IN THE COURT OF APPEALS

STATE OF GEORGIA

VICTOR GRAHAM, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

COURT OF APPEALS CASE NO.: A22A1698

BRIEF OF APPELLEE

MICHELLE THOMAS HARRISON
Assistant District Attorney
State Bar No.: 611711
P.O. BOX 99
Valdosta, Georgia 31603
Phone: (229) 671-3250
Email: mharrison@pacga.org

IN THE COURT OF APPEALS

STATE OF GEORGIA

VICTOR GRAHAM,	*	
Appellant	*	**CASE NO.: A22A1698**
	*	
vs.	*	
	*	
	*	
STATE OF GEORGIA,	*	
Appellee	*	

BRIEF OF APPELLEE

Statement of Facts and Proceedings

Over the summer of 2007, from May to August, fourteen-year-old Shaquashia Graham (Shaquashia) stayed with her biological father, Victor Graham (Appellant) in Valdosta, Georgia to get to know him. (T 20, 21, 22, 32)[1]. During the course of this summer, Shaquashia would wake up in the Appellant's bed with dry white stuff between her thighs. (T 36, 38). This happened more than one time and always when Appellant's girlfriend was not home. (T 38). Shaquashia had no idea how she had gotten into her father's bed or what the white stuff was that was on her thighs. (T 38).

After returning to her mother's home in Adel, Georgia, Shaquashia learned she was pregnant in September 2007. (T 23, 39). Upon learning of the pregnancy,

[1] T = Transcript
MNT = Motion for New Trial Transcript
R = Record

Appellant suggested to Shaquashia and her mother that Shaquashia should have an abortion. (T 25, 42). Initially believing that her boyfriend could be the father of her child, Shaquashia and her mother began to believe it could be Appellant based on Shaquashia's due date that suggested she had been impregnated in May. (T 24, 40). Shaquashia had only had sexual intercourse with her boyfriend after returning from Appellant's home and had not had sexual intercourse with anyone prior. (T 40).

In March 2008, Shaquashia gave birth to Heaven Graham (Heaven). (T 26, 32). A DNA paternity test was conducted and showed Appellant fathered Heaven (T 72, 73). Subsequently, Appellant was charged with rape, statutory rape and incest. (T 18). Appellant had a jury trial on June 1, 2009 before the Honorable Frank D. Horkan. (T 1). Appellant was represented by Latesha Bradley (Ms. Bradley) at trial. (T 1). After the completion of the State's case-in-chief, a directed verdict of acquittal was entered as to the rape count. (T 76-79). Appellant was convicted on charges of statutory rape and incest. (T 97). On June 3, 2009, Appellant was sentenced to 20 years in prison on the statutory rape charge and 30 years in prison on the incest charge to be served consecutively to the statutory rape charge. (T 105). Appellant timely filed a motion for new trial on June 30, 2009. (R 52-54).

On July 16, 2021, a hearing was held on Appellant's motion for new trial. (MNT 1). After the conclusion of the hearing, both the State and Appellant were allowed to submit briefs on the issues raised. (R 78-90, 91-101). In an order filed

with the Clerk of Superior Court in Lowndes County on November 1, 2022, the trial court denied Appellant's motion for new trial. (R 6-9). No timely notice of appeal was filed. On January 21, 2022, Appellant filed a motion for out-of-time appeal as he never received notice of the filed order on the motion for new trial. (R 102-104). On January 24, 2022, the trial court granted a motion for out-of-time appeal, which was consented to by the State[2]. (R 4-5). This appeal follows.

Standard of Review

The standard of review for ineffective assistance of counsel is a mixed question of fact and law; the facts are upheld unless they are clearly erroneous, but those facts are applied to the law de novo. Gramiak v. Beasley, 304 Ga. 512, 513 (2018).

Argument and Citation of Authority

1. The trial court did not err in denying Appellant's motion for new trial as Appellant's trial counsel was not ineffective.

To effectively establish a claim of ineffective assistance of counsel, a Defendant must meet the two part test set out in Strickland v. Washington, 466 U.S. 668 (1984), which is deficient performance of his counsel and prejudice resulting therefrom. Moreover, courts are "not required to address the performance portion of the inquiry before the prejudice component or even to address both components

[2] The out-of-time appeal was granted and the notice of appeal filed prior to the Supreme Court of Georgia's decision in Cook v. State, which held that the "trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations." 313 Ga. 471, 472 (2022).

if the Defendant has made an insufficient showing on one." Green v. State, 240 Ga. App. 650, 653 (1999). Appellant is unable to meet this standard on any of the claims he raises as to ineffective assistance of counsel. Although Appellant claims that there are multiple deficiencies that collectively result in ineffective assistance of counsel under State v. Lane, 308 Ga. 10 (2020), there was no deficient performance by Ms. Bradley and no prejudice to Appellant. Each of Appellant's claims of ineffective assistance of counsel will be addressed individually below.

a. Trial counsel was not deficient in her trial preparation.

i. Trial counsel spent sufficient time with Appellant to prepare for the case.

As stated previously, Defendant must show that his trial counsel acted with deficient performance and that he was prejudiced as a result to succeed on a claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Defendant cannot meet this standard, and as such, his ineffective claim must fail in regards to preparation.

One of Appellant's primary complaints is that Ms. Bradley only met with him a limited number of times before trial. Prior to the start of trial, Appellant alleged to the trial court that Ms. Bradley was not sufficiently prepared for trial. Ms. Bradley stated to the trial court that she had communicated with Appellant by mail a number of times, but had only met with Appellant briefly. (T 8, 9-11; MNT 10-11, 35). Ms. Bradley addressed the trial court stating that she had reviewed the evidence and was

prepared to go to trial. (T 9-11, 12). Ms. Bradley indicated that she had gone through the evidence and had an opportunity to discuss the same with Appellant. (T 12). "For purposes of an ineffective assistance of counsel claim, there exists no magic amount of time which counsel must spend in actual conference with his client, and [Appellant] does not specifically describe how additional communications with his lawyer would have enhanced his defense. Moreover, he has failed to show what a more thorough investigation would have uncovered." (Citation and punctuation omitted). Morrison v. State, 303 Ga. 120, 125 (2018). Appellant alleges that this lack of time spent with him caused a number of the issues that he has raised in the following enumerations of error, which will be addressed below. Even considering those errors, Appellant is unable to show deficient performance or prejudice so this claim of ineffective assistance of counsel must fail.

ii. Trial counsel was not deficient in regards to plea offer and negotiations.

Appellant contends that Ms. Bradley was deficient with regards to a plea offer and negotiations. The State respectfully denies this contention.

"A defendant is entitled to the effective assistance of counsel during plea negotiations. To establish ineffective assistance of counsel in this context, the defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or

both, under the offer's terms, would have been less severe than under the judgement and sentence that were imposed." (Citations and punctuations omitted). Turner v. State, 345 Ga. App. 894, 895 (2018).

The State made a plea recommendation to Appellant, which would have been less than he was sentenced to after trial. (MNT 14). Ms. Bradley testified at the motion for new trial hearing that she would have communicated the plea recommendation from the State to him, even if only by sending him a copy through mail. (MNT 12). However, Ms. Bradley further stated that she went over the consequences of trial and would have recommended that he accept the State's plea recommendation based on the evidence in this case and the fact that he had no viable defense. (MNT 42-43). Ms. Bradley met with Appellant the Thursday before trial and she spent a lot of time encouraging him to take the plea deal because of what he was looking at with a trial, but she is unable to force a client to take a plea deal. (MNT 43). Appellant made the decision to have a trial. (MNT 43).

In order for a Defendant to show prejudice to himself, Appellant must show that "there is some indication that he was amenable to the offer made by the State." (Citation and punctuation omitted). Daniel v. State, 342 Ga. App. 448, 452 (2017). There is no evidence that Appellant would have accepted a plea at all in this case. At the time of trial, Appellant was requesting a continuance to pursue additional

evidence and brought forth names that he wanted subpoenaed[3] to testify at trial, which is evidence that Appellant did not intend to plea. Appellant was not amenable to the State's offer. Although Appellant complains that Ms. Bradley should have made a counteroffer. There is also no evidence that the State would have accepted the counteroffer or made any other offer that Appellant would have accepted.

