IN THE COURT OF APPEALS OF GEORGIA

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

APPELLANT'S REPLY BRIEF

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1. The Evidence was Insufficient for Felony Fleeing and Attempting to Elude

The State apparently misunderstood the facts when it charged with Mr. Beckett with felony fleeing and attempt to elude police.

The original complaint was that Mr. Beckett was in one car (a Kia Soul) recklessly chasing his girlfriend, Jennifer Stancil, who was driving her car (a 4Runner) ahead of him. The officer who responded to this call, Hovie Lister, testified and confirmed, to an extent, this reckless vehicle pursuit. But Officer Lister saw the unsafe driving *before* he attempted to stop the vehicles. Count three

of the indictment cites two specific acts of driving during an attempt to elude: driving in the wrong lane and running a red light. Both acts occurred before he exercised his authority to make a traffic stop. Lister was stopped at a light when he saw both the vehicles run a red light and weave outside their lanes. Lister followed the two vehicles for about 300 yards observing but not yet deciding to make a traffic stop. (Tr., p. 225). He saw both the vehicles weaving in and out of their lanes. (Tr. p. 226). Once he initiated visual and audible command to stop he testified that both vehicles "started obeying traffic and staying sort of in their lanes." (Tr. p. 226). The officer also testified that after he activated his blue lights, "they (both drivers) started to brake." (T. p. 227).

Appellant set out his argument in his initial brief as to why this evidence does not support a guilty verdict on count three, felony fleeing and attempting to elude police. The State's response in its brief is to mislead by significantly mischaracterizing the facts.

In its "Statement of Facts", the opening sentence citing Officer Lister's testimony on page 209 of the trial transcript is wrong. (Appellee Brief, p. 3). Lister did not testify that the vehicles were "speeding". Nor did he testify that the vehicles were weaving "in and out of traffic". He never mentioned any other traffic other than the two cars involved in the incident. (Tr. p. 209). Also, Appellee's claim that "Appellant ran another red light and sped away." (Appellee

Brief, p. 4) is not a fact in the testimony within the cited pages of 209–227, or anywhere else.

The "Argument" portion of its brief gets worse.

Appellee makes a gross misstatement of the evidence in claiming that a high-speed chase was captured on a police officer's body camera. (Appellee Brief, p. 6). This is untrue.

The State admitted Officer Lister's body camera recording into evidence as State's Exhibit 1, but it only contains his conversation with Jennifer Stancil after he stopped her car in a parking lot. Yet Appellee's brief boldly claims that "Lister's body camera shows the manner in which Appellant was driving his vehicle—at a high speed, into on-going traffic, running a red light, attempting to crash into victim's car." (Appellee Brief, p. 6). The video recording on State's Ex. 1 shows no driving whatsoever. Nor was there any testimony at trial from Officer Lister that Appellant drove into "on-going traffic".

Appellee also says "the jury, *after viewing the camera* …" determined that Appellant drove as alleged in count three. (Appellee Brief, p. 7). Again, there is no "camera" or video recording of the driving at issue. The Kia Soul is never seen on the officer's recording and the 4Runner is stopped. (State's Ex. 1).

There simply was no police "chase." The officer saw two vehicles run a red light and drive out of their lanes prior to initiating a traffic stop. Appellee's Brief

(incorrectly) implies that this improper driving took place during a police pursuit.

Appellant again urges this Court to reverse the conviction on count three as it is not supported by the evidence.

2. Evidence of the Baldwin County Incident was Not Intrinsic Evidence

The State's arguments with respect to the allegedly intrinsic evidence of the Baldwin County fleeing charges rather miss the point. First of all, the State, in response to Mr. Beckett's argument that the Baldwin County conduct was used by the prosecution as nothing more than propensity evidence, seems to argue that a propensity argument is permissible if the prosecutor sincerely believes in the "truth" of that argument. However, the case that Appellee cites in support of this proposition – *Jackson v. State*, 301 Ga. 774 (2015) – reviewed a prosecutor's argument in light of an assertion that the prosecutor was vouching for the credibility of a witness, not an argument that the prosecutor was arguing guilt based on propensity evidence. *See Jackson*, *supra*, at 775. Thus, the holding in *Jackson* is entirely inapplicable to Mr. Beckett's argument here.

The record shows that the prosecutor in this case argued that Mr. Beckett was "apparently an expert in fleeing because he did so again in Baldwin County", (T. at 530-31), and that he was "trying to evade police" at the hospital. (T. at 531.) This argument is nothing more than arguing that Mr. Beckett is guilty of fleeing police in this case because he allegedly did so in Baldwin County, and because he

was evasive with police at the hospital; such an argument is, at its core, arguing propensity. A propensity argument is always improper.

Likewise, Appellee's argument regarding why the Baldwin County incident is intrinsic to the charged conduct misapprehends the law regarding the definition of "intrinsic evidence", and misconstrues Mr. Beckett's argument regarding the review of the evidence under O.C.G.A. § 24-4-403.

The Appellant begins by arguing that because Mr. Beckett was alleged to have possessed the Kia Soul in Baldwin County on October 16, this fact somehow is connected to the crime of Theft by Taking that he was alleged to have committed on October 12. The elements of Theft by Taking (O.C.G.A. § 16-8-2), as charged in Count 4 of the indictment in this case, are 1) a taking of another's property 2) with the intent of depriving the owner of that property. Further, "the evidence must show that the requisite intent to deprive the owner of the property was present at the time of the taking." *Spray v. State*, 223 Ga. App. 154, 156 (1996). It was never really contested at trial that Mr. Beckett was the one driving the Kia Soul in Athens-Clarke County on October 12. Therefore, the fact that Mr. Beckett was alleged to have been driving that same vehicle in Baldwin County on October 16 is not intrinsic to any of the offenses alleged in the indictment in this case. The Baldwin County act did not arise out of the same transaction or series of transactions as the Athens case. Proof that Mr. Beckett may have been in

possession of the Kia Soul on October 16 is not necessary to complete the story of the crimes alleged to have transpired on October 12 – since Mr. Beckett's intent at the time of the alleged taking is the critical fact, his alleged possession of the property on October 16 does not usefully inform the question of his intent on the 12th. Finally, Appellee asserts that proving Mr. Beckett's possession of the vehicle on October 16 was "important" to its case, but "important" is not equivalent to "inextricably intertwined"; the evidence must be an "integral and natural" part of the witness' descriptions of the circumstances surrounding the offenses charged in the indictment. *See Whitson v. State*, 359 Ga. App. 757, 764-65 (2021) (quoting *Williams v. State*, 302 Ga. 474, 485-86 (2017)).

Appellee argues that "Appellant asserts that the charges are self-contained in the indictment, but that leaves out an important part of the explanation of the case," (Appellee's Brief at 12), but fails to demonstrate what "important part" of the Clarke County case is left out if the evidence had been limited solely to the events described in the indictment. All of Appellee's arguments seem to concern the Theft by Taking count of the indictment, but Appellee offers no argument how the Baldwin County act would be at all intrinsic to any of the other counts of the indictment. Since the only possible asserted connection between the Baldwin County act and the charged conduct concerns only one of five counts, Mr. Beckett

would argue that the probative value of the Baldwin County act is greatly reduced, which leads into a discussion of the 403 analysis.

Appellee seems to criticize Mr. Beckett for propounding the argument that the verdict at trial demonstrates the prejudicial effect of the Baldwin County evidence, (Appellee's Brief at 12), but this criticism fails to recognize that it is a common appellate practice to examine the harm from erroneously admitted evidence through a consideration of the jury's ultimate verdict. *See, e.g., Harris v. State*, 314 Ga. 238, 283-88 (2022). Moreover, Appellee seems to make the curious argument that intrinsic evidence, by virtue of such evidence not being subject to the provisions of O.C.G.A. § 24-4-404(b), may be introduced as propensity evidence. (Appellee's Brief at 14.) However, this is not consistent with the state of the law. "'The prejudicial effect of evidence is unfair if the evidence has the capacity to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged, or an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Jackson v. State*, 317 Ga. 95, 102 (2023) (quoting *Wilson v. State*, 315 Ga. 728, 738 (2023)). The danger of the Baldwin County evidence is precisely that identified in *Jackson*: introduction of that evidence in Mr. Beckett's case suggested that the jury should

convict him of the fleeing count based upon his asserted propensity to attempt to evade police, which is the quintessential improper purpose.[1]

Therefore, it was error for the trial court to admit evidence of the Baldwin County event as intrinsic evidence, and, even if the evidence was intrinsic, its probative value was overshadowed by the significant prejudicial effect of admitting that evidence.

3. Hearsay Evidence was Improper and Prejudicial to Mr. Beckett

The State attempts to justify several of the trial court's rulings on hearsay based on arguments that were never presented to the trial court and were never referenced in the trial court's rulings. Arguments which appear nowhere in the record should be deemed as having been waived by the State. *See, e.g.*, *Vivian v. State*, 312 Ga. 268, 274 (2021) (arguments which "the trial court did not rule on" are waived on appeal). This is especially true where the State affirmatively argued a different reason for admitting the statements which has no basis in proper legal theory – *i.e.*, that statements are not hearsay if the declarant will later be called to testify – rather than advancing the argument more tenable on appeal. T. at 209. Indeed, Mr. Beckett urges this Court to find an *affirmative* waiver on the part of the

[1] It should be noted that this assertion is not universally true: evidence admitted pursuant to Rule 413 may be allowed to be used as propensity evidence. *See 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).

State, since they took the position in the court below that Ms. Stancil's statements were *not* hearsay (or, not objectionable hearsay), rather than arguing that they fell into some exception to the normal hearsay requirements. *See, e.g.*, *Mohr v. State*, 896 S.E.2d 8, 13 (Ga. Ct. App. 2023) (because party "did not argue below that he was offering the testimony for a non-hearsay purpose," that argument was waived on appeal); *Davis v. State*, 311 Ga. 225, 857 S.E.2d 207, 211 (2021) (attorney's statement to judge that opposing counsel's statement of the law was correct was an affirmative waiver of the grounds for same objection on appeal).

But, even if these arguments are not waived, they do not cover the vast array of hearsay statements admitted, and they certainly do not wash away the substantial prejudice to Mr. Beckett.

Jennifer Stancil's 911 Call

The State argues that the 911 call admitted into evidence was a present sense impression, relying exclusively on *Driskell v. State*, 333 Ga. App. 886 (2015). That case is entirely inapposite to the matter at hand, since it deals with the question of whether a 911 call is testimonial in relation to a Confrontation Clause argument. *See Driskell*, 333 Ga. App. at 891–92.

In any case, the entire 911 call does not fall into the present sense impression exception. To be considered a present sense impression, a statement must be "describing or explaining an event or condition made while the declarant was

perceiving the event or condition or immediately thereafter." O.C.G.A. § 24-8-803. During the 911 call, Ms. Stancil relates matters that are not happening at the present time or happened in the not-too-distant past. For example, though she has *not* seen a weapon, she tells dispatch that Mr. Beckett has a weapon – "I think a gun" – because "he stole someone's car." *See* State's Exhibit 4 at 2:15 – 2:31. She speculates about future matters – she cannot go to the police station, because she thinks "he's going to follow me there." *Id*. at 2:40 – 2:47. Neither of these statements would fall into the present sense impression exception to hearsay.

Jennifer Stancil's Other Hearsay Statements

The State argues that any and all statements admitted into evidence fall within some exception to the hearsay rule. First, the State alleges that Ms. Stancil's statements *en masse* would be "excited utterances," and cites *Lopez v. State*, 311 Ga. 269 (2021),[2] for the proposition that a statement made "under the stress of the current event" is an excited utterance. *See* Appellee's Brief at 15. But *Lopez* does not help the State – in order for a statement to be admitted as an excited utterance, a court must "determine" if the declarant is "still in a state of excitement resulting from that event" by examining the "totality of the circumstances." *Lopez*, 311 Ga. at 271. No such determination was made by the trial court here. And, the

[2] The State erroneously cites the case as 310 Ga. 269, but Appellant is reasonably confident that Appellee meant to cite to 311 Ga. 269.

record is not sufficiently clear for such a determination to be made about each and every one of Jennifer Stancil's statements now on appeal. For this reason, the excited utterance argument, particularly, should be deemed waived.

