IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
versus	)	
	)	Case 14-9-3124
JUSTIN ROSS HARRIS,	)	
Defendant.	)	Judge STALEY CLARK

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS COURT, having reviewed Defendant's Motion for New Trial, Amended Motions for New Trial, the State's Responses and having heard testimony and oral argument on December 14 and 15, 2020, and March 30, 2021, hereby DENIES Defendant's Motion for New Trial.[1]

I. The evidence presented was sufficient to sustain Harris' convictions beyond a reasonable doubt.[2]

Following the death of Cooper Harris from hyperthermia, after being left in a hot car by his father Justin Ross Harris on June 18, 2014, the State obtained an

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[1] Harris timely filed a motion for new trial on January 3, 2017, which he supplemented twice in writing, on December 2, 2020 and December 7, 2020. The State's preliminary response was filed on December 1, 2020, with supplemental responses filed on December 23, 2020 and March 18, 2021. The Motion for New Trial Hearing was held over two days on December 14 – 15, 2020, with an additional hearing held on March 30, 2021.

[2] A note on citations: References to Defendant's Motion for New Trial are labeled "Defendant's Brief page ____." "MNT" refers to the transcript from the Motion for New Trial Hearing that was held December 14 -15, 2020. T:Vol: is the volume of the trial transcript followed by the page number.

indictment charging Harris with the offenses of Malice Murder, Felony Murder, Cruelty to Children in the First Degