

Ronald M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

TRAVIS MCMICHAEL,
GREG MCMICHAEL, and
WILLIAM R BRYAN,

Defendants.

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Case No. CR2000433

ORDER ADDRESSING EXTRA-JUDICIAL STATEMENTS

On September 3, 2021, the State of Georgia filed a Motion for an Order Restricting Extrajudicial Statements which seeks to prevent counsel for each party from making extrajudicial statements to the media that would have a substantial likelihood of materially prejudicing the trial. Defendants Travis McMichael and Greg McMichael (the "Defendants") filed a joint response to the motion on September 30, 2021. The State filed a supplemental motion and response on October 1, 2021, and a Brief by Media Intervenors in Opposition to the State's Motion was filed on October 4, 2021.¹ Having read and considered the motion, the Defendants' Response,² the State's supplemental brief, the Brief by Media Intervenors, evidence of the record and applicable law, the Court finds as follows:

FINDINGS OF FACT

The above captioned matter arises from the death of Ahmaud Arbery on February 23, 2020. The investigation involving his death and the subsequent arrests of Travis McMichael, Greg McMichael and William Bryan evoked public concern and outcry and generated extensive media coverage and publicity in Glynn County, Southeast Georgia,

¹ The Atlanta Journal-Constitution, Action News Jax, WSB-TV and WSB Radio filed the Brief by Media Intervenors in Opposition to 4.69 State's Motion for an Order Restricting Extrajudicial Statements.

² Defendant William R. Bryan did not file a response to the State's motion.

the State of Georgia, and nationwide. This case still has motions before this Court and a trial is scheduled with jury selection to begin on October 18, 2021.

The District Attorney Pro Tempore filed a Motion for an Order Restricting Extrajudicial Statements in which it moved the Court to impose a gag order on both the attorneys for the Defendants and the Assistant District Attorneys Pro Tempore for the State. Specifically, the State requests the restriction include: (1) the making of any statements, commentary or arguments about the facts or evidence involved in the case; (2) the making of any statements or commentary about the judicial proceedings that previously took place inside the Courtroom, or will take place in the future; (3) the making of statements or commentary about the rulings and orders of this Court; and (4) the release of any information concerning the case to any individual or entity, including but not limited to radio, television or newspaper reporters, in any form or medium, including interviews or written statements.

In support of its motion, the State attached an article published in The Atlanta Journal-Constitution, dated September 1, 2021, in which a defense attorney is quoted commenting on this Court's ruling on the Defendants' Motion for Other Act Evidence: "Why the judge would now decide that all of [Ahmaud Arbery's] prior motives, his intent, his plan to do these things is not relevant in this case is baffling." He went on to say: "Now [the jurors] will be denied the truth." The State argues that these statements "blatantly [ask] the public to call into question the integrity of the justice system, the rules of evidence and this Court's rulings on the admission of evidence."³ The State also claims that there has been extensive reporting about the facts of the case and comments on the evidence, and that counsel for the Defendants have provided scripted interviews for podcasts, live interviews after each court hearing and statements for newspaper articles. Based on these comments and actions, the State seeks a gag order.

Counsel for the McMichaels have responded arguing, *inter alia*, the State's Motion should be denied because almost all of the media coverage has been slanted in ways

³ State's Motion for an Order Restricting Extrajudicial Statements, p. 3, filed on September 3, 2021.

consistent with the State's position, and that counsel for the Defendants are allowed under Rule 3.6(c) of the State Bar Handbook of Georgia to mitigate adverse publicity.⁴

Additionally, four news organizations filed a joint motion to intervene. They argue the State's Motion is without merit and should be denied because the State has failed to offer any evidentiary basis to support the request for a gag order and because the State's request is overly broad.

ANALYSIS AND OPINION

"Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." To guarantee a defendant's Sixth Amendment right to a fair trial, the Supreme Court has placed "an affirmative duty on trial court's to guard against prejudicial pretrial publicity." [Citations omitted]. Atlanta Journal-Constitution et.al. v. State, 266 Ga. App. 168, 169, 596 S.E.2d 694, 696 (2004). "There can be no question that a criminal defendant's right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps." [Citation omitted]. United States v. Brown, 218 F.3d 415, 424 (5th Cir. 2000).

Under the Georgia Rules of Professional Conduct, "a lawyer who is or has been a participant in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Bar Rule 4-102; Georgia Rules of Professional Conduct, Rule 3.6(a).⁵

⁴ The Defendants' position is that the sources of information for the coverage has been almost exclusively legal representatives of the family of the victim, the victim's family members, and commentators in the media.

⁵ There are certain subjects that are likely to have a material prejudicial effect on a proceeding, particularly when they refer to any proceeding that could result in incarceration. These subjects include the character, credibility, reputation or criminal record of a party or witness, or the identity of a witness, or the expected testimony of a party or witness; the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; and, information that the lawyer knows or reasonably should know is likely to be inadmissible

Notwithstanding the general prohibition, lawyers may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Bar Rule 4-102; Georgia Rules of Professional Conduct, Rule 3.6(c). However, any comment made for this purpose "shall be limited to such information as is necessary to mitigate the recent adverse publicity." Id.

The Court finds that counsel for the Defendants have provided numerous interviews to television stations and podcast programs, as well as live interviews after each court hearing. The Court also finds that Defense counsel have provided numerous statements for newspaper articles, including statements which detailed evidence that has been ruled inadmissible or which is under consideration by this Court. The Court, however, notes that the State, and other actors, have also provided various news and media outlets with information and commentary about what they think the evidence in this case may show at trial. The Court has even noted during proceedings its concern that certain arguments made by the parties are intended for "other audiences".

