Case No. A23A0670

Court of Appeals of Georgia

Daniel Bruce Franz, II, Appellant

v.

State of Georgia, Appellee

Brief of Appellant

Gabrielle Amber Pittman
State Bar No. 58144
Attorney for Appellant
135 L. Cary Bittick Drive
Forsyth, Georgia 31029
apittman@gapublicdefender.org

R. Shawn Hoover
State Bar No. 554883
270 Washington Street
Atlanta, GA 30334
shoover@gapubdef.org

Samuel Carlos Wood
State Bar No. 401679
P.O. Box 18122
Macon, GA 31209
Samuel.wood@gacapdef.org

Appellant: Daniel Franz, II

GDC No. 1001120078
Calhoun State Prison
P.O. Box 249
Morgan, GA 39866

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Summary of the Argument

Daniel Franz, II was the victim of an armed robbery. This fact was undisputed. While his assailant of this armed robbery was still in Mr. Franz's presence and in possession of his property, Mr. Franz, defended himself against the man who robbed him and threatened him with a gun. Mr. Franz had the right to defend himself and his property and no duty to retreat, O.C.G.A. § 16-3-23.1, but this was not made clear to the jury. Instead, the trial court gave incomplete and inadequate jury instructions on justification. This compounded trial counsel's inadequacies, which included failing to conduct a pretrial investigation, to subject State's case to adversarial testing, to request jury charges, to object to improper arguments from the prosecution and to object to the legally inadequate charges given by the court. The trial court's failure to give adequate and complete charges regarding self-defense and justification, coupled with trial counsel's ineffective defense at trial worked together to deny Mr. Franz "the inherent right of self-defense" under the state and federal constitutions as well as the statutory law of Georgia, D.C. v. Heller, 554 U.S. 570, 628, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008). See also Henry Cty. Bd. of Educ. v. S.G., 301 Ga. 794, 802, 804 S.E.2d 427, 435 (2017) ("That an individual prevails in standing [her] ground against an aggressor does not make her actions unlawful.") Glover v. State, 105 Ga. 597, 31 S.E. 584, 584 (1898).

I.

Statement of Proceedings Below and Material Facts

Mr. Franz was indicted for malice murder, felony murder and aggravated assault in Houston County, Georgia on February 6, 2018. R. 4. The jury returned a guilty verdict of the lesser included charge of voluntary manslaughter on July 17, 2019. R. 118-119. Mr. Franz was sentenced to a total of twenty-five years to serve, twenty years for voluntary manslaughter and five years, consecutive, for possession of a firearm by a convicted felon. R. 120-125.

Defendant filed a timely motion for new trial on August 12, 2019, Supp. R. 1-3, followed by a timely Amended Motion for New Trial on June 7, 2021 and Second Amended Motion for New Trial. R. 142-151. On September 17, 2021, Mr. Franz's Motion for New trial was denied R. 152-164. This appeal follows. Notice of appeal was timely filed on September 21, 2021. R. 1-3. The above-stated charges stem from the January 13, 2018 death of Vincent Junior.

Initially, Mr. Franz was represented by counsel from the Houston County Public Defender's Office. Initial counsel had to withdraw and new trial counsel was appointed. Before withdrawing, original counsel filed a Motion for a Continuance, alleging, amongst other claims, that investigation was necessary as was a forensic expert. R. 16. That motion was granted.

At trial the evidence showed that Mr. Franz was a visitor at an apartment when Vincent Junior arrived. The State presented evidence showing that the area of the apartment involved was small with limited exits. T. State's Exhibit 2-3. There was only one way out of the apartment in the front and one in the back. T. 152.

Mr. Junior was the aggressor in the incident that transpired. T. 148, 182. He was larger than Daniel Franz. T. 148. After arriving, Vincent Junior began to demand

items from Mr. Franz. T. 138-139. Mr. Junior told other people present that he was planning to rob Mr. Franz, stating "I'm fixing to go back there and take that from him" before pulling out his gun and following Mr. Franz T.166-167. Mr. Junior pursued Mr. Franz, following him from room to room. T. 140-141. Mr. Franz asked Mr. Junior to leave him alone, but Mr. Junior continued to pursue Mr. Franz. T. 149. Mr. Junior was the aggressor, bullying and threatening Mr. Franz because Mr. Franz had something Mr. Junior wanted. T. 147-148, 166. Mr. Junior threatened Mr. Franz and lifted his shirt to show a gun to Mr. Franz, telling Mr. Franz that "he wasn't going to leave up out of there without an ass whooping." T. 150. Mr. Junior told Mr. Franz to take his pants he was wearing off "'cause they belonged to him." T. 151.

It was undisputed that Mr. Junior had a gun at some point and threatened Mr. Franz with it. T. 166, 179-180. Mr. Franz and Mr. Junior went into another room, and Mr. Junior returned with Mr. Franz's property. T. 140-141. Mr. Junior and Mr. Franz began to argue again, then Mr. Junior "turned towards Danny who was in the room and walked into that hallway where they got really heated" and gunshots immediately followed. T. 140-141. The incident took place in a matter of seconds. T. 153, 180.

Some witnesses were unable to determine whether or not Mr. Junior had a gun at the time of the shooting, while others indicated that Mr. Junior did, in fact, have a gun. T. 156-157, 167-168, 180. It is clear, however, that Mr. Franz shot Mr. Junior while Mr. Junior was still in possession of property obtained by robbery and had not had an opportunity or sufficient time to dispose of his weapon. T. 179-182. The witnesses disagree as to whether Mr. Junior was turned towards Mr. Franz and approaching him or away from Mr. Franz, at the time of the shooting.

In opening, defense counsel argued that Mr. Junior was on cocaine and that Mr. Franz acted in self-defense. T. 75-78. The State argued Mr. Franz killed Mr. Junior over a bag of marijuana was seeking revenge on Mr. Junior for the robbery which it considered to be a prior wrong. T. 69-74.

The State presented irrelevant and inflammatory evidence pertaining to the life of the victim. T. 119-127. This character evidence from two witnesses, Mr. Junior's cousin and the mother of his children, related to Mr. Junior's relationship with his children and his employment. T. 119-127. The State admitted a photograph of Mr. Junior with his daughter. T. Exhibit 75. Trial counsel offered no objections and no cross examination because he "didn't think it was improper." M.F.N.T. 59. He acknowledged that evidence pertaining to where Mr. Junior worked, how long he worked there, what school he went to, that he graduated, and the number of children he had was "probably irrelevant." M.F.N.T. 61.

Prior to trial, trial counsel did not interview the witnesses to confirm what their testimony would actually be. M.F.N.T. 26-27, 36-38. Trial counsel did not seek out additional evidence in the possession of the state. This includes exculpatory crime lab evidence relating to Mr. Junior's blood toxicology before it was destroyed which could have supported his defense because he does not file those in criminal cases. M.F.N.T. 52, 94. Trial counsel did not object to improper testimony pertaining to the victim. Trial counsel did not seek out expert assistance. M.F.N.T. Trial counsel did not move for a pretrial immunity hearing despite this being a self-defense case. M.F.N.T. 47-48. Trial counsel did not prepare written requests to charge. M.F.N.T. 48-49. At trial, trial counsel did not object to improper arguments by the prosecutor or improper jury charges.

When questioned why he did not conduct any investigation and took the discovery at face value, trial counsel explained why:

> He and I [the prosecutor] have tried a lot of cases over the years, both in this county and in Peach county where he prosecuted in Peach County, and they've ran the gauntlet. I didn't think there was anything there. I just didn't think it was necessary. I thought I had what I needed to try the case when we started.

M.F. N. T. 39.

In closing arguments, trial counsel noted the consistencies and inconsistencies between the witnesses. T. 254-263. Trial counsel emphasized the justification charge, but did not make mention of the fact that Mr. Franz had no duty to retreat. T. 260. He further argued that there was no malicious intent. T. 261-263.