Even though he refused the plea recommendation presented by the State and wanted a trial, Appellant complains that Ms. Bradley did not present a counter-offer to the State. Ms. Bradley indicated that Appellant was adamant that he was not guilty and he was not going to plead so she chose not to make a counteroffer to the State because there was no indication that he would take a plea. (MNT 16). The "failure to initiate plea negotiations does not constitute ineffective assistance of counsel." (Citations and punctuation omitted). Terrell v. State, 276 Ga. App. 102, 103 (2005). If defense counsel is not required to initiate plea negotiations in terms of ineffective assistance of counsel, it would be counter-intuitive to require defense counsel to make counter-offers to the State when there is no indication that the Defendant would take the proposed counter-offer. Appellant has failed to show

[3] Appellant provided the trial court with two names of witnesses, Sarah Whitlock and Terri Whitlock, that he wanted to testify at trial; however, he had only provided those names to Ms. Bradley on the Thursday before trial, which was outside the time limitations for trial. (T 12, 14; MNT 19, 20).

prejudice to him in regards to plea negotiations and, therefore, his claim of ineffective assistance of counsel in this regard must fail.

iii. Trial counsel was not ineffective in regards to Appellant's request for a continuance.

Appellant claims that Ms. Bradley was ineffective in regards to his request for a continuance at trial. The State respectfully refutes this claim.

As purported evidence of his position that Ms. Bradley was ineffective in failing to request a continuance, Appellant points to witnesses Sarah Whitlock (Sarah) and Terri Whitlock (Terri) that were not called to testify for Appellant at trial. However, trial counsel's decision about which witnesses to call falls well within trial strategy and tactics and will typically not rise to the level of ineffective assistance. Herndon v. State, 235 Ga. App. 258 (1998).

Appellant's use of these witnesses to allege that Ms. Bradley failed to investigate and should have asked for a continuance is self-serving and a self-imposed failure as Appellant was the one who failed to provide this information to Ms. Bradley until right before trial. (T 12, 14; MNT 19, 20). "Where counsel was not given the names of the potential witnesses, his failure to contact those witnesses is not deficient performance." (Citation and punctuation omitted). Martin v. State, 360 Ga. App. 1, 6 (2021).

Appellant and Ms. Bradley may have only met a limited number of times, but they communicated through letters in which Appellant would tell Ms. Bradley

what he wanted done. (T 9, 10, 12; MNT 11, 12, 34, 35). Ms. Bradley also indicated she was hired by Appellant's girlfriend or fiancé, which according to testimony from Sarah, Shaquashia, and Erin Harris (Shaquashia's mother) as well Appellant's own brief, would be Terri. (T 20, 32; MNT 9-10, 53). Although the female who hired Ms. Bradley, presumably Terri, was involved in discussions with Ms. Bradley, never once did she indicate that she had knowledge of the case. (MNT 35). Neither Sarah nor Terri attempted to speak with Ms. Bradley about Appellant's charges and neither made any statement to law enforcement. (MNT 54). Appellant also did not provide the witness names or what information they could provide in his letters to Ms. Bradley. (MNT 35-36). As both of these women lived in the home with Appellant, he would have known their names and contact information and certainly should be able to communicate to Ms. Bradley that he wanted her to speak with them because they had some information about the case, but he failed to notify his attorney about these witnesses until right before trial was scheduled to begin. Ms. Bradley's failure to contact these witnesses and have them subpoenaed for trial is not deficient performance.

