IN THE COURT OF APPEALS OF GEORGIA

DEMOND BECKETT,	:	
	:	
Appellant	:	
	:	
	:	
	:	
vs.	:	**CASE NO. A24A0491**
	:	
	:	
	:	
STATE OF GEORGIA,	:	
	:	
Appellee	:	

BRIEF OF APPELLANT

PART I: STATEMENT OF THE CASE

A. SUMMARY

Appellant Demond Beckett and Jennifer Stancil were in a relationship for around six years up until October 2020. (Transcript p. 312; hereinafter T.312).

The State charged Beckett with several crimes in Clarke County on October 12, 2020: Aggravated Assault and Terroristic Threats against Ms. Stancil; Theft by Taking a vehicle (from Jerry Clary); and two traffic offenses: hit and run and felony fleeing or attempting to elude police. (Record p. 51-52; hereinafter R.51-

52).

The State alleged, essentially, that Beckett stole the car of an acquaintance (Clary) and then used the car to assault Stancil by driving it into her car and then fleeing from a police officer who happened upon the two moving cars.

After a jury trial, Beckett was convicted only of count three, fleeing or attempting to elude police. He was acquitted of the other four charges. (R.122-123).

B. FACTS

1. Primary Incident

Athens police officer Hovie Lister was on patrol on October 12, 2020, when he got a call about a reckless driver. (T.208). Shortly after receiving this information, Lister was at an intersection where he observed two cars run a red light directly in front of him and driving perpendicular to Lister's orientation. (T.209).

Lister followed the vehicles, passively at first. He observed one, a white Kia "Soul", appear to try to run the other, a white Toyota "4Runner" off of the road. (T.209). Lister followed for about 300 yards. (T.225). Then, Lister initiated his patrol vehicle's blue lights. He also called out for the vehicles to stop. (T.209-210).

The Toyota pulled into the parking lot of a closed business; the Kia

continued driving. Lister stayed with the Toyota, which was driven by Stancil. (T.210). Lister did not see the driver of the Kia well enough to identify them. (T.229).

Lister testified that after he signaled the cars to stop, both cars then "started obeying traffic and staying sort of in their lanes." (T.226).

Lister had no further contact with the Kia. He took a statement from Stancil, who said that Beckett had been chasing her in a stolen vehicle. (T.208–11).

2. Subsequent Baldwin County Incident

Four days later, on October 16, 2020, the State presented evidence of a police pursuit in Milledgeville, Georgia. Baldwin County deputy Shawn Isley testified that he was on patrol that night when he noticed a small Kia S.U.V. make a u-turn into a gas station. Isley turned into the gas station to attempt a traffic stop of the Kia, but the Kia sped off. (T.245–46). After about a half mile of pursuit with his emergency equipment engaged, the deputy discontinued the chase for traffic safety. A short time later Isley saw the Kia turn off of 441 and he followed again. The Kia fled again and quickly crashed into a parked car and came to a stop in the front yard of a residence. (T.247–48).

Other police officers arrived to help investigate, but the driver was not seen or located. (T.249).

Stancil showed up as the police were investigating. She told the police that

"Derrick" Beckett was the driver. (T.251). She later changed her story to say that Demond Beckett was the driver. (T.255). The car was later determined to have been reported stolen by its owner Jerry Clary. (T.251–52.).

PART TWO: ENUMERATION OF ERROR

JURISDICTION

Jurisdiction is in this Court rather than the Supreme Court of Georgia because it is a direct appeal of a final criminal conviction of a crime other than murder. Ga. Const. art. VI, § 5, ¶ III; O.C.G.A. § 5-6-34(a). The appeal was filed timely. Notice of appeal was filed on July 11, 2023, five days after Mr. Beckett was sentenced on July 6, 2023. The appeal was submitted by the Clarke County clerk's office on October 4, 2023, and the appeal was docketed by this Court on October 20, 2023. On October 27, this Court granted Appellant an extension of time to file his brief until November 30, 2023.

ENUMERATION OF ERROR

1. The evidence was insufficient as a matter of law to support the verdict on count three, fleeing and attempting to elude.
2. The trial court erred in allowing the State to introduce evidence of the unrelated independent incident in Baldwin County.
3. The trial court erred in admitting hearsay statements.
4. The trial court erred in denying a motion for a mistrial after a witness

invoked her Fifth Amendment right to remain silent and in counseling the witness improperly about her Fifth Amendment right.

5. The trial court erred in giving a jury instruction on flight that confused the issues of fleeing to elude.
6. The trial court erred in permitting the State to make improper arguments to the jury in closing.
7. The trial court erred by allowing the State to introduce facts not in evidence during closing arguments.

PART THREE: ARGUMENT AND AUTHORITY

1. The evidence was insufficient as a matter of law to support the verdict on count three, fleeing and attempting to elude police.

Count three charged Appellant with felony fleeing and attempting to elude Officer Lister. The crime of fleeing or attempting to elude police is a felony if one of three aggravating factors in alleged and proved. Here, the indictment alleged the aggravating factor of driving in traffic conditions which placed the general public at risk of serious injuries. O.C.G.A. 40-6-395(c)(4). The indictment further alleged that Beckett met that aggravating factor by "driving into the oncoming lane of traffic on Poplar Street and running a red light at the intersection of Poplar Street and Oak Street." (R.4).

The State's evidence was scant as regards the Kia even fleeing from Officer

Lister, but there was no evidence presented as to the element of driving in conditions that placed the general public at risk by driving into the oncoming lane of traffic on Poplar Street or by running the red light at the particular intersection. Lister never testified that the Kia drove into the oncoming lane of traffic on Poplar Street, as alleged in the indictment. Lister did testify that both cars, the Kia and Stancil in the Toyota, ran the red light at the intersection of Poplar and Oak Streets, but this only occurred *before* the officer engaged his signals to stop. (T.209). This act was possibly a moving violation, but it was not part of any fleeing. There was no pursuit at that time.

