurred before the felony was at an end or before any attempt to avoid conviction or arrest for the felony.

The felony must have a legal relationship to the homicide, be at least concurrent with it in part, and be a part of it in an actual and material sense. A homicide is committed in the carrying out of a felony when it is committed by the accused while engaged in the performance of any act required for the full execution of the felony.

State's Request to Charge 44

2.20.21 Assault, Aggravated (Weapon); Statutory; Extended Definition

Modified for this case:

A person commits the offense of aggravated assault when that person assaults another person with a deadly weapon or with any object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury.

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant attempted to cause a violent injury to the alleged victim or intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury.

As to Count 6 of the indictment, the State must prove as a material element of aggravated assault, as alleged in this case, that the assault was made with a deadly weapon.

As to Count 7 of the indictment, the State must prove as a material element of aggravated assault, as alleged in this case, that the assault was made with an object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury.

State's Request to Charge 46

2.20.23 Aggravated Assault; Deadly Weapon; Other Weapons

Modified for this case:

A pick-up truck, if and when used in making an assault upon another person, is not a deadly weapon per se but may or may not be a deadly weapon depending upon the manner in which it is used and the circumstances of the case.

You may or may not infer the serious injury-producing character of the instrument in question from the nature and extent of the injury, if any, inflicted upon the person allegedly attacked.

Whether or not, under all of the facts and circumstances of this case, a pick-up truck, alleged in this bill of indictment to have been used in making an assault upon the alleged victim did, in fact, constitute a weapon likely to cause serious bodily injury is a matter to be decided by the jury from the evidence in this case.

State's Request to Charge 48

§ 2.26.10 False Imprisonment (There is no pattern charge – this is the statute)

O.C.G.A. § 16-5-41

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.

State's Request to Charge 49

2.01.10 Attempt; Statutory Definition

Modified for this case:

A person commits criminal attempt to commit False Imprisonment when, with intent to commit False Imprisonment , that person performs any act that constitutes a substantial step toward the commission of the crime of False Imprisonment, which has been previously defined for you.

State's Request to Charge 50

§ 1.40.15 Multiple Ways of Committing a Crime (This is the pattern)

When a count of an indictment charges that the Defendant committed a crime in more than one way, you may convict him/her if the evidence shows that the crime was committed in any one of the ways charged.

ADDITIONAL SPECIAL STATE CHARGE: Conjunctive/Disjunctive

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.

See *Graham v. State*, 337 Ga. App. 193, 197-198 (2016).

State's Request to Charge 52

§ 3.01.10 JUSTIFICATION; GENERALLY

Modified for this case:

The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed

- a) when the person's conduct is justified as the use of force in defense of self, or
- d) when the person's conduct is reasonable and is performed in the course of making a lawful arrest

O.C.G.A. § 16-3-20

State's Request to Charge 53

SPECIAL STATE CHARGE: § 17-4-60. Grounds for arrest (This is the statute.)

A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

SPECIAL STATE CHARGE: § 17-4-60. Terms are synonymous

The terms, in his presence and within his immediate knowledge are synonymous in a crime committed in one's presence, only if, by the exercise of any of his senses, he has knowledge of its commission, or by the accused admitting that such a crime is being, or has been committed. A private person may not act on hearsay or information furnished him by other persons.

Dinnan v. State, 173 Ga. App. 191, 194 (1984).

Johnson v. Jackson, 140 Ga. App. 252, 257 (1976).

Forehand v. State, 130 Ga. App. 801, 802 (1974) (Reliable informant case: Holding that 'in his presence,' and the words 'within his immediate knowledge' are synonymous. "To justify the arrest without warrant, the officer need not see the act which constitutes the crime take place, if by any of his senses he has personal knowledge of its commission." "What the officer sees must be what he sees before the arrest and not afterward.")

Young v. State, 238 Ga. 548, 549 (1977) ("While the actual shoplifting was not done in the sight of the manager, appellant's admission, together with other evidence of the shoplifting known by the manager at the store, were sufficient to bring the offense within the immediate knowledge of the manager and authorize him to arrest appellant without a warrant. The terms "in the presence of" and "within his immediate knowledge" have been held to be synonymous").