However, if this Court is inclined to examine each statement made by Jennifer Stancil under the rubric of excited utterance, it is clear that the State did not establish that the declarant was "still in a state of excitement" when making all of her out of court statements. The State argues that Ms. Stancil's entire encounter with Officer Lister after he pulled her over would be an excited utterance, but it is not apparent from the video that was admitted that she was, in fact, agitated or stressed in any way. *See generally* State's Exhibit 1. Officer Lister was not asked whether Ms. Stancil appeared to be excited or agitated. T. 207–36. Nor did he spontaneously give any information as to Ms. Stancil's demeanor or manner of speaking. *See id*. Simply put, there is no evidence that Ms. Stancil was still acting under the stress of any event that had occurred when speaking to Hovie Lister.

The same is true for the statements made to Shaun Isley. The State never elicited Ms. Stancil's demeanor or manner of speaking. T.244–263. It is true Mr. Isley described Jennifer Stancil's initial request not to shoot Mr. Beckett as "yelling." T.249, 250. But it was very clear from Mr. Isley's testimony that Ms. Stancil was questioned "several times" over the course of the investigation. T.251. The record is silent as to in what manner Ms. Stancil spoke when she identified

Demond Beckett as the driver of the car. T.251, 253–55, 262–63. Thus, the State cannot prove for the first time on appeal that all statements made to Mr. Isley were an "excited utterance."

As to the prejudice of Ms. Stancil's statements, Mr. Beckett would incorporate by reference the arguments in his initial brief about the blatant credibility bolstering that the State used for the only witness that could have identified Mr. Beckett as the driver of the Kia Soul. The Appellee argues that "any error" in admitting Ms. Stancil's statements would be harmless and cites to *Hufstetler v. State*, 171 Ga. App. 106 (1984), for that proposition. *Hufstetler* cannot help Appellee's argument; that case dealt only with a single hearsay statement which was repeated by the same witness in trial later. *See Hufstetler*, 171 Ga. App. at 107. In sharp contrast, the trial court below admitted a voluminous number of hearsay statements from multiple sources. Further, Jennifer Stancil did not repeat on the stand all the content of those hearsay statements. T.311–405. She could not remember many of the details of what happened that night, nor the details of what happened in Baldwin County, nor the details of what happened when Mr. Beckett was later arrested, nor the subsequent encounter between the two parties in Gwinnett County. T. 315–16, 317, 319, 322, 324, 329–30, 331, 332, 335. In fact, she expressly repudiated the veracity of several of the statements she gave to various law enforcement officers. T. 326, 330, 403. Thus,

the fact that she testified did not "cure" any prejudice of her admitted hearsay statements.

Additionally, the State makes no arguments whatsoever for the hearsay statements of Jennifer Stancil to Officer Sartain admitted after Ms. Stancil testified.[3] T.431. Thus, Appellee concedes that, even under their faulty prejudice argument, the statements admitted into evidence *after* Mr. Beckett no longer had the opportunity to cross examine Jennifer Stancil were prejudicial error.

Statements of Jerry Clary

The argument of Appellee as to the hearsay of Jerry Clary is nonsensical. It appears that they contend that because Mr. Clary testified differently than the hearsay statements admitted, the hearsay statements *could* have been admitted as impeachment *by the defense*. Brief of Appellee at 16. Mr. Beckett asserts that this Court should not make a legal ruling based on a fictional world that never existed. The State introduced the hearsay – not the defense. The State did not introduce those hearsay statements as impeachment material – they were introduced as factual statements, *i.e.*, "the truth of the matter asserted." *See* O.C.G.A. § 24-8-801. This was error, and Mr. Beckett's conviction should be reversed.

[3] Indeed, Appellee does not seem to advance any legal theory for why those statements were admissible, either. *See* Appellee Brief at 14–16.

Statements of Police Dispatcher

The State argues that the out of court statements by police dispatch were not offered for the truth of the matter asserted. Brief of Appellee at 17. This argument cannot be squared with the statement that was admitted. The State was allowed to introduce a statement that there was a "reckless driver" who was the "father of [Jennifer Stancil's] child." T.208. This statement goes to the heart of the truth that the State was presenting – that the "father of her child" – believed to be Demond Beckett at the time – was a "reckless driver – the basis for the felony fleeing to elude. The State cannot introduce hearsay statements that capture the basis for their prosecution and then argue they weren't admitting those statements for the truth of the matter asserted.