In order for a dangerous act of driving to aggravate an act of fleeing or attempting to elude police it must occur *after* the officer has signaled for the driver to stop. "It shall be unlawful … to flee or attempt to elude a pursuing police vehicle…" O.C.G.A. 40-6-395; *see also Bledson v. State*, 294 Ga. App. 772, 774 (2008) (holding that the fleeing to elude charge must happen while the officer is in pursuit of the defendant). The evidence here shows the opposite. The officer testified that once he signaled for the cars to stop, both cars began driving more safely. (T.226–27). From the officer's testimony it appears that the Kia was recklessly chasing the Toyota, but that both the driver of the Kia and the Toyota noticed the officer's indicators and responded by immediately driving more appropriately.

Furthermore, there was no evidence the Kia's movements placed the general public at risk as required by the statute (and alleged in the indictment). *See Hicks v. State*, 321 Ga. App. 773 (2013). The officer did not mention any other traffic, cars or pedestrians out in the area at the time of the incident.

The State misunderstood its own evidence as revealed in its closing argument. The prosecutor urged the jury to convict on this count in stating: "how is going in oncoming traffic not going to place the public at receiving serious injury?" (T.530). Officer Lister simply did not testify that Appellant ever drove in "oncoming traffic", and certainly not after any lights or audible signal to stop was given. Because the State's evidence established that the reckless driving that occurred did not rise to the level required to "place the general public at risk," and because the reckless driving occurred before the officer signaled to stop, Appellant urges the Court to reverse the conviction on count three.

2. The trial court erred in allowing the State to introduce evidence of the unrelated independent incident in Baldwin County.

The trial court admitted evidence regarding Mr. Beckett's alleged criminal act in fleeing or attempting to elude pursuing law enforcement officers in Baldwin County some four (4) days subsequent to the events described in the indictment in this case. The court did so under the theory that it was intrinsic to the State's case. (T. at 160.) The court also made a finding that the probative value of the

supposedly intrinsic evidence was not substantially outweighed by its prejudicial effect. (T. at 162.) Both rulings were in error.

(a) The Baldwin County incident was not intrinsic evidence

The State articulated potential reasons why the Baldwin County incident would be admissible as *extrinsic* evidence, but the trial court explicitly did not admit the evidence as extrinsic evidence. (T. at 161.) The State never really articulated why the events of October 16th in Baldwin County were necessary to complete the story of the events of October 12th described in the indictment. At the pre-trial motion hearing regarding the Baldwin County incident, the most the State argued was that introduction of that evidence "would help to explain the story about who is driving this car, who took the car, and why this individual is continuing to flee." (T. at 150.) This stated rationale is insufficient to justify the admission of this evidence as intrinsic to the charged crimes.

> Evidence is admissible as intrinsic evidence when it is "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense."

Whitson v. State, 359 Ga. App. 757, 764 (2021) (quoting *Leslie v. State*, 355 Ga. App. 244, 255 (2020)). Applying these factors to the evidence of the Baldwin County event shows that it is not, in fact, intrinsic to the crimes charged in the indictment in this case. The chase in Baldwin County did not arise out of the same

series of transactions as the charged offenses; it was a separate and distinct event involving none of the witnesses or law enforcement agencies involved in the indictment. Jennifer Stancil might have been a witness to the chase in Baldwin County, but she was not involved as an alleged victim.

Similarly, it was not necessary to discuss the Baldwin County chase to complete the story of the events described in the indictment. The charges in the indictment are self-contained, and could easily be explained in a narrative without any mention of a car chase in Baldwin County.

Finally, the Baldwin County chase is not "inextricably intertwined" with the charges in the indictment.

> [E]vidence pertaining to the chain of events explaining the context, motive, and set-up of the crime is properly admitted if it is linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.... [E]vidence of other acts is "inextricably intertwined" with the evidence regarding the charged offense if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted. And this sort of intrinsic evidence remains admissible even if it incidentally places the defendant's character at issue.

Whitson, *supra*, at 764-65 (quoting *Williams v. State*, 302 Ga. 474, 485-86 (2017) (modifications in the original)). Using this discussion of the meaning of "inextricably intertwined", it is apparent that the Baldwin County chase is not inextricably intertwined with the charged conduct. It is simply not part of the

context of the charged conduct, nor can a chase four days later shed any light on the motive to flee law enforcement at the time of the events on October 12th. Likewise, a subsequent event cannot be considered to be part of the "set-up" of earlier-occurring crimes.

The final factor in the analysis – whether a witness's account of the charged conduct would naturally include the Baldwin County act – also firmly cuts against the admission of the Baldwin County chase as an intrinsic act. If the jury never heard a single word about the October 16 events, the narrative of the various acts alleged to have occurred on October 12 would be complete. All of the crimes alleged in the indictment were completed on the 12th, and there was nothing about the events of the 16th which provided any further information or context to the earlier circumstances of the alleged offenses. No law enforcement officer was able to identify the driver in Baldwin County. (T. at 257). Nothing of any evidentiary value was recovered from the vehicle in Baldwin County. (T. at 261.) Therefore, it was error for the trial court to admit the Baldwin County chase as intrinsic to the charged offenses. Arguably, the events of October 12th could be considered intrinsic to the chase on the 16th, but not *vice versa*.

(b) The Baldwin County incident should have been excluded under Rule 403

Even if the trial court did not err in admitting the Baldwin County chase as an intrinsic act, the trial court erred in its 403 analysis. Evidence should be

excluded under O.C.G.A. § 24-4-403 when the probative value of that evidence is substantially outweighed by the danger of unfair prejudice. In this case, there is very little probative value to the introduction of the events of October 16 in Baldwin County. As discussed above, the State's case regarding the charged conduct was completely self-contained; testimony regarding the events four days later added nothing of substance to the State's case. However, the unfair prejudice presented by this evidence is substantial. Mr. Beckett would argue that the introduction of evidence surrounding the Baldwin County chase was nothing more than propensity evidence. There is a very real danger that the jury could have – and did – convict him of Fleeing and Attempting to Elude as charged in the indictment solely because he allegedly committed the same crime by fleeing from Baldwin County deputies four days later. This argument is supported by the fact that the only offense in the indictment which he was convicted of was the Fleeing count, and by the fact that the State utilized the Baldwin County incident as a propensity argument in its closing argument.[1] (T.530–31, 533).

Propensity evidence is essentially *a priori* unfairly prejudicial. In discussing the interplay between Rule 404(b) and Rule 403, the United States Supreme Court observed that "[t]here is, accordingly, no question that propensity would be an

[1] The State's use of the Baldwin County incident as improper propensity arguments is discussed in more detail hereinafter on pp. 21–24 of this brief.

'improper basis' for conviction…." *Old Chief v. United States*, 519 U.S. 172, 182 (1997); *see also State v. Dowdell*, 335 Ga. App. 773, 780-81 (Peterson, J., concurring specially) (recognizing that ordinarily propensity evidence is unfairly prejudicial, though not necessarily when admitted pursuant to § 24-4-413).

Mr. Beckett submits that there was a distinct possibility that his sole conviction for the crimes charged in this indictment – for Fleeing and Attempting to Elude – was due to the unfair prejudice resulting from the jury believing that he is simply the sort of person who flees from law enforcement. This circumstance is much more likely, given that the State argued that Mr. Beckett "was an expert in fleeing." (T. at 530-31.) Since there was minimal probative value to the evidence of the Baldwin County chase, and significant unfair prejudice, the trial court erred by admitting evidence of that chase.

Admission of other acts evidence is reviewed for a clear abuse of discretion. *See, e.g.*, *Lofland v. State*, 357 Ga. App. 92, 94 (2020). Mr. Beckett submits that the trial court did indeed abuse its discretion in this case.

3. The trial court erred in admitting hearsay statements.

Throughout the proceedings, the trial court demonstrated a fundamental misunderstanding of the hearsay statute. The trial court ruled that any statement made by a witness who would be testifying or had already testified was not inadmissible hearsay. (T.170–71, 208–09, 210–11, 237–38, *et cetera*). These were

errors as a matter of law: "Hearsay shall not be admissible except as provided by this article." O.C.G.A. § 24-8-802. Hearsay is any "statement" offered to "prove the truth of the matter asserted" that is not made "by the declarant while testifying." O.C.G.A. § 24-8-801. There is no exception in the Georgia code for situations where the witness will eventually testify. Certainly, statements made by witnesses who testify at trial can be admitted as a prior inconsistent statement or a prior consistent statement. O.C.G.A. §§ 24-8-801(d)(1)(A), 24-6-613. However, both of those scenarios involve specific requirements that were not met during the trial. The "prior consistent" statements were admitted before any attack on the credibility of the witness occurred (which attack *never* occurred for several witnesses), and thus were improper bolstering statements. And, the statements could not have been "prior inconsistent statements," since the majority of the hearsay statements were admitted before the witness testified – there was no trial testimony that the statements could have been "inconsistent" with. Furthermore, it was clear that the State was admitting hearsay to bolster their own version of events – it was not an attempt to confront the witness with inconsistent testimony.

These hearsay statements prejudiced Mr. Beckett, as set forth below, and should result in a reversal of his conviction for fleeing to elude.

(a) Statements of Jennifer Stancil

The trial court admitted seven (7) distinct categories of Jennifer Stancil's

statements.[2] The court admitted her 911 call to police on the night of the incident. (T.170–71, 320). The court admitted her hearsay statements to Officer Hovie Lister through the testimony of Hovie Lister. (T.208–11, 231, 235). The court admitted her hearsay statements to Hovie Lister through admission of Hovie Lister's body camera footage. (T.213). The court admitted her hearsay statements to Shawn Isley through Isley's testimony. (T.249–51, 254, 262). And the court admitted Jennifer's hearsay statements to Officer Sartain through Officer Sartain's testimony. (T.431). The content of these statements, as relevant to the fleeing to elude charge, was that (1) Demond Beckett stole the Kia Soul belonging to Jerry Clary, (2) Demond Beckett was driving the car that was chasing Ms. Stancil through Athens, and (3) that Demond Beckett was the driver of the Kia Soul in Baldwin County.

The cumulative prejudice of these statements is quite high. Jennifer Stancil was the *only* witness to place Demond Beckett as the driver of the vehicle that Hovie Lister saw fleeing. She is the *only* witness to identify Demond Beckett as the one who took the Kia Soul in the first place. And she is the *only* witness to link Demond Beckett to the Baldwin County incident, which the State used in closing to argue (improperly) that Mr. Beckett was "an expert in fleeing." (T.530–31).

[2] Mr. Beckett obtained a standing objection to all of Jennifer Stancil's hearsay statements. (T.211, 250).

By admitting numerous hearsay statements of Ms. Stancil, the trial court improperly bolstered the only evidence that the State had of Mr. Beckett's guilt in the fleeing to elude count. Before Ms. Stancil testified, and thus before any of her statements could be tested or examined, the jury had already heard *four* times that Jennifer Stancil identified Demond Beckett as the driver of the fleeing Kia Soul. And, even after she testified, the court continued to allow hearsay statements of hers into court, even though there would be no future opportunity for Mr. Beckett to test those hearsay statements.

Mr. Beckett asserts that any one of Ms. Stancil's erroneously-admitted hearsay statements would be reversible error, since she was such an important witness to the State's case and because her credibility was a central feature of Mr. Beckett's defense. But certainly admitting her statements many times, sanitized through the lips of police officers, was prejudicial error requiring reversal of Mr. Beckett's fleeing to elude conviction.

(b) Statements of Jerry Clary

The version of Jerry Clary that testified at trial was not helpful to the State. He quibbled about almost every detail and seemed to have forgotten almost everything he told the police. (T.270–276, 288–93, 298–302). However, the State was permitted to introduce a version of Jerry Clary through hearsay statements that was much more helpful to their theory of the case before and after Mr. Clary

testified. First, Officer Mills testified about what Mr. Clary told him. (T.237–38, 240). Second, Officer Sartain testified about how Mr. Clary had described the whole incident to her. (T.428–29). Then, in closings, they relied primarily on the hearsay statements of Mr. Clary, rather than what his actual testimony was. (T.531–32).

The introduction of Mr. Clary's statements was prejudicial to Mr. Beckett because Mr. Clary's account of what happened – though he never identified Mr. Beckett – was described by *other* witnesses as applying to Demond Beckett. Mr. Beckett was not able to directly cross examine Mr. Clary about the statements introduced through Officer Sartain, since she testified after him, and the State did not meet the threshold requirements for admitting those statements under O.C.G.A. § 24-6-613. Mr. Clary's hearsay statements admitted through Officer Sartain were particularly prejudicial because they contained statements about Mr. Beckett's alleged "erratic" driving, which may have confused the jurors on the fleeing to elude issue, as Mr. Beckett's driving behavior earlier in the day was not relevant to his driving behavior after police told him to pull over. Thus, the admission of Jerry Clary's hearsay statements is reversible error.

(c) Statements of Police Dispatcher

Finally, the trial court admitted statements made by an unknown police dispatcher during Hovie Lister's testimony. This statement – that there was a

"reckless driver" who was the "father of [Jennifer Stancil]'s child," (T.208), was inadmissible hearsay which dealt with the two subject matters most relevant to Mr. Beckett's fleeing to elude defense: identity and the nature of the car's movement. By allowing this untested summary of Mr. Beckett's conduct through inadmissible hearsay, the trial court committed reversible error.

4. **The trial court erred in denying a motion for a mistrial after a witness invoked her Fifth Amendment right to remain silent and in counseling the witness improperly about her Fifth Amendment right.**

The alleged victim in the case, Jennifer Stancil, was also the main witness for the State, as she was the only witness to identify Demond Beckett as the driver of the fleeing Kia Soul. (T.315, 320–21). Thus, her credibility was central to the evidence of the case. During cross-examination, Mr. Beckett attempted to enter into evidence recorded conversations where Ms. Stancil admitted to lying to police officers because she had illegal substances in her vehicle. (T.345–346). The judge sent the jury out of the room to allow counsel an opportunity to play the recording for Ms. Stancil, because the State believed her recollection needed to be refreshed before an impeachment could be admitted. (T.346–348). Once the recorded statement was played, during which the witness stated that she lied to police to "cover her own ass" because she "had all kinds of shit" in her car, such as cocaine, (T.381), the witness invoked her Fifth Amendment right against self-incrimination.

Specifically, she stated "I have the right to remain silent." (T.349). Mr. Beckett moved for a mistrial, arguing that by invoking her rights to remain silent, the witness had prevented Mr. Beckett's ability to cross-examine her. (T.349, 351–53).

Rather than granting the motion for a mistrial, the trial court ordered that cross-examination was still allowed because the witness was not a defendant. (T.353–55). The trial court then went on to instruct Ms. Stancil on her rights, saying "Your right to remain silent in invoking the Fifth…cannot be used a way to not answer questions… The Fifth Amendment right to remain silent involves only those situations where you could put yourself in a situation, for example, to get arrested on a specific charge… it cannot be used as a … sort of shield just not to answer questions that make you uncomfortable." (T.355–57). After that conference, Mr. Beckett asked the court to appoint a lawyer to advise Ms. Stancil, since the subject of cross-examination did touch on unlawful possession of cocaine and lying to a police officer. (T.372). The trial court denied that request, stating that the court did not have the authority to appoint a lawyer for the witness. (*Id*.). Instead, the trial court again instructed the witness on her constitutional rights:

> I'm going to start again with you, Ms. Stancil, and tell you that invoking the Fifth -- and I did mention this before and I'm going to do it again. Invoking the Fifth is a constitutional right that you have to protect yourself from incriminating yourself and the questions that are asked of you on the stand are – at least to this point, the question that is at issue is did you make the statement or not, okay, and the questions are not -- have not been directed to necessarily put you in a

> position to incriminate yourself, but they are merely, at least the question at least from Ms. Beck, was did you make that statement or not.

(T.373). In other words, the trial court advised the witness that her answer to questioning would not be incriminating because she was only admitting to "making the statement" rather than admitting to the underlying conduct.

(a) The motion for mistrial

The proper response to a witness invoking their Fifth Amendment privilege is as follows:

> When the witness manifests his intention to claim Fifth Amendment protection, the court must conduct a hearing outside the presence of the jury to determine whether the testimony the State seeks to elicit potentially could incriminate the witness. If so, the question whether the testimony might incriminate the witness is left to the witness. If the witness concludes he must assert his Fifth Amendment privilege, the State will not be permitted, through the use of leading questions on topics the witness has indicated fall within the privilege, to suggest the guilt or complicity of the defendant. Conversely, if during the hearing the court concludes the testimony could not incriminate the witness, the witness must testify.

Parrott v. State, 206 Ga. App. 829, 832 (1992) (internal citations omitted). The trial court followed none of these steps. First, the trial court assumed without evidence that the witness could not incriminate herself based on the fact that she had no pending charges. Then, the judge ordered that the witness must testify and did not have a Fifth Amendment privilege to remain silent – a determination which was, ultimately, up to the witness herself. Finally, if the trial court had conducted

the proper procedures, the trial court would have allowed the witness to remain silent, since being asked about statements where she admitted lying to police officers and possessing cocaine are clearly capable of incriminating the witness. The witness remaining silent would have necessitated a mistrial, because Mr. Beckett's confrontation rights would have been violated: "Confrontation alone is not enough. Confrontation in a criminal trial really means the right to ask questions and secure answers from the witness confronted." *Lingerfelt v. State*, 235 Ga. 139, 140 (1975); *see also Lawrence v. State*, 257 Ga. 423, 425 (1987) (holding that allowing the State to ask a series of leading questions to a witness who consistently invoked the Fifth Amendment privilege deprived the defendant of their confrontation rights). Thus, this Court should hold that the trial court's handling of the situation constitutes reversible error.