With no evidence to infer such an argument, the State emphasized that the killing was revenge and meant to send a message to the community. T. 264-265. The State argued that if Mr. Franz had shot Mr. Junior while Mr. Junior was taking the bag, it would have been self-defense, but otherwise was not. T. 269. He further argued, ignoring Georgia law on defense of property, that there was no way the shooting could have been justifiable because the defendant shot Mr. Junior over a bag of marijuana. T. 276-277. The State, ignoring the law on stand your ground, emphasized that Mr. Franz could have called the police or left. T. 273-274. The State then quoted Proverbs, stating that "the wicked flee when none pursueth but the righteous are as bold as the lion" and going on to argue that Mr. Franz "was not righteous." T. 276. The State went on to argue that Mr. Junior "was a working man, had a job, had children he was supporting," emphasizing this. T. 278-279. None of this was objected to by trial counsel.

At the charge conference, the trial court agreed to give the pattern jury charges on justification and refused to give a charge on mistake of fact. T 238-243. However, the trial court did not give the agreed to pattern charges. Instead, the trial court omitted the sections of the pattern jury charges pertaining to forcible felonies, "great

bodily injury," failed to charge on defense of property, charge on mistake of fact, erred in charging on excessive force without including charges on the lesser included defenses of reckless conduct and involuntary manslaughter, conflated and combined the charges on involuntary manslaughter and self-defense such that the jury was misled on the law of self-defense and conflated the charges on voluntary manslaughter, provocation and justification in that the jury was misled on the law of self-defense. T. 280-310. Trial counsel did not object to anything other than the voluntary manslaughter charge not aligning with the evidence and the prosecutor bringing up the issue of flight. T. 306.

At the Motion for New Trial hearing, the defense was allowed to proffer evidence from an expert that he would have been able to contest the state's theory of guilt by discussing the trajectory of the bullets and the order of the bullets fired, which would have undermined the medical examiner's testimony that Mr. Junior was facing away from Mr. Franz at the time he was shot. M.F.N.T. 157-159. This testimony would have indicated that Mr. Junior was approaching Mr. Franz, not walking away from him as the state argued. M.F.N.T. 159.

The trial court denied Mr. Franz's motion for new trial. R. 152-15. The trial court contended it was not required to give the entire charge on justification on the grounds that the because Mr. Junior had taken Mr. Franz's property, the armed robbery was over and Mr. Franz no longer had the right to defend himself. R. 153. In explaining the decision not to give certain jury charges, the trial court relied almost exclusively on the testimony of one witness, ignoring the inconsistencies and contradictions from other witnesses, outlined above, which would have justified the charge by indicating that Mr. Junior was approaching Mr. Franz at the time of the shooting and that the entire incident occurred in a matter of seconds. T. 153. The

trial court While the trial court contends that it "gave the pattern jury charges," R. 154, this is belied by the trial transcripts.

II.

Enumeration of Errors

1. The verdict and sentence are based on insufficient evidence to support them and are contrary to and decidedly against the weight of the evidence.
2. The trial court committed plain error by giving charges that were insufficient, did not comport with the law or the pattern jury charges, were confusing, and denied Mr. Franz the right to adequately present a defense and denied Mr. Franz the right to self-defense under the Georgia and Federal constitutions.
3. Trial counsel's performance was deficient under the law and denied Mr. Franz the right to counsel and the right to self-defense under the Georgia and Federal constitutions.

Preservation of Errors

1. Issues pertaining to sufficiency of the evidence were raised and preserved in the Amended Motion for New Trial, Second Amended Motion for New Trial and at the Motion for New Trial Hearing. Supp. R. 1-3, R. 142-151.

2. Error pertaining to the jury instructions were raised and preserved in the Amended Motion for New Trial, Second Amended Motion for New Trial and at the Motion for New Trial Hearing. Supp. R. 1-3, R. 142-151.
3. Trial counsel's deficient performance was raised and preserved in the Amended Motion for New Trial, Second Amended Motion for New Trial and at the Motion for New Trial Hearing. Supp. R. 1-3, R. 142-151.

Statement of Jurisdiction

The Georgia Court of Appeals, and not the Supreme Court of Georgia, has proper jurisdiction over this case; this is an appeal from the final judgment of a Georgia Superior Court in a non-capital case where jurisdiction is not reserved to the Supreme Court of Georgia or on other courts of law. Ga. Const. art. VI, § 6, ¶ III. This Court docketed this appeal on November 23, 2022. This brief is timely pursuant to this Court's grant of extension on November 30, 2022 to December 30, 2022.

Standards of Review

1. For sufficiency of evidence, courts "view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." White v. State, 250 Ga.App. 783, 552 S.E.2d 927 (2001).

2. Failure to give adequate jury instructions in the absence of a request or objection is reviewed for plain error. Emilio v. State, 257 Ga.App. 49, 52, 570 S.E.2d 372 (2002). Issues of constitutional law are reviewed *de novo*.
3. For ineffective assistance of counsel, a defendant must show both deficient performance and actual prejudice. Strickland v. Washington, 466 U.S. 688, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Argument and Citation of Authorities

I. THE EVIDENCE WAS INSUFFICIENT TO AUTHORIZE A FINDING OF GUILT ON VOLUNTARY MANSLAUGHTER.

Under O.C.G.A. § 16-3-21, an individual is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself. When acting under that statute, an individual is under no duty to retreat and has the right to stand his ground and use deadly force in defending himself or others. O.C.G.A. § 16-3-23.1. The verdict and sentence are decidedly and strongly against the weight of the evidence, see In re Winship, 397 U.S. 358, 364 (1970) (The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime being charged). The uncontroverted evidence at trial, outlined above, is that Mr. Franz was the victim of an armed robbery by a perpetrator armed with a gun who threatened him repeatedly. While Mr. Franz was acquitted of the murder counts, the evidence was insufficient to support a verdict of voluntary manslaughter. Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 2787 (1979).

"When voluntary manslaughter is raised, the issue is whether based on the evidence, the jury could have found beyond reasonable doubt that the defendant 'was so influenced and excited that he reacted passionately rather than simply to defend himself.'" Williams v. State, 245 Ga. App. 670, 671, 538 S.E.2d 544, 546 (2000)(internal citations omitted). Given the quick sequence of events and ongoing danger from an armed perpetrator who had made numerous threats, there is no scenario at law which would suggest that the shooting was anything other than justifiable. Mr. Franz shot Mr. Junior while the armed robbery was still ongoing,[1] after Mr. Junior threatened him with a gun and assault, then forcibly taking items belonging to Mr. Franz. This was not a case of reacting to a provocation in passion, but instead was a clear case of self-defense and defense of property.

"When a defendant presents evidence that he was justified in using deadly force, the burden is on the State to disprove the defense beyond a reasonable doubt." Daniley v. State, 274 Ga. 474, 474, 554 S.E.2d 483, 485 (2001). Here, the state did not disprove Mr. Franz's guilt. The State theorized that because Mr. Junior had successfully stolen an item belonging to Mr. Franz, Mr. Franz no longer had the right to defend himself. For this theory of guilt to stand, Mr. Franz would have had to have had a legal obligation to retreat once the armed robber was successful. No such obligation exists in Georgia. This runs contrary to the plain language of Georgia law,

[1] "A person commits the offense of murder when, *in the commission of a felony*, he or she causes the death of another human being irrespective of malice." O.C.G.A. § 16-5-1 (emphasis added). In cases involving felony murder, sufficient evidence to support a conviction of felony murder was found when the victim was killed after the items were taken by the armed robbers. See e.g. Jordan v. State, 293 Ga. 619, 620, 748 S.E.2d 876, 879 (2013) (evidence was sufficient for a conviction of felony murder where, after defendants "took their [the victms'] money" the victim was "shot after he refused to walk away.") This indicates that Georgia recognizes that an armed robbery can continue past the time the property enters the hands of the robber.