The admitted hearsay statement was not necessary to explain Officer Lister's behavior, as in the case the Appellee relies on. *See generally Howard v. State*, 305 Ga. App. 159 (2010). In *Howard*, a police officer testified to the general description of a robber as an explanation for why he stopped the defendant. *Id*. at 161. This Court ruled that the description was not hearsay because the officer "did not relate the exact words that had been provided by dispatch but only explained his actions after receiving the radio call." *Id*. Here, by contrast, Officer Lister related specific details of the statements of dispatch – who was calling, who the alleged perpetrator was, and the manner in which the alleged perpetrator was

driving – rather than a general summary. T.208. Further, Officer Lister did not use the statement to explain his actions; he instead stated that he observed a vehicle that matched the description of the vehicle in the call. T.209. If he had only stated the dispatch's description of the perpetrator's vehicle, as the officer in *Howard* related the description from dispatch of the perpetrator, 305 Ga. App. at 161, the State's argument might stand. But here, he gave specific hearsay statements that were not connected to his decision to follow the cars – most importantly, the alleged identity of the driver as Jennifer Stancil's "father to her child," (T.208) – and thus were not admitted to merely explain his next course of action. Instead, the statement was inadmissible hearsay used to bolster the State's case.

4. The Trial Court Should Have Granted the Motion for Mistrial Based on Jennifer Stancil's Assertion of the Privilege against Self-Incrimination

Appellee argues that the trial court correctly handled Ms. Stancil's invocation of her right to remain silent by advising her that her statements would not be incriminatory and allowing cross examination to continue. *See* Brief of Appellee at 18–19. Appellee relies on *Davis v. State*, 264 Ga. App. 128 (2003),[4] for the assertion that only a defendant may invoke the right to remain silent, not a witness. That was not the holding of the court in *Davis*, nor is it the law.

[4] Brief for Appellee styles this matter as *David v. State*, but Mr. Beckett is reasonably confident *Davis v. State* is the case referred to.

In *Davis*, the analysis of the self-incrimination argument was scant, because the defendant was attempting to claim that his wife's invocation of the right to remain silent was an invocation on behalf of the defendant and implicated the defendant's right to remain silent. *See Davis*, 264 Ga. App. at 133–34. Thus, the *Davis* court properly determined that, assuming the scope of the cross examination was properly limited, and assuming that *Davis* could have asked for curative instructions to the jury, the motion for mistrial was properly denied. For this holding, the *Davis* court relied on *Bowen v. State*, 194 Ga. App. 80 (1989). In *Bowen*, a State's witness invoked his right to remain silent during questioning of the State. *See id*. at 81. The trial court allowed the witness to invoke the privilege because the trial court determined the answers could be incriminating. *See id*. On appeal, the defendant argued that his right to cross examine the witness had been infringed, not that the trial court improperly addressed the witness's invocation of the privilege. *See id*. The *Bowen* court said that his right to cross examine the witness had not been infringed because (a) the witness only invoked the privilege as to specific questions that were asked, and (b) the defendant was able to elicit testimony favorable to the defendant on cross-examination. *See id*.

Thus, *Davis* and *Bowen*, both, show that what happened in Mr. Beckett's case was contrary to the law regarding a witness's invocation of their right to remain silent. First, the court should determine whether or not the questions put to

the witness have the potential to incriminate the witness. *See Lawrence v. State*, 257 Ga. 423, 425 fn. 3 (1987) ("The appropriate course where, as here, a witness invokes his right to remain silent is as follows: First, the trial court must determine if the answers *could* incriminate the witness.") (emphasis in original). At this first step, the trial court in Mr. Beckett's case clearly erred. The trial court tried to rule as though merely asking if the witness stated she had cocaine in her car did not implicate her in a crime – when in fact, she was admitting to have claimed possession of contraband and also lying to the police. T.373. Second, the court must allow the witness to make their own determination about the incriminatory effect rather than ruling on that matter for the witness. *See Lawrence*, 257 Ga. at 425 fn. 3 (if an answer has the potential to implicate the witness, "the decision whether it *might* must be left to the [witness].") (emphasis in original). Ms. Stancil was not properly instructed on her right to determine if her own answers could incriminate her and was instead instructed to answer the questions posed by counsel for Mr. Beckett. (T.373–74, "and I would like to hear your answer.").