(b) Advising the witness

The trial court improperly stepped into the role of counsel for the State's witness. The trial court should not have given legal counsel to the witness regarding whether or not her testimony was incriminating. *See Mallin v. Mallin*, 227 Ga. 833, 834 (1971) (quoting, with approval, the federal court decision in Aaron Burr's case to allow Burr to determine himself which statements would be incriminating). Further, the court's advice was incorrect – Ms. Stancil was asked to give incriminating answers. Although Ms. Stancil was asked if she *said* that she

had cocaine and lied to officers, the obvious implication of those statements was that she *did* lie to police and possess cocaine. *See Elliott v. State*, 305 Ga. 179, 197 (2019) (noting that the interpretation of the right against self-incrimination has been understood to include answers to questions with "a tendency thereto" incriminate). The trial court's counseling of a State witness was also improper as it could be perceived as bias for the State:[3] "At least in some circumstances, the giving of such advice could create an appearance of partiality, which is a proper ground for a motion to recuse under our Code of Judicial Conduct." *Pyatt v. State*, 298 Ga. 742, 751 (2016). The proper response of the trial court should have been to conduct a hearing, allow the witness to plead the fifth, and then grant the motion for a mistrial. The failure to do the proper steps when Mr. Beckett moved for a mistrial is grounds for a reversal of his conviction. *See Lingerfelt*, 235 Ga. at 140; *Lawrence*, 257 Ga. at 425.

5. The trial court erred in giving a jury instruction on flight that confused the issues of fleeing to elude.

During the charge conference, the trial court instructed the jury with a pattern jury charge regarding flight:

[3] Mr. Beckett did not ask for the trial court to recuse itself after this interaction. Thus, the issue of judicial bias is not a separate grounds for reversal of his conviction. *See Dukes v. State*, 364 Ga. App. 425, 431 (2022). However, Mr. Beckett contends that the apparent bias is still relevant as demonstrating the trial court's inappropriate remedy to the motion for the mistrial – that the court coached the witness how to answer to avoid "a mistrial moment." (T-354).

> Evidence of alleged flight has been introduced. Such evidence is governed by the rules concerning circumstantial evidence you have already been given. Furthermore, you may only consider it if you find more likely than not that the defendant actually, one, committed such act, and two, that the reason was to avoid arrest.

(T.576). The State requested the jury charge so that they could argue about the events that occurred in Baldwin County demonstrating that the defendant was trying to escape punishment for his actions. (T.488–89). Mr. Beckett objected to this charge on the basis that it might confuse the jury, since fleeing to elude was one of the felony charges facing Mr. Beckett. (T.488). Mr. Beckett also noted that giving the flight charge was considered reversible error by appellate courts. (T.489). Regardless, the trial court overruled the objection on the basis that it fit the evidence presented. (T.489, 492).

As argued by Mr. Beckett during the charge conference, giving the pattern charge on flight is reversible error. The charge essentially allows the trial to court "identify and explain the possible consequence of one circumstance," which invades the province of the jury. *Renner v. State*, 260 Ga. 515, 517–18 (1990). It "inevitably carrie[d]" the "intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant." *Id.* at 518.

The charge was also misleading due to the nature of the alleged conduct, and thus the trial court committed reversible error in giving it. *Harris v. State*, 202 Ga.

App. 618, 621 (1992) ("If any portion of a requested charge is inapt, incorrect, misleading, confusing, not adequately adjusted or tailored, or not reasonably raised or authorized by the evidence, denial of the charge request is proper."). Mr. Beckett was charged with fleeing to elude, so "flight" was already a point of contention between the parties. When the trial court stated that "evidence of alleged flight *has been introduced*," the jury might easily have heard that as "evidence of alleged fleeing to elude has been introduced" – as in, a suggestion that there *was* evidence that the defendant committed one of the charges. Further, it was misleading to have this instruction on flight when fleeing to elude had already been defined, because the jury may have felt that the evidence for "flight" – *i.e.*, the evidence from Baldwin County – was evidence for the "fleeing to elude" charge. In fact, the State conceded during the charge conference that it wanted the pattern jury charge on flight to talk about the Baldwin County incident. (T.488). The State then proceeded to use the Baldwin County evidence exactly as Mr. Beckett feared, (T.516), blurring the lines between his "fleeing to elude" charge in Athens and his alleged "flight" in Baldwin County:

> And [flight] becomes a felony when you do this under conditions which place the general public at risk of receiving serious injuries. … And he did. He determined they were. In fact, Demond apparently is an expert in fleeing because he did so again in Baldwin County.

(T.530–31). Again, the State argued that "He hauled his butt down the road. He

did not only once here, he did it again in Baldwin County." (T.533). And again, the State argued that "[t]he evidence is what it is, and it is beyond a reasonable doubt that Demond assaulted Jennifer with Jerry's stolen vehicle and then fled to Baldwin County before crashing it." (T.539–40). Because of the facts of the case, and the charges that Mr. Beckett faced, giving the "flight" charge was reversible error as it led to misleading parallels between the Baldwin County incident and the fleeing to elude charge for which Mr. Beckett was on trial.

6. The trial court erred in permitting the State to make improper arguments to the jury in closing.

The trial court committed a reversible error by failing to intervene during the State's attempt to make improper arguments. Under O.C.G.A. § 17–8–75, when counsel makes statements that are not in evidence, "it is the duty of the court to interpose and prevent the same." When opposing counsel objects, "the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender." O.C.G.A. § 17–8–75.

Rather than follow the above obligations, the trial court allowed the State to make improper arguments under the theory that "any comments made by the attorneys are not evidence," and thus anything the State said was permissible.

(T.541). Because of the prejudicial and improper nature of the State's argument, Mr. Beckett's conviction for fleeing to elude should be reversed.

(a) Arguments regarding use of an attorney

The State argued that the jury could infer the defendant's guilt from the use of an attorney. Specifically, the State argued "Innocent people don't need their attorneys to play these kinds of games."[4] (T.542). The State also made a visual presentation, through PowerPoint, that "Guilt – Innocent People Don't Need Their Attorneys to Play these Kind of Games." (R.37). These statements were objected to contemporaneously by Mr. Beckett. (T.540–41).