which says that a person who uses force in self-defense (O.C.G.A. § 16-3-21) and/or in defense of property (O.C.G.A. § 16-3-24) "has no duty to retreat and has the right to stand his or her ground." O.C.G.A. § 16-3-23.1. Because Mr. Franz had no duty to retreat, while in the presence of a perpetrator who threatened him with a weapon, was in possession of his property and was in the process of committing an armed robbery against him, the evidence was insufficient to support a verdict of voluntary manslaughter.

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY GIVING CHARGES THAT WERE INSUFFICIENT, DID NOT COMPORT WITH THE LAW OR THE PATTERN JURY CHARGES, WERE CONFUSING, AND DENIED MR. FRANZ THE RIGHT TO ADEQUATELY PRESENT A DEFENSE AND THE RIGHT TO SELF-DEFENSE UNDER THE GEORGIA AND FEDERAL CONSTITUTIONS.

A defendant is entitled to a jury charge on a subject as long as there is slight evidence to support it, and whether the evidence was sufficient to warrant the charge is a question of law. Lewis v. State, 292 Ga. App. 257, 264, 663 S.E.2d 721, 727 (2008). It is the duty of the trial judge to give to the jury appropriate instructions on every substantial issue in the case which is made by the evidence, and a failure to do so is cause for a new trial. State v. Stonaker, 236 Ga. 1, 2, 222 S.E.2d 354, 356 (1976); Walker v. State, 122 Ga. 747, 50 S.E. 994, 996 (1905). "Questions about the existence of justification are for the jury to resolve, and the jury may reject any evidence in support of a justification defense." Goodson v. State, 305 Ga. 246, 248, 824 S.E.2d 371, 375 (2019).

The trial court failed to give a charge on defense of property, charge the full language self-defense and give full pattern charge on justification. O.C.G.A. § § 16-3-20, 16-3-21, 16-3-23.1, 16-3-24. These individually constitute plain error but when compounded by the other failings of the jury charges including:

- failing to include the language on forcible felonies in the jury charge on self-defense in light of the fact that the armed robbery committed by the victim was ongoing, see e.g. Jordan v. State, 293 Ga. 619, 620, 748 S.E.2d 876, 879 (2013) (evidence was sufficient for a conviction of felony murder where, after defendants "took their [the victms'] money" the victim was "shot after he refused to walk away.");
- failing to charge on mistake of fact as an alternative defense in light of the fact that it is reasonable to infer that when one leaves a room with a gun, would return with the gun still in his possession, McClure v. State, 306 Ga. 856, 861, 834 S.E.2d 96, 101 (2019);
- conflating and combining the charges on voluntary manslaughter and self-defense such that the jury was misled on the law of self-defense and was unable to distinguish between justifiable homicide and voluntary manslaughter. The trial court erred in charging on excessive force without including charges on the lesser included defenses of reckless conduct and involuntary manslaughter; and
- failing to charge on involuntary manslaughter based on the lawful act of self-defense committed in an unlawful manner;

these together led to the denial of Mr. Franz's right to defend himself under State and Federal constitutions and the Georgia statutory scheme for justification resulting in a grave miscarriage of justice which affects the fairness and integrity of this judicial proceeding.

"To show plain error, Appellant must demonstrate that the instructional error was not affirmatively waived, was obvious beyond reasonable dispute, likely affected the outcome of the proceedings, and seriously affected the fairness, integrity, or public reputation of judicial proceedings." Hood v. State, 303 Ga. 420,

425, 811 S.E.2d 392, 397 (2018). Trial counsel did not affirmatively waive charges on justification, self-defense and defense of property. These charges were necessary to the defense and it was unreasonable not to given them in light of the facts deduced at trial.