Winn-Dixie Stores v. Nichols, 205 Ga. App. 308, 310-311 (1992) ("We agree with appellant that as a matter of law it owed appellee no duty to confront or arrest the couple she was accusing of stealing her wallet. The alleged crime was not committed in the presence or within the immediate knowledge of Arrowood or any other employee of appellant, and thus Arrowood and other employees of appellant were not legally authorized to arrest the alleged criminals. O.C.G.A. § 17-4-60. Indeed, the only person who could have effected a citizen's arrest was appellee herself because she was the only person who "by the exercise of any of [her] senses . . . ha[d] knowledge of [the crime's] commission. [Cit.]" *Johnson v. Jackson*, 140 Ga. App. 252, 257 (230 S.E.2d 756) (1976). Nothing in O.C.G.A. § 51-7-60 suggests that a merchant is authorized to detain or arrest persons accused by business patrons of committing crimes against the patrons, since that statute expressly involves only the limited right of a merchant to detain or arrest a person reasonably believed to have committed the offense of shoplifting as defined in O.C.G.A. § 16-8-14.")

State's Request to Charge 55

SPECIAL STATE CHARGE: § 17-4-60. Must make the arrest contemporaneously.

A private citizen's warrantless arrest must occur immediately after the perpetration of the offense. If the observer fails to make the arrest immediately after the commission of the offense his power to do so is extinguished, and a subsequent arrest is illegal.

McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16, 17 (1971)

State's Request to Charge 56

SPECIAL STATE CHARGE: § 17-4-60. Probable Cause is not Enough

The existence of probable cause standing alone is not a complete defense in a false imprisonment case because, even if probable cause to believe a crime has been committed exists, a warrantless arrest would still be illegal unless it was accomplished pursuant to one of the "exigent circumstances" applicable to private persons, which include the fact that the crime committed was a felony and that the felony offender is escaping or attempting to escape.

Arbee v. Collins, 219 Ga. App. 63, 66 (1995).

State's Request to Charge 57

SPECIAL STATE CHARGE: § 17-4-60. May not arrest on suspicion alone

There is no authority in Georgia under which a citizen may be arrested without a warrant and held for investigation to determine if he has committed some crime merely because the person making the arrest has a suspicion that the person arrested may have committed some then unknown crime.

Raif v. State, 109 Ga. App. 354, 358 (1964) (conviction reversed where defendant was arrested for walking near a shopping mall as a suspicious character (illegal arrest), and hours later it was discovered that a store in the mall had been burglarized)

Forehand v. State, 130 Ga. App. 801, 802 (1974) (Holding that 'in his presence,' and the words 'within his immediate knowledge' are synonymous. "To justify the arrest without warrant, the officer need not see the act which constitutes the crime take place, if by any of his senses he has personal knowledge of its commission." "What the officer sees must be what he sees before the arrest and not afterward." Finding illegal the detention and subsequent arrest of a defendant solely based on a reliable informant telling the officer that the defendant was engaged in the business of burglary, but the informant knew of no particular burglary and the officers did not see or know of any particular crime the defendant had committed.)

Smith v. State, 314 Ga. App. 583, 585 (2012) (Affirming a conviction for false imprisonment, "Significantly, Smith testified that he was not present when the money was allegedly taken. His suggestion that the victim had committed the theft was based upon mere speculation. Smith's claim that he wanted "to question" the victim reflected that he was uncertain and did not have immediate knowledge that the victim had been the perpetrator of the alleged theft, as required for a lawful citizen's arrest.")

§ 3.16.40 ARREST; RIGHT TO RESIST UNLAWFUL FORCE IN MAKING LEGAL ARREST

Modified for this case:

A citizen is authorized to use in making a lawful arrest only that degree of force that is reasonably necessary to accomplish the arrest. The mere fact that a lawful arrest is being made does not give the citizen the right to use excessive force or an unlawful degree of force upon the person being arrested.

A person being arrested, even though the arrest itself is lawful, has the right to resist the use of excessive and unlawful force by those making the arrest to the extent that the person reasonably believes that the degree of resistance used is necessary to defend against the citizen's use of unlawful or excessive force. In resisting, the person being arrested would not be authorized to use force that is unlawful or disproportionate to the amount of force necessary to prevent the unlawful force being used against the person.

Support for changing this from an officer to a citizen:

Hayes v. State, 261 Ga. 439 (1991) (For a citizen's arrest to be valid, the citizen must use no more force than is reasonable under the circumstances. Deadly force in effecting an arrest is limited to self-defense or to a situation in which it is necessary to prevent a forcible felony.)

Prayor v. State, 214 Ga. App. 132, 133 (1994) (“[T]he law in Georgia forbids a person from using more force than is reasonable under the circumstances to make a citizen's arrest and deadly force in making the arrest is limited to self-defense or to a situation where it is necessary to prevent a forcible felony. See OGCA § 17-4-20; 17-4-60.”);

See also *Prayor v. State*, 217 Ga. App. 56, 57 (1995);

Patel v. State, 279 Ga. 750, 754 (2005) (Holding that although a private person may make a citizen's arrest under OCGA § 17-4-60, only force that is reasonable under the circumstances may be used to restrain the individual arrested and the use of unreasonable force is not a part of a legitimate citizen's arrest.).

State's Request to Charge 60

§ 2.68.32. CRIMINAL TRESPASS; ENTERING OR REMAINING

Modified for this case:

A person commits the offense of criminal trespass when that person knowingly and without authority

a) enters upon the land or premises of another person of another person for an unlawful purpose;

b) enters upon the land or premises of another person after receiving, prior to entry, notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that entry is forbidden; or

c) remains upon the land or premises of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart.

O.C.G.A. § 16-7-21(b)

State's Request to Charge 61

SPECIAL STATE CHARGE: Duty owed to trespasser

There is a duty owed by a landowner (or his agent) to not willfully or intentionally injure a trespasser.

Johnson v. Jackson, 140 Ga. App. 252, 256 (1976).

Mansfield v. Colwell Constr. Co., 242 Ga. App. 669, 671-672 (2000)

(“The duty owed to a trespasser is to avoid wilfully or wantonly injuring him. *Atlantic Steel Co. v. Cleaton*, 52 Ga. App. 502, 506 (183 S.E. 827) (1936) (physical precedent only). Even when a property owner knows that it is customary for trespassers to come upon the premises, the duty owed is merely "to refrain from wilfully and wantonly injuring him once his presence [is] known; and no duty of anticipating the decedent's presence [is] imposed. [Cit.]" *Barber v. Steele*, 133 Ga. App. 290, 292 (1) (211 S.E.2d 133) (1974)").

State's Request to Charge 62

§ 2.62.11. BURGLARY IN THE FIRST DEGREE (INTENT TO COMMIT A THEFT)

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

Modified for this case:

A person commits the offense of burglary in the first degree when without authority and with the intent to commit a theft therein that person enters or remains within the dwelling of another. For purpose of this law, a dwelling includes any house, building, or structure which is designed or intended for occupancy for residential use. It makes no difference whether the building or structure was occupied, unoccupied, or vacant; however, you may consider occupation status in determining whether or not the structure in question was designed or intended for residential use.

State's Request to Charge 63

§ 2.62.31. BURGLARY (ENTRY--AMPLIFIED)

Modified for this case:

To constitute the offense of burglary, it is not necessary that it be shown that a break-in occurred. To constitute "entry," the evidence need only show a "breaking of the plane" of the structure alleged by the offender or by any part of his body or by any instrument controlled by him.

State's Request to Charge 64

§ 2.62.13. BURGLARY (INTENT TO STEAL--AMPLIFIED)

(Give subsections below as facts may dictate.)

Modified for this case:

The evidence need not show that an actual theft was accomplished; however, an intent to commit a theft, that is, an intent to steal, is an essential element of burglary.

You may infer an intent to steal where the evidence shows an unlawful entry without authority into the place of another where items of some value are present or kept inside and where there is no other apparent motive for the entry. Whether or not you make such inference is a matter solely for you, the jury, to determine.

3.14.10 Justification; Use of Force in Defense of Property

Modified for this case:

A person is justified in threatening or using force against another person when, and to the extent that, the person reasonably believes that such threat or force is necessary to prevent or terminate the other's trespass onto property or land that

- a) is lawfully in the person's possession,
- b) is lawfully in the possession of a member of the person's immediate family, or
- c) belongs to another person whom the person had a legal duty to protect.

The use of force that is intended or likely to cause death or great bodily harm in order to prevent a trespass is not justified unless the person using such force reasonably believes that such force is necessary to prevent the commission of a forcible felony.

Burglary, theft and trespass are not forcible felonies.