

Ronald M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA :
 :
v. : INDICTMENT NO.
 : CR-2000433
TRAVIS MCMICHAEL :
 :
GREGORY MCMICHAEL, :
 :
Defendants. :

5.7
MOTION TO ELIMINATE THE "ALL DOUBT" AND
"MATHEMATICAL CERTAINTY" SENTENCE FROM
THE JURY CHARGE ON REASONABLE DOUBT

Defendants, GREGORY MCMICHAEL and TRAVIS MCMICHAEL, through counsel, move this court to eliminate the "all doubt" and "mathematical certainty" sentence from the jury charge on reasonable doubt prescribed by the Council of Superior Court Judges in the Criminal Pattern Jury Charges. In support of this Motion, Defendants show this Court the following:

Introduction

The Georgia Suggested Pattern Jury Instructions, Volume II: Criminal Cases (2013), contains a suggested charge regarding reasonable doubt, to be used in a preliminary charge (0.01.00) or in the final charge (1.20.10). It reads as follows, in pertinent part (with the part to be challenged in this motion printed in bold italics):

This defendant is presumed to be innocent until he/she is proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his/her favor, and this presumption remains with the defendant until it is overcome by the State with evidence that is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the crime or crimes charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt. The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime(s) charged beyond a reasonable doubt. *However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty.*

A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror honestly seeking the truth. It is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but it is a doubt for which a reason can be given arising from a consideration of the evidence or lack of evidence, a conflict in the evidence, or any combination of these. There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to prove his innocence.

If, after giving consideration to all of the facts and circumstances of this case, your minds are wavering, unsettled, or unsatisfied, then that is a doubt of the law, and you should acquit the defendant. But if no doubt exists in your minds about the guilt of the accused, then you will be authorized to convict the defendant. If the State fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

The focus of this motion concerns the sentence "However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty." Given the placement of this sentence in the charge, it is misleading and confusing. In addition, it is simply wrong.

This sentence suffers from two serious flaws: First, it contains an ambiguity created by its syntax. The fallacy of ambiguity it creates is known as “amphiboly.” This ambiguity diminishes the State’s burden of proof and, therefore, should not be conveyed to the jury. Second, in addition to the ambiguity, the sentence also trades on a notion of “mathematical certainty” that misleads the jury and also diminishes the State’s burden of proof and is simply an incorrect notion in this context. In what follows, Defendants address both flaws.

I. Ambiguity in the Charge Diminishes the State’s Burden of Proof

After establishing that the burden of proof rests upon the State to prove every material allegation and each element of each crime charged beyond a reasonable doubt, but before attempting to define reasonable doubt, the charge begins the sentence under attack with the word “however.” “However” is a conjunctive adverb, which means it joins two phrases or clauses and, in this instance, modifies them by drawing a contrast between them. In its use in the paragraph above, “however” joins and contrasts the previous description of the State’s burden to prove its case “beyond a reasonable doubt” with the limitation expressed in the sentence that begins with the contrastive “however;” namely the limitation that the State’s burden does not extend to “all doubt.” The sentence beginning with “however,” therefore, first sets out the State’s

burden—beyond a reasonable doubt—then limits it by saying, but not “beyond all doubt.”

The sentence under scrutiny here creates the ambiguity of amphiboly because the only doubt under discussion to this point in the charge is “reasonable doubt.” Thus, the phrase “all doubt” intimates by its placement after “however” that it means “all reasonable doubt,” the only doubt that’s been mentioned so far in the charge. The contrast that appears to be drawn, therefore, is that while the State’s burden is to prove its case “beyond a reasonable doubt,” its burden does not extend to proof beyond “all reasonable doubt.” The later mention of “vague or arbitrary doubt” does nothing to modify the phrase “all doubt” in the earlier paragraph. “Vague or arbitrary doubt” contrasts with “reasonable doubt,” not the phrase “all doubt.”

Thus, this ambiguous phrase diminishes the State’s burden of proof, since its burden is precisely that it must prove its case beyond each and every—“all”—reasonable doubt. No juror should be left with the incorrect notion that he or she may still convict the defendant even if he or she possesses a reasonable doubt, even if only one and even if not as weighty, perhaps, as others that have been eliminated. A single reasonable doubt is sufficient to require that the jury acquit the defendant. Thus, given the placement of this sentence in the charge, a reasonable juror hearing it could take it, incorrectly, to

mean that while the State's burden is to prove the accused's guilt beyond a reasonable doubt, that does not extend to all reasonable doubts.