Appellant attempts to get around this issue with his ineffective assistance of counsel claim by altering it from a failure to call witnesses to a failure to join in his requested continuance. Although it was not deficient performance for Ms. Bradley not to have spoken with Appellant's witnesses because he failed to provide them,

Appellant believes Ms. Bradley should have joined his request for a continuance so that these witnesses could testify. However, after he provided Sarah and Terri's names to Ms. Bradley and discussed it with her at their meeting before trial, Ms. Bradley indicated that she believed these to be character witnesses, which she advised against because it would open up the possibility of his criminal history coming into evidence. (T 12, 14; MNT 36). "Trial counsel's decision to not place the defendant's character in issue is a matter of trial tactics and does not equate with ineffective assistance of counsel." (Citation and punctuation omitted). Terrell v. State, 276 Ga. App. 102, 104 (2005). Ms. Bradley's decision not to call these witnesses or request a continuance is not "so patently unreasonable that no competent attorney" would have done the same. Cochran v. State, 305 Ga. 827, 830 (2019). With Appellant's significant criminal history as detailed to the trial court before trial, it is reasonable that Ms. Bradley would want to take precautions to keep from Appellant's character in evidence before the jury.

Even if the decision to not request a continuance so that Sarah and Terri could be called as witnesses at trial was deemed to be deficient performance, Appellant is unable to show prejudice to him as a result. Terri did not testify at the motion for new trial, nor did Appellant submit a legally recognized substitute as to what testimony Terri could have offered at trial. Without a showing of what Terri would have said, all that is left is Appellant's mere speculation as to what her

testimony would have been and Appellant cannot demonstrate deficient performance or prejudice to him as a result of Ms. Bradley's failure to call Terri to testify at trial. (Citation and punctuation omitted). Price v. State, 305 Ga. 608, 614 (2019). "[A defendant's] speculation does not constitute a showing of professionally deficient performance by trial counsel." Hughes v. State, 323 Ga. App. 4, 10 (2013).

Although she did not testify at trial, Sarah testified at the motion for new trial hearing on July 16, 2021 that she lived in the home with Appellant when Shaquashia was staying with them. (MNT 49). She further testified that she slept in a different room. (MNT 53). Although saying that she "knows what goes on" in her house, Sarah admitted that she does not see Appellant all day, everyday and she did not sleep in the room with him. (MNT 53). Appellant alleges she was a fact witness, but her testimony at the motion for new trial hearing shows that her testimony would not have benefitted Appellant in light of the other evidence that was presented at trial. Even if Sarah had testified at trial there is no substantial likelihood that her limited ability to testify regarding the happenings in Appellant's bedroom would have made a difference in the verdict at trial. Even if it is considered deficient performance to not have called Sarah to the stand during the trial, Appellant is unable to show prejudice to him as a result of Ms. Bradley not putting Sarah on the stand in his trial due to the nature of the remaining evidence presented against him. It is not

reasonable to believe that the jury would have ignored the DNA test results based on Sarah's testimony.

Appellant points to no evidence that would require a continuance other than the witnesses that he was aware of from the start, yet failed to provide to Ms. Bradley. Appellant is also unable to show what any additional investigation would have uncovered. Appellant has presented "no evidence, or even assertion, as to what further investigation or preparation might have produced that would have made a difference in the outcome of his trial." (Citation and punctuation omitted). Lane v. State, 299 Ga. 791, 795 (2016). Appellant is unable to show deficient performance or prejudice to him as a result of such and his claim of ineffective assistance must fail on this ground.

iv. Trial counsel was not deficient for failing to file a special demurrer.

As thoroughly detailed throughout this brief, the Appellant must satisfy both prongs of the test set out in Strickland v. Washington, 466 U.S. 668 (1984). Appellant is unable to prove deficient performance nor is he able to prove prejudice as a result and, therefore, the claim must fail. *Id.*

Ms. Bradley testified that she did not see any issue with the indictment based on the allegations. (MNT 37-38). If challenged, there is no guarantee that the special demurrer would have been successful in quashing the indictment and Appellant would still have proceeded to trial on the indictment. "Where the State can show

that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates." (Citation and punctuation omitted). Thompkins v. State, 348 Ga. App. 511, 513 (2019). The State alleged the time period that Shaquashia was in the home with Appellant. (T 21, 22, 29, 33, 39; MNT 37). This was not a one-time incident, but occurred multiple times during the time Shaquashia was with Appellant. (T 38; MNT 37).