This argument and PowerPoint presentation plainly constitute a comment on Mr. Beckett's Sixth Amendment right to counsel, and imply that Mr. Beckett's exercise of that right constitutes evidence of his guilt. This argument – even if made by implication – is a serious constitutional violation. Various federal courts have reversed convictions based on similar arguments by prosecuting attorneys, and have been crystal clear in describing the unacceptable nature of such comments.

In a Third Circuit case, a prosecutor argued that various actions of the defendant after he had allegedly committed a murder demonstrated his guilt. One

[4] The "games" referenced appear to be a straw man argument that Ms. Stancil's drug abuse made Mr. Beckett abuse her – something that was never argued or implied. (T.542).

of these actions was calling an attorney. *See United States ex rel. Macon v. Yeager*, 476 F.2d 613, 614 (3rd Cir. 1973). The circuit court reviewed the district court's analogy of a prosecutor's commenting on a defendant's invocation of his Sixth Amendment right to counsel to a prosecutor's commenting on a defendant's invocation of his Fifth Amendment right against self-incrimination by not testifying at trial. *See id*. Since the United States Supreme Court held *in Griffin v. California*, 380 U.S. 609 (1965), that a prosecutor's argument that a negative inference should be drawn from the defendant's silence, and such an argument constituted a constitutional violation which mandated reversal of Griffin's conviction, *id*. at 613–14, the district court in *Yeager* determined that a similar rationale would mandate reversal when the prosecutor argued that consulting an attorney was evidence of guilt. *See Yeager*, *supra*, at 615-16. The circuit court affirmed. *Id*.

The District Court of South Dakota reached a similar conclusion in its grant of a habeas corpus petition when it examined the prosecutor's closing argument at trial. The prosecutor had stated that the petitioner's call to his attorney was a "telling sign", and immediately argued that the government had "further proven" its case. *Zemina v. Solem*, 438 F. Supp. 455, 465 (D.S.D. 1977), *aff'd Zemina v. Solem*, 573 F.2d 1027 (8th Cir. 1978). Just as in *Yeager*, the district court analyzed the prosecutor's argument in the context of *Griffin* (citing *Yeager* itself), and found

that "the only thing that petitioner's call could have been a 'telling sign' of was his guilt." *Id*. at 465-66. Thus, the district court granted habeas relief, commenting that "[t]he prosecution should not be allowed to imply that only guilty people contact their attorneys." *Id.* at 466.

The case which most strongly establishes that a prosecutor's implication of a defendant's choice to avail himself of his Sixth Amendment right to counsel is reversible error is *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980).[5] In *McDonald*, the attorney for the government intentionally elicited testimony that McDonald's attorney was present when the United States Secret Service served a search warrant at McDonald's residence, and then argued in closing that "I suggest to you if Jimmy McDonald knew all this was going on, and had his lawyer out there three hours later, I believe that would be sufficient time to dispose of any ashes or any evidence, if you were so inclined." *McDonald, supra*, at 561-62.

Given the context of the government's argument and the evidence, the Fifth Circuit concluded "that the real purpose of the reference to the attorney's presence was to cause the jury to infer that McDonald was guilty. The reference therefore penalized McDonald for exercising his Sixth Amendment right to counsel." *Id.* at 564. The court went on to find that he comments were likely to give rise, in the

[5] Pre-split 5th Circuit cases are binding on the 11th Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

average juror's mind, to at least three inferences: (1) McDonald's attorney acted illegally or unethically, (2) defense counsel generally in criminal cases act illegally or unethically, and (3) McDonald would not have gotten a lawyer unless he was guilty. *Id.* Given these inferences, the court strongly condemned arguments in this vein:

> No prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as a means of imputing guilt to a defendant. It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel.

Id. The court found that the error presented by the prosecutor's argument implicated a fundamental constitutional right, and thus the error was harmful *per se*. *See id*. Further, the court held that "[o]bvious and insidious attacks on the exercise of this constitutional right [to counsel] are antithetical to the concept of a fair trial and are reversible error." *Id.*

There can be little doubt that the prosecutor's closing argument in this case is just such an odious attack. Displaying a PowerPoint slide with the word "GUILT" appearing in all capital letters, in bold type, and underlined, with the statement that "Innocent People Don't Need Their Attorneys to Play these Kind of Games" cannot be anything but an argument that Mr. Beckett is guilty because he has attorneys representing him at trial. The inferences created by the State's argument in this case are exactly those that the Fifth Circuit found so execrable,

and, in fact, are more blatant than those in *McDonald*. The State is clearly arguing to the jury that criminal defense lawyers act unethically by "playing games," especially in light of the comments appearing on the PowerPoint slide immediately above "GUILT" which reference defense attorneys "throwing dirt."

This Court should follow *McDonald* and hold that the State's invitation to the jury to find Mr. Beckett guilty because he had the temerity to avail himself of his constitutional right to counsel – and further implying that such counsel is unethical – constitutes a fundamental constitutional violation, and thus mandates reversal of his conviction.

(b) Arguments that shifted the burden of proof to the defense

During closing, the State argued to the jury in a way that impermissibly shifted the burden to the defense to prove that Mr. Beckett was not driving the car that fled police. In particular, the State asked a rhetorical question: "What theory has the Defense put forward to inform you of who else could've been in that car?" (T.538). Upon Mr. Beckett's objection, the trial court – instead of admonishing the State and instructing the jury – admonished Mr. Beckett for objecting: "So I don't really like interruptions during closing and opening, so this better be a good one." (*Id*.). The trial court then sustained the defense's objection in secret – during the bench conference – and did not instruct the jury on the burden-shifting element that the State had introduced. So, the jury was allowed to believe that "what theory has

the defense put forward" is a valid argument for the State to make.

Even after the trial court secretly ruled that the State could not burden shift, the State continued to do so. The very next line of the closing argument contained the same error: "Have they identified anybody else who could've been in that car? No." (T.539). Furthermore, the State was allowed to continue presenting a visual image of the same burden-shifting argument: a slide with "The Defense – What has been shown?" along with a picture of a rainy puddle.[6] These arguments were improper and were never remedied by the judge. Thus, this court should find the trial court committed reversible error.