II. The Notion of "Mathematical Certainty" Further Diminishes the State's Burden of Proof

After joining "reasonable doubt" and "all doubt" with the conjunctive adverb "however," thereby creating a misleading amphiboly, the same sentence adds a disjunctive phrase—"or to a mathematical certainty"—in a further attempt to draw a limit to "reasonable doubt" and the State's burden of proof. The contrast here is between "reasonable doubt," on the one hand, and "mathematical certainty," on the other. "Reasonable doubt" has not yet been defined—that purports to occur in the next paragraph of the charge—but the charge now merely assumes that "mathematical certainty" is a clear notion that every juror will immediately understand to refer to a level of certainty beyond what the State is required to prove. There are two problems with this assumption.

A. "Mathematical certainty" is not greater than any other kind of certainty.

We are left to speculate, since the phrase is nowhere defined, that the meaning of "mathematical certainty" encompasses indubitable propositions of mathematics, such as "two plus two equals four" and the like. The reason nobody doubts this mathematical proposition is because we have all learned how to use the terms "two," "plus," "equals," and "four" properly. Yet, I am no

less certain, for example, that I am sitting in my office typing these words on my computer right now (as I type these words, not as you read them) than I am that “two plus two equals four.” Indeed, most of the beliefs we hold at any given time are as indubitable as any mathematical proposition. That is because both—the belief that I am typing these words right now and that two plus two equals four—are propositions that turn on our having learned the proper use of the terms within them. I know what “I” “am” “typing” “now” means and how to use these words no less than I know the terms “two,” “plus,” “equals,” and “four” and how to use them. My level of certainty about both propositions is the same. I could no more have a “reasonable doubt” about the fact that I am typing these words on my computer in my office right now than I could that “two plus two equals four.” Doubting either proposition—one about the world and one about mathematics—would be equally unreasonable.

B. “Beyond a reasonable doubt” should rest upon the very kind of certainty that we have about mathematical and other indubitable propositions.

I can no more have a reasonable doubt about “two plus two equals four” than I can about the proposition that I am sitting at my computer typing these words right now. To doubt either of these propositions would require that I become a philosopher of the skeptical sort, the kind of philosopher that Rene Descartes answered in his famous “*cogito ergo sum*” (“I think, therefore, I am”) in the seventeenth century, the sort of skeptic who no longer exists, even among

philosophers. Descartes thought that he could find the foundation upon which all certainty could be built by taking the skeptic's assertion that nothing could be known and pressing it to its extreme, all the way to doubting whether he himself even existed (whether, that is, that he—Descartes—was merely dreaming that he existed). Descartes's "*cogito*," therefore, represents the conclusion he reached that if he was to doubt everything that could be doubted, even his own existence, there still remained an "I" who was doing the doubting. Thus, the very act of doubting, Descartes believed, refuted the doubt itself, since the person must exist to be doing the doubting about his very existence. This became the foundation upon which Descartes built his epistemology and, for a long time, became the foundation of modern philosophy and its efforts to provide a secure mooring for the growth of science, which was just coming into its own in Descartes's day.¹ The notion in our law that "mathematical certainty" is a mental state occupying a vaulted position above any other kind of certainty is an unfortunate hangover from Descartes' day. As often happens, the law holds on to notions from philosophy, science, and culture way beyond their shelf life within those other contexts. The law is sometimes slow to change, especially when it concerns notions that seem to have stood the test of time, whether they still make sense or not.

¹ It need not concern us for purposes of this motion that Descartes's foundationalism in epistemology itself

But having no reasonable doubt about a defendant’s guilt should carry with it exactly the sort of certainty that we hold about mathematical propositions, and most other propositions we carry with us every day. The idea that we have no reason to doubt that “two plus two equals four” does not describe a level of certainty that is greater than that certainty we should have about a defendant’s guilt based upon the evidence produced by the State at a trial. It is precisely what it should mean to have no reasonable doubt about the guilt of the accused—no less than one would doubt a mathematical proposition. To say otherwise, as this charge does, is to diminish, once again, the State’s burden of proof.²

Conclusion

For these reasons, we move this Court to remove from the Pattern Jury Instruction the inaccurate, misleading, and defunct sentence that reads, “However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty.”

Dated this 1st day of September, 2021.

*** Signatures on following page ***

² While the Supreme Court of Georgia addressed a similar objection to the pattern charge on reasonable doubt in *Rowland v. State*, 306 Ga. 59, 829 S.E.2d 81 (2019), and refused to reverse the defendant's conviction on such ground, the Rowland Court found that the court's charge "as a whole" at trial properly informed the jury of the State's burden of proof and the meaning of reasonable doubt. Thus, the ruling was limited to the facts of the case, given all of the instructions that particular jury heard.

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Certificate of Service

I hereby certify by my signature that I have served a copy of 5.7: Motion to Eliminate the "All Doubt" and "Mathematical Certainty" Sentence from the Jury Charge on Reasonable Doubt on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it to District Attorney, Flynn D. Broady, Jr., by emailing it to:

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This 1st day of September 2021.

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