The trial court's failure to give complete charges on the statutory scheme regarding self-defense and justification and no duty to retreat denied Mr. Franz his rights to due process and to defend himself under the state and federal constitutions; D.C. v. Heller, 554 U.S. 570, 628, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008)(" the inherent right of self-defense has been central to the Second Amendment right"); Henry Cty. Bd. of Educ. v. S.G., 301 Ga. 794, 802, 804 S.E.2d 427, 435 (2017)("That an individual prevails in standing [her] ground against an aggressor does not make her actions unlawful.") Glover v. State, 105 Ga. 597, 31 S.E. 584, 584 (1898). The confusing and incomplete charges affected the outcome of the proceedings because it did not allow the jury to adequately differentiate between justifiable homicide and voluntary manslaughter.

III. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT UNDER THE LAW AND DENIED MR. FRANZ THE RIGHT TO COUNSEL AND THE RIGHT TO SELF-DEFENSE UNDER THE GEORGIA AND FEDERAL CONSTITUTIONS.

Defendant's trial counsel was ineffective, Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Kirkland v. State, 274 Ga. 778, 779, 560 S.E.2d 6 (2002); Smith v. Gearinger, 888 F.2d 1334, 1338 (11th Cir. 1989.) in that his performance was deficient and prejudicial to the outcome of the trial.

A. Trial counsel was ineffective by failing to subject the State's case to adversarial scrutiny.

Trial counsel was ineffective for failing to subject the state's case to adversarial scrutiny by taking the state's case as provided in the discovery at face

value and doing no further investigation. Trial counsel was ineffective for failing to investigate, see Wiggins v. Smith, 539 U.S. 510, 521 (2003) (Counsel has a duty to make a reasonable investigation and a particular decision not to investigate must be assessed for reasonableness in all circumstances, with a deference to trial counsel's judgement.); Humphrey v. Williams, 295 GA 536 (2014); Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), aff'd sub nom. Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987) ("Although the scope of the required investigation depends upon the number of issues and their complexity, the strength of the government's case and the overall strategy of trial counsel, at a minimum, counsel has the duty to interview potential witnesses and to make an *independent* investigation of the facts and circumstances of the case.")

This failure was prejudicial because it led to his failure to obtain and utilize a forensic expert who would have undermined the State's theory of guilt. See Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995) ("Under these circumstances, a reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results…Considering the circumstances as a whole, defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression…fall short of reasonableness under the prevailing professional norms.") Moreover, because he did not adequately investigate, trial counsel failed to provide effective assistance of counsel when he failed to adequately cross-examine witnesses including the state's expert, see Ray v. State, 792 S.E.2d 421 (2016), whose testimony was relied on by the state in their closing argument. T. 270.

B. Trial counsel failed to protect Mr. Franz's right to defend himself and his property.

Trial counsel was ineffective for failing to adequately protect Mr. Franz's rights under the State and Federal constitutions and state law to defend himself against attacks, threats and the forcible felonies of the victim by failing to request charges on justification, defense of property and of self and/or object to the inadequate, incomplete and confusing jury charges or the improper arguments presented by the state. See D.C. v. Heller, 554 U.S. 570, 628, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008) ("the inherent right of self-defense has been central to the Second Amendment right"); Henry Cty. Bd. of Educ. v. S.G., 301 Ga. 794, 802, 804 S.E.2d 427, 435 (2017)("That an individual prevails in standing [her] ground against an aggressor does not make her actions unlawful."); Glover v. State, 105 Ga. 597, 31 S.E. 584, 584 (1898).

C. Trial counsel was ineffective for failing to object to irrelevant and improper testimony.

Trial counsel failed to provide effective assistance of counsel when he failed to object to improper victim character witnesses during trial based on the improper legal assumption that it was appropriate; O.C.G.A. § 24-4-404(a)(2), Ledford v. State, 264 Ga. 60, 66 (1994)("The general rule is that it is not error to admit a photograph of the victim while in life. However, the better practice is to not permit a victim's family member to identify the victim where other nonrelated witnesses are able to do so") (internal citations omitted); Flowers v. State, 275 Ga. 592 (2002); and Boyd v. State, 284 Ga 46 (2008) ("every effort should be made to proffer a photograph of the victim alone"). Given that the State raised these issues in closing, this prejudiced Mr. Franz.

D. Trial counsel was ineffective for failing to preserve evidence.

Trial counsel failed to provide effective assistance of counsel when he failed to request, preserve and present victim toxicology reports from the Georgia Bureau of Investigation in that this evidence would have been readily available, subject to defense testing, admissible and relevant to the issue of self-defense, Humphrey v. Williams, 295 GA 536 (2014). Had this evidence been preserved it could have supported the defense's theory that Mr. Junior was under the influence of cocaine at the time of the incident. This prejudiced the defendant.

E. Trial counsel was ineffective for failing to object to improper argument from the state.

Trial counsel failed to provide effective assistance of counsel when he failed to object to improper argument by the prosecution, including improper references to the Bible and improper argument under the law regarding a duty to retreat; see Powell v. State, 308 Ga. App. 489, 490, 707 S.E.2d 877, 878 (2011)("References to religion that invite jurors to base their verdict on matters not in evidence should be avoided in prosecutorial argument.") These arguments likely confused the jury on the distinction between justifiable homicide and voluntary manslaughter while also injecting prejudicial matters into the deliberations. As such, they prejudiced the defendant.

F. Trial counsel failed to adequately argue for and preserve issues pertaining to the jury charges.

Trial counsel was ineffective for failing to submit any written jury instructions, see Spring v. Seese, 558 S.E.2d 710 (2002); to provide effective assistance of counsel by failing to request a charge on mistake of fact, McClure v.

State, 306 Ga. 856, 861, 834 S.E.2d 96, 101 (2019); to submit a written request to charge on self-defense; and to provide effective assistance of counsel when he failed to request or object to improper/incomplete jury charges, see Potts v. State, 771 S.E.2d 510 (2015). This failure kept him from adequately objecting to and preserving the issues pertaining to the jury charges and allowed the jury to receive confusing, incomplete and inadequate charges on Mr. Franz's affirmative defenses.

G. The cumulative consequences of these errors denied Mr. Franz the right to counsel and to present a defense.

Trial counsel's errors which may not have been individually prejudicial, were cumulative in their prejudice to the defendant, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Conclusion

For the forgoing reasons, and any additional reasons which may appear to this Court, Mr. Franz requests that this court overturn his conviction and sentence.

This submission does not exceed the word count limit imposed by Rule 24.

This 30th Day of December, 2022.

/s/ Gabrielle A. Pittman
Attorney for Appellant
Georgia Bar No. 581044
P.O. Box 18122
Macon, GA 30252

(478) 227-3654
apittman@gacapdef.org

IN THE COURT OF APPEALS OF GEORGIA

Daniel Bruce Franz, II,
Appellant,

Case Number: A23A0670

v.

The State of Georgia,
Appellee

CERTIFICATE OF SERVICE

I certify that on December 30, 2022 the original of the forgoing BRIEF was electronically filed with the Clerk of the Georgia Court of Appeals, and a copy was served upon the Defendant via U.S. Mail with adequate postage affixed to ensure delivery, addressed as follows:

Defendant: Daniel Franz, II
Calhoun State Prison
P.O. Box 249
Morgan, GA 39866

A copy was also served on the appellee via email to the following address:
Opposing Counsel: Rodrigo Silva
Assistant District Attorney
Houston Judicial Circuit
rsilva@houstonda.org

I certify that there is a prior agreement with Rodrigo Silva to allow documents in a PDF format sent via email to suffice for service.

This 30th Day of December, 2022.

/s/ Gabrielle A. Pittman
Attorney for Appellant

Georgia Bar No. 581044
P.O. Box 18122
Macon, GA 30252
(478) 227-3654
apittman@gacapdef.org