(c) Arguments regarding the social injustice of domestic violence

The State took a long moment in their closing to compare the case that was before the jury with the societal injustice of domestic violence everywhere:

> Quite frankly, and it's clear, I'm angry. I'm angry not just for Jennifer. I'm angry for every woman that has to endure this at the hands of a man who is weak, weak and has to make up for his insecurities by wanting to control and have power over someone who he sees is weaker than himself.

(T.543). The idea that the jury needed to convict Mr. Beckett for societal justice on this issue had already appeared earlier in the State's argument when talking about one of the acquitted charges, family violence aggravated assault:

This could not be more of a family violence matter. It screams it. And

[6] Mr. Beckett is not entirely sure what the photograph is portraying or what it means, and so would not object to this slide if not for the language above the picture. (R.36).

> there's a reason why Georgia legislature created this aggravating factor. To deter violence within families. Families are the building blocks of our society, where we learn what love is, where we learn how to navigate the world, where our children see and learn what is appropriate from their parents, biological or not. And it is for the purpose of deterring violence behind closed doors within one of the most sacred units in our community.

(T.529–30). Further, on the PowerPoint used in closing argument, the State had a slide telling the jurors it was "Important" to find the defendant guilty because it was a "Message to be sent" to the community. (R.38).

It is true that Appellant was acquitted of the family violence charges. However, the violation of Mr. Beckett's rights to a fair trial affects any guilty verdict that was rendered. Some of the jurors may have been angry enough about domestic violence to try and convince the other jurors to convict Mr. Beckett on *something*, with fleeing to elude being the only charge to agree on. Further, the State intentionally equated the anger that the jury might feel at the alleged domestic violence to the danger Mr. Beckett posed to the community: "He doesn't think of the consequences of his actions, and he has no remorse for the pain that he has caused, who he puts at risk, whether that be the mother of his child or our community." (T.543). Prior to that statement, the "harm" to the "community" was in reference to Mr. Beckett's alleged fleeing to elude conduct. ("general public at risk," T.530, "public at risk" with driving, T.534, putting the "community at risk," T.543). Thus, when the State argued that Mr. Beckett had "no remorse" for either

the "mother of his child" or the "community," the State was intentionally trying to get the jury to feel the anger of the domestic violence allegation and apply that same prejudicial anger to the fleeing to elude charge. Thus, this Court should reverse Mr. Beckett's conviction for fleeing to elude.

(d) Argument improperly commenting on Appellant's right to remain silent

During part of their closing argument, the State commended Jennifer Stancil for taking the stand and clearing the air about her "skeletons." (R.534). Then, the State went on to compare the Appellant with this witness and implicitly comment on his right to remain silent:

> She owns it. She absolutely says, yes, I am an addict. Someone who knows it, who owns it, who is trying to see the light, to become sober, they have to own it when they go to NA meetings. But Demond can't take responsibility for his wrongdoings. He couldn't spare her of having to come to court to be re-traumatized by the process of this criminal justice system.

(T.534–35). Arguing that Mr. Beckett's exercise of his right to a trial was a sign of his bad character is deeply concerning. And, by comparing Mr. Beckett's choice not to testify and/or take a plea (not to "take responsibility for his wrongdoings"), the State improperly commented on Mr. Beckett's right to not incriminate himself. The State committed a similar error a few moments later:

> You're doing something that someone doesn't approve of, fine. That's fine. Don't lie about it. Own it. Demond Beckett has [not] owned crap for a while. He has repeatedly used his brother's name. He's even willing to hit below the belt and try to paint Jennifer as a liar but can't

> admit to his actions on October 12th, 2020. And as she said on the stand, her drug addiction has absolutely no bearing on his behavior. A man doesn't hit a woman. A man doesn't put a woman he believes is the mother of his child at risk of serious harm. A man makes mistakes, sure, absolutely. He may very well make poor decisions. I give them that. But they own them, and they learn from them. And Demond hasn't learned a thing. He hasn't become wiser from his actions. As Defense stated in their opening, he sits there innocent. He believes he is innocent. He believes that it's not violent to hit her in the face…

(T.537). While Appellant could legitimately argue a number of problems with the above argument, it is clearly a comment on Appellant's decision not to testify. The State continuously calls on the jury to hold Mr. Beckett accountable for not "owning" his mistakes – in other words, not breaking his right to remain silent.

7. The trial court erred by allowing the State to introduce facts not in evidence

Making comments concerning facts not in evidence is prohibited as a matter of law. *See Bell v. State*, 263 Ga. 776, 777 (1994); *Conner v. State*, 251 Ga. 113, 122 (1983); *Walker v. State*, 232 Ga. 33, 36 (1974); *Coleman v. State*, 189 Ga. App. 366, 367 (1988). The law condemns "the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." *See Conner*, 251 Ga, at 123 (internal citations omitted). "The law forbids the introduction into a case by way of argument of facts which are not in the record and are calculated to prejudice a party and render the trial unfair." *Beamon v. State*, 348 Ga. App. 732, 734 (2019) (internal citations omitted).

Attorneys are permitted "wide latitude" in the arguments they make to the jury. *See Nundra v. State*, 885 S.E.2d 790, 799 (Ga. 2023). However, within the scope of such latitude is the attorney's obligation to argue reasonable and permissible inferences from the evidence. *See Tucker v. State*, 313 Ga. App. 537 (2012); *Nundra,* 885 S.E.2d at 799. They are allowed to draw deductions during closing arguments provided that they are supported by evidence presented at trial. *See Billups v. State*, 234 Ga. App. 824, 828 (1998). In other words, statements attorneys make during closing arguments must be derived from evidence that was properly before the factfinder. *See Frady v. State*, 359 Ga. App. 255, 257 (2021). They cannot go beyond the facts introduced at trial and "lug in extraneous matters as if they were a part of the case." *Id*. Here, the State introduced at least three categories of facts not in evidence that require reversal of Mr. Beckett's conviction.

(a) Conditions of Mr. Beckett's life

The State in closing introduced facts not in evidence to try and explain the nature of Mr. Beckett and Jennifer Stancil's relationship: "But he stayed because he's homeless, and it's a heck of a lot easier to get by when you don't have very much when somebody else is splitting the bills with you and helping you get by…" After objection, the State finished their analysis as follows: "It's a lot easier when

you're in a relationship with someone who's willing to submit to your abuse." (T.536).

The prosecutor's argument is improper because it introduces facts that were never before the jury during the trial. Jennifer Stancil admitted that she was homeless in January 2023, (T.381), but she never testified that Demond Beckett was homeless at the time the alleged incidents between them occurred. She did testify that they were "surfing from one place to another," (T.313), but it was never stated that this was because they did not have a home to go to. Further, no mention of "splitting bills" or any other financial information about Mr. Beckett was ever introduced.

(b) Jennifer Stancil's panic attack preventing her testimony

During her response to cross some cross examination questions, Ms. Stancil stated that she "had to go to the hospital this morning because I had a panic attack for coming here." (T.387). However, in closing argument, the State went a step beyond her testimony and stated that "In fact, to let you in on something, I actually planned to call her first, and I couldn't… Jennifer Stancil testified that she had a panic attack the morning that she testified. That's why I couldn't call her first." (T.562–63).

The jury was never informed during the course of the trial that Ms. Stancil was slated to be the State's first witness. The jury never heard that Ms. Stancil was unable to testify first because of her panic attack. By communicating those ideas to

the jury, counsel for the State passed beyond the role of attorney and took on the role of witness, corroborating Ms. Stancil's story by introducing new facts – that the State had tried to call her to testify and that her hospital visit prevented that from happening. This was improper.

(c) State prosecutor's experience with being tailed

Most egregiously, the prosecutor inserted a story into her closing argument detailing her own experience of being tailed by an erratic driver:

> When I was in college, I was actually driving on 441, I think, to come back home, and there weren't many people on the road. I was about in the middle of nowhere actually, and somebody was tailing me, literally riding my butt down 441, and you know, when somebody's riding your butt, and you know, wanting you to go faster, it tends to make you want to go faster because they're pushing you. And I was young and dumb, and I did, I sped up, and they continued to tail me. And then I got in a different lane to try to let them go around me, and they followed me, and then I got back in the other lane, and they continued to follow me. And eventually a police officer got behind both of us, and when he blue lighted and ran his siren, we both pulled over. He didn't have to get on his intercom and tell both of us because common sense would tell both of you if you are speeding that you need to pull over.

(T.560–61). It is improper for a prosecutor to insert personal anecdotes to persuade a jury of a defendant's guilt. *See Durden v. State*, 293 Ga. 89, 98 (2013), *overruled on other grounds by Jeffrey v. State*, 296 Ga. 713, 770 S.E.2d 585 (2015); *see also Wyatt v. State*, 267 Ga. 860, 864 (1997) ("expressions of personal opinion by the prosecutor are improper in closing argument."). This error is compounded because

the facts that the prosecutor relates are "prejudicial matters" that are "not in evidence." O.C.G.A. § 17-8-75.

(d) The cumulative effect of the facts not in evidence

Mr. Beckett urges this Court not to engage in a piecemeal analysis of each improperly admitted fact not in evidence. The facts detailed above were compounded by other improper facts not in evidence, such as the prosecutor's comments about the value of her own car as a means to persuade the jury that the car Mr. Beckett took had a certain value. (T.561). The cumulative effect of all these improperly argued facts rises to the level of a due process violation. By allowing the State to recite these improper facts again and again and again, the trial court allowed the State to fashion an argument filled with so much prejudicial information that the jury could not have been able to fairly consider the evidence that was admitted at trial. Thus, the trial court allowed a violation of the principles of a fair trial, and thus, a due process violation which did harm Mr. Beckett – the jury returned a verdict for which there was no competent evidence.

PART FOUR: CONCLUSION

Mr. Beckett's conviction for Fleeing to Elude must be reversed for a number of reasons. First, there was not sufficient evidence for a jury to find beyond a reasonable doubt that Mr. Beckett engaged in actions which placed the public at risk after the police officer had signaled him to pull over. Second, the jury was allowed

to hear evidence of a separate event that took place in Baldwin County four days after the alleged incident that formed the basis of Mr. Beckett's charges. This evidence was not intrinsic to the case and was substantially more prejudicial than probative, as it tended to confuse the jury as to the issue of fleeing to elude – a confusion that the State took full advantage of in their closing arguments. Third, the trial court admitted voluminous amounts of hearsay statements that improperly bolstered the State's flimsy case against Mr. Beckett. Fourth, the trial court impermissibly denied Mr. Beckett's motion for a mistrial and engaged in counseling of a State witness, actions which deprived Mr. Beckett of a fair trial. Fifth, the trial court gave a jury instruction on flight that has been clearly and unequivocally held to be reversible error and which likely confused the jurors as to Mr. Beckett's fleeing to elude charge. Sixth, the trial court allowed the State to make blatantly improper arguments to the jury that infringed upon Mr. Beckett's constitutional rights to counsel and to a fair jury trial. Seventh, the trial court allowed to State to introduce through closing arguments several facts that were not properly introduced through evidence at trial.

Mr. Beckett argues that this Court should overturn his fleeing to elude conviction on any one of those seven grounds. But Mr. Beckett also contends that this court has an obligation to examine the cumulative error of all those grounds together – the numerous errors of the trial court and the many unfairly prejudicial statements of the State naturally culminate into one conclusion: Mr. Beckett was not

given a fair trial. For these reasons, Mr. Beckett urges this Court to reverse his conviction for felony fleeing to elude.

Respectfully submitted this 29th day of November, 2023.

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

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF OF APPELLANT has been served upon Robert Wilson, Assistant District Attorney for the Western Judicial Circuit, by electronic service and by handing a copy of same to them personally or to one of their duly authorized agents at their main office located at:

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This 29th day of November, 2023.

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