The question then becomes whether any extrajudicial statements have been made that "will have a substantial likelihood of materially prejudicing the trial."⁶ The Court finds that, at a minimum, extrajudicial statements already made which suggest certain rulings on the admission of evidence are "baffling" and that "the [jury] will be denied the truth" are highly prejudicial. However, it is hard to look at that those statements in a vacuum. The Court must take into consideration all of the statements made by both the State and defense counsel. Given the nature of this case, the community, and all of the publicity

as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial. See Official Comment 5A to Bar Rule 4-102; Georgia Rules of Professional Conduct, Rule 3.6.

⁶ The Court notes that the Supreme Court of Georgia has not decided definitely whether the standard of "substantial likelihood of material prejudice" established in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791 (1976), or the standard of "reasonable likelihood of prejudice" set forth in Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720 (1991), applies in cases like this one. However, this Court has considered the State's request for an order using the "substantial likelihood of material prejudice" standard in accordance with the Supreme Court of Georgia's comment found in footnote 10 in WXIA-TV v. State, 303 Ga. 428, 439, 811 S.E.2d 378, 387 (2018). ("... Because we need not definitely decide upon the proper standard of review, we decline the invitation... In light of this uncertainty, ... we think that a prudent trial judge would at least consider the standard described in Nebraska Press before issuing a gag order.")

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the case has and will receive, counsel's statement is a clear indicator that the Court must take action to deter potential prejudice.

The Court has considered the concerns of prejudicial pretrial and trial publicity, the trial judge's responsibility to control court proceedings and the trial court's duty to protect the Defendant's constitution rights to a fair trial, as well as the public's right and interest in the court proceedings. In the near future, the Court will announce rulings on other pending motions, and a jury panel will be summoned to hear this matter. As soon as these steps are taken, the levels of interest in the media reports will intensify. Additionally, the Court finds that it is likely that there will continue to be inquiries made by media representatives and that comments made by the attorneys are likely to be widely disseminated. Extrajudicial statements publicly criticizing evidentiary rulings, claiming that such rulings will deny the jury the truth, and commenting on evidence that this Court has deemed inadmissible causes this Court grave concern. Therefore, based upon the particular facts of this case, and the extrajudicial statements made by counsel, it is apparent to this Court that without some restraint on the attorneys, there is a substantial likelihood that the Defendants may be denied a fair trial.

THEREFORE, THIS COURT ORDERS AND DIRECTS that during pendency of this case and until final determination in the trial court, the Assistant District Attorneys Pro Tempore for the State and all lawyers representing the Defendants, shall not release, make or authorize the release of any out-of-court opinion on, or related to: (1) evidence that has been previously ruled inadmissible; (2) evidence that is ruled inadmissible during the trial; and (3) matters that counsel know, or reasonably should know, will be inadmissible at trial, and would if disclosed create a substantial risk of prejudicing an impartial trial.

IT IS FURTHER ORDERED THAT consistent with Rule 3.6 of the Georgia Rules of Professional Conduct, the State attorneys and defense attorneys shall be prohibited from divulging any prejudicial matter that is not of public record and shall be prohibited from making any statement that he or she should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter. This Order does not

prevent defense counsel's "right to make a statement that a reasonable lawyer would believe is required to protect [his] client from substantial undue prejudicial effect of recent publicity not initiated by the defendant's counsel or the defendant" as long such a statement is "limited to such information as is necessary to mitigate the recent adverse publicity. See Georgia Rule of Professional Conduct, Rule 3.6(c). It also does not prevent the attorneys from commenting on those subjects as outlined in Comment 5(B) under Rule 3.6 of the Georgia Rules of Professional Conduct. Violation of Rule 3.6 of the Georgia Rules of Professional Conduct is a Georgia State Bar issue.

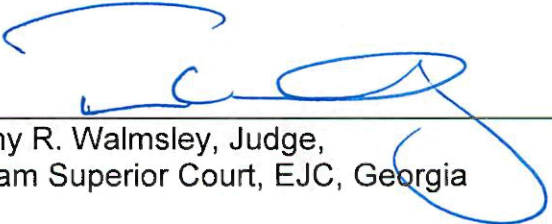
The parties and their counsel are cautioned that any failure to strictly comply with the terms of this order can result in sanctions against the offending individual, including contempt of court. Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.C. 2791 (1976), Sheppard v. Maxwell, 384 U.S. 333, 86 S.C. 1507 (1966). See also, Atlanta Journal-Constitution v. State, 266 Ga. App. 168 (2004).

This order is not directed at the media, and it does not prohibit the press or media from reporting events that transpire in the courtroom or that are available in the public record of this case. Furthermore, nothing in this Order is intended to limit the public's access to the court proceedings, or limit the restricted parties' ability to speak to the media on matters not prohibited by this Order.

CONCLUSION

For the reasons stated above, it is **ORDERED** that the State's Motion for an Order Restricting Extrajudicial Statements is **GRANTED in part**. This Order is effective from the date of this Order until conclusion of the jury trial in this matter or until further order of the Court.

SO ORDERED, this 11th day of October, 2021.



Timothy R. Walmsley, Judge,
Chatham Superior Court, EJC, Georgia

cc: Counsel of Record

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