Appellant claims that Ms. Bradley should have challenged the indictment based on the pregnancy timeline. However, Ms. Bradley, being familiar with the way pregnancy due dates can move around, as well as knowing that birth can be premature or late, chose not to challenge the dates on the indictment. (MNT 23, 38). Even if this indictment had been quashed, Ms. Bradley knew that the State could re-indict the case so challenging the dates would not prevent Appellant from going to trial, but only delay the process if the State had to re-indict. (MNT 37). "Because a defendant can be re-indicted after the grant of a special demurrer, a failure to file such a demurrer generally will not support a finding of ineffective assistance of counsel." (Citation and punctuation omitted). Bighams v. State, 296 Ga. 267, 270-271 (2014). Appellant cannot show deficient performance or prejudice to himself and, therefore, his ineffective assistance of counsel claim in regards to the special demurrer must fail.

b. Appellant's circumstances do not require a change in the law regarding time spent with a client in connection with a claim of ineffective assistance of counsel.

Appellant's current counsel claim that the circumstances in this case require a change in the law requiring a certain amount of time to be spent with a client or in communication with a client by his trial counsel or it would be per se deficient performance. The State disagrees with this claim.

While the Georgia Rules of Professional Conduct may permit an attorney to make claims through their representation of a client to alter existing law, Appellant's case has no special circumstance that would require the altering of the established case law. The Georgia Supreme Court has been clear in stating that there is no specific amount of time required in consultation with a client in regards to ineffective assistance of counsel. Morrison v. State, 303 Ga. 120, 125 (2018). Even Appellant's own claim would allow for time spent with a client in person and time spent in communication with a client to count toward the required time with a client. That is exactly what happened in this case. Although Ms. Bradley met with the Appellant only a limited amount of time in person, they communicated through letters and Appellant was able to direct Ms. Bradley as to things he wanted done in preparation of his case. There is no allegation or any indication that there was not communication between Ms. Bradley and Appellant—merely that she did not spend a lot of time with him in person.

Although asking for a change in the law, Appellant's current counsel fails to specify what amount of time should be used in communication with a client or how many times counsel must meet with a client in order to satisfy this change in law that he now requests. Without suggesting any guiding principles, the request is haphazard and arbitrary. As it stands now, the decision for how much time is required to for an attorney to be prepared to move forward with trial rests with the attorney assigned to each individual case. These attorneys are the ones who would know about the case and the time needed to move forward on the case as each individual case is different and may require different amounts of time to prepare. To place a strict time amount on it would be to dismiss the attorney's professional judgment and opinion on the matter.

CONCLUSION

For the foregoing reasons, the State respectfully prays that the Appellant's conviction be affirmed and that there be no change to the law in regards to required time in person with or in communication with a client.

Respectfully submitted,

/s/ Michelle T. Harrison
Michelle Thomas Harrison
Assistant District Attorney
Southern Judicial Circuit
State Bar No. 611711

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Brief of Appellee upon counsel for the Appellant by placing a true and accurate copy in the U.S. Mail with appropriate postage affixed and addressed to:

Jody D. Peterman
P.O. Box 6010
Valdosta, GA 31603-6010

This 10th day of August, 2022.

/s/ Michelle T. Harrison
Michelle Thomas Harrison
Assistant District Attorney
Southern Judicial Circuit
State Bar No. 611711

District Attorney's Office
Southern Judicial Circuit
Post Office Box 99
Valdosta, Georgia 31603-0099
(229) 671-3250

CERTIFICATE OF COMPLIANCE

This is to certify that this submission does not exceed the word count limit imposed by Rule 24.

This 10th day of August, 2022.

/s/ Michelle Thomas Harrison
MICHELLE THOMAS HARRISON
Assistant District Attorney
Southern Judicial Circuit
Georgia Bar No. 611711

Address of Counsel:
District Attorney's Office
Southern Judicial Circuit
P.O. Box 99
Valdosta, GA 31603
(229) 671-3250