Unlike the matters in *Bowen* and *Davis*, the privilege was invoked by a witness being examined by defense counsel. Thus, the prejudice to Mr. Beckett in the trial court not following proper procedures was two-fold. First, in a case where Ms. Stancil's credibility was at issue, the judge should not have advised the witness how to answer or to think of her answers to the question that could have

incriminated her. Instead, the jury should have been allowed to hear Ms. Stancil invoke the privilege, such as Ms. Stancil saw fit to do, which would have informed them regarding Ms. Stancil's credibility. Second, by scrambling to prevent a mistrial during defendant's questioning of a witness, the trial court allowed a case to continue – which should have been terminated – that resulted in a conviction for Mr. Beckett. Thus, the court should reverse Mr. Beckett's conviction due to the improper handling of Ms. Stancil's invocation of her right to remain silent.

5. Giving the Flight Instruction Requires Reversal

Appellee concedes that it was error to give the instruction that Appellee requested at trial. *See* Brief at 19–20. However, Appellee seeks immunity from its unlawful request by reference to *Rawls v. State*, 310 Ga. 209 (2020), which did not reverse defendant's conviction for the mere fact of the flight instruction being given. However, *Rawls* does not save the State from the error it committed. To begin with, the Court in *Rawls* determined that the objection to the flight instruction was not properly preserved because the defendant did not renew the objection after the jury was charged. *See Rawls*, 310 Ga. at 17–18. Here, Mr. Beckett renewed his objection to the flight charge after it was given, and the judge expressly recognized that the matter was preserved for appeal. T.586. Thus, this Court cannot conduct the "plain error" review that the *Rawls* court engaged in. And, it was *only* the plain error review that saved the State from reversal in the

Rawls case.[5] That standard does not apply to Mr. Beckett, who properly preserved his objection. "Accordingly, the trial court committed a clear and obvious error by instructing the jury on flight in disregard of *Renner*." *Rawls*, 310 Ga. at 219 (referencing *Renner v. State*, 260 Ga. 515 (1990), which first disproved of the flight instruction). Thus, the State's notation that there were no jury questions on the issue of the flight instruction stands as an irrelevant appeal to a plain error analysis that this Court cannot conduct.

Furthermore, unlike *Rawls*, this court should not find there was "other strong evidence" of Mr. Beckett's guilt, as per the argument above, such as to find this error harmless. Indeed, the fact that Mr. Beckett was convicted of "fleeing to elude," after being acquitted of all other charges, is indication that the jury was persuaded by the language of the "flight" charge that evidence of Mr. Beckett's flight *had* been introduced and *should* be weighed as evidence of guilt – the very sort of judicial commentary that the *Renner* court wished to avoid. *See Renner*, 260 Ga. at 518. Thus, this court should reverse Mr. Beckett's conviction due to the erroneous flight instruction.

The State appears to argue that Mr. Beckett waived his argument when trial counsel told the judge "I think that is the best solution." T.492. That statement, in

[5] In this "plain error" review, the *Rawls* Court stated that defendant could not show that the jury instruction likely affected the outcome of his conviction. *Rawls*, 310 Ga. at 219.

context, is a direct response to the judge's question about certain language she would use when giving the flight charge. Specifically, the trial court asked for counsel's input on the language without waiving the initial objection: "I realize you have objected and I'm not taking that away, but do you have any problem with my saying avoid arrest *other than your objection*?" T.492 (emphasis added). To argue that this exchange waived any argument is to ignore the context and content of the conversation between counsel for Mr. Beckett and the trial court.

6. Certain Prosecutorial Arguments Were Improper and Prejudicial

Commenting on Mr. Beckett's Right to Counsel

The Appellee's characterization of the State's closing argument referencing Mr. Beckett's Sixth Amendment right to counsel is not consistent with the context of the argument actually presented. If the State's argument truly was that by raising Ms. Stancil's drug use, trial counsel was avoiding addressing the evidence, such an argument would be permissible. But that is not the argument the State made at trial, nor was it appropriate given the context of the argument at trial. The statement shaming Mr. Beckett for using counsel was argued during the State's principal summation, before the defense had an opportunity to make argument; it was not argued in rebuttal of something counsel for Mr. Beckett said.

As the State displayed the PowerPoint slide described in Appellant's brief, counsel for the State began arguing that raising Ms. Stancil's "skeletons" was

"throwing dirt" to distract from relevant considerations. (T. at 540.) Mr. Beckett's counsel objected, which objection was overruled (Mr. Beckett would argue erroneously), and State's counsel continued her argument. "The fact that she does drugs makes him hit her." (T. at 542.) This statement referenced other acts evidence regarding other alleged incidents of physical abuse Mr. Beckett inflicted upon Ms. Stancil. (T. at 333-34; 338-39.) None of this conduct was charged in the indictment in the present case.

Immediately after this statement, the prosecutor stated that "[i]nnocent people don't need their attorneys to play these kinds of games," and segues into a discussion of reasonable doubt. (T. at 542.) Referring to reasonable doubt and innocence at this point in the argument can only be in reference to the crimes charged in the indictment. The implication from the context of the State's argument is not that the State is arguing that defense counsel is "playing games" by distracting the jury from its consideration of the charged offenses by bringing up Ms. Stancil's past – which would make little sense given that the prosecutor had just referenced Mr. Beckett hitting her, which did not refer to any of the charged conduct – but rather that innocent people don't need attorneys to "play games" by arguing about reasonable doubt, given that is the topic of the argument that immediately follows.

Just as in *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980), cited in Appellant's original brief, the prosecution attempts to argue that the closing argument implicating the defendant's invocation of his Sixth Amendment rights was not an attempt to urge the jury to draw a negative inference from such invocation. *See McDonald*, *supra*, at 563. Like the Fifth Circuit did in *McDonald*, this Court should reject this argument. Displaying the PowerPoint slide and arguing, in essence, that only the attorney of a guilty person would "play games" – a reference immediately followed by a discussion of reasonable doubt – urges the jury to infer that Mr. Beckett is guilty because he has the assistance of counsel who argues the concept of reasonable doubt. The *McDonald* Court "conclude[d] that the real purpose of the reference to the attorney's presence [when the search warrant was served] 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. Likewise, the prosecutor's reference to Mr. Beckett's attorney's anticipated argument invites the jury to penalize Mr. Beckett for the invocation of his Sixth Amendment right to counsel.

This argument is a violation of constitutional magnitude, and is entirely dissimilar from the argument challenged in *Clonts v. State*, 200 Ga. App. 143 (2002), cited in Appellee's Brief. Given the constitutional considerations

implicated by the prosecution's argument, this Court should vacate Mr. Beckett's conviction.

Arguments Shifting the Burden of Proof to the Defense

Appellee argues that *Harper v. State,* 248 Ga.App. 106 (2001), precludes Mr. Beckett's argument as to the prosecutor's closing remark that Mr. Beckett had not explained who else could be in the car. *See* Brief of Appellee at 22. But the statement in *Harper* was materially different from the one in the present case. In *Harper*, which was a trial regarding driving under the influence, the prosecutor asked "If there was another person driving the vehicle, where is that person?" 248 Ga.App. at 106. In other words, it was a "suggestion that the State's proof of appellant's guilt had not been rebutted." *Id*. Here, by contrast, the prosecutor explicitly argued that the defendant should have put up evidence: "What theory *has the Defense put forward* to inform you of who else could've been in that car?" (T.538). And, "The Defense – what has been shown?" was displayed on the State's visual aid. (R. at 36). And, the State repeated the point: "Have they identified anybody else who could've been in that car? No." (T.539). These statements go far and beyond the point made in the *Harper* case. They are direct calls for the jury to hold the defendant responsible for a lack of evidence and thus go far beyond the permissible scope of argument articulated by the cases cited in Appellee's brief.

In addition, although no curative instruction was given, the trial court did rule that these comments were improper. (T.538). That ruling is entitled to some deference on appeal, since the trial court had the benefit of observing the State attorney's gestures and tone of voice.

Arguments Regarding Social Injustice of Domestic Violence

Appellee argues that no authority was submitted for the proposition that societal justice for an issue like domestic violence is not a relevant or fair argument to make in asking to send a man to prison. To be sure, Mr. Beckett did cite to authority – statutory authority – for the proposition that improper arguments by attorneys are not allowed. *See* O.C.G.A. § 17–8–75; Brief of Appellant at 24. But it should not need to be stated that a conviction for a crime should rest on a jury's view of that crime, not their view of the societal evils of that *category* of crime. The prevalence of domestic violence – and the prosecutor's anger about it – were irrelevant and prejudicial comments affecting the integrity of the criminal process itself. "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same." O.C.G.A. § 17-8-75. "Under Georgia law, evidence about a crime victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, and the *victim's community* generally is not admissible in the guilt/innocence phase of a criminal trial." *Lofton v. State*, 309

Ga. 349, 363 (2020) (emphasis added); *accord Lucas v. State*, 274 Ga. 640, 643 (2001). "[H]ypothesizing in a general tone," as Appellee labels it, is not a legitimate reason to use a criminal defendant as a scapegoat for a societal ill. *See* Appellee's Brief at 23. When a prosecutor "inject[s] into the case prejudicial statements on matters outside of the evidence," it is the trial court's duty to intervene and grant a mistrial or provide curative instructions. *See Geiger v. State*, 295 Ga. 190, 194 (2014). No such intervention occurred here. These numerous comments by the prosecutor should be censured, not encouraged, and thus, Mr. Beckett's conviction should be reversed.

Arguments Commenting on Mr. Beckett's Right to Remain Silent

Appellee unwittingly concedes Mr. Beckett's argument as to the commentary on his refusal to "take responsibility." Appellee concedes that the statement "is a comment on what Appellant did or did not do in regards to the case." *See* Brief of Appellee at 24. What Appellant did do – remain silent – and what he did not do – take the stand and testify – is exactly the sort of "comment" strictly prohibited. *See, e.g.*, *Smith v. State*, 279 Ga. 48, 49, 610 S.E.2d 26, 27–28 (2005) ("As a rule of both constitutional law and Georgia statutory law, a prosecutor may not make any comment upon a defendant's failure to testify at trial.").

7. **The State Did Introduce Facts Not in Evidence during Closings**

Appellee seems to concede that no evidence was introduced at trial that Mr. Beckett was homeless at the time the charged conduct occurred. *See* Brief of Appellant at 25. However, Appellee argues that Jennifer Stancil's status of homelessness can logically be imputed to Demond Beckett. It may seem logical to the State, who had knowledge of this fact outside of the facts of trial, but there was not testimony produced at trial which would allow this "logical inference" to be argued to the jury. The argument is a clear attempt to circumvent the rules of character evidence – had the State tried to present evidence of Mr. Beckett's homeless status, it would have drawn an objection. Thus, arguing for the first time in closing that he was homeless was highly prejudicial to Mr. Beckett.

Similarly, the State's argument that they "planned" to call Jennifer Stancil to testify in the morning, and that she was not available because of her panic attack, were both matters not in evidence. It is true that Ms. Stancil mentioned off-handedly that she had a panic attack. (T.387). But nothing was put into evidence about the nature, length, or effect of the panic attack. The State never put into evidence that Ms. Stancil was supposed to have been the first witness. And, certainly, there was no evidence on the State's "plan" for the trial, irrelevant as that might have been. These were pieces of information designed to bolster Jennifer Stancil's credibility and sympathy that were improperly introduced in closing

argument.

Finally, Appellee attempts to distinguish "personal opinion" from "personal experience," implying that a prosecutor may, without evidence, relate to a jury personal experience on any subject matter of his or her choosing. *See* Brief of Appellee at 26. This is preposterous. "[C]losing argument must be based on the evidence presented at trial." *Williams v. Harvey*, 311 Ga. 439, 445 (2021). It cannot be based on the prosecutor's personal life experience. Those comments were irrelevant and prejudicial to Mr. Beckett, such that his conviction should be overturned.

Respectfully submitted this 15th day of February, 2024.

This filing does not exceed the word count limit imposed by this Court in its order on February 15, 2024, which extended the normal limit of 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 Deborah Gonzalez, 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 15th day of February, 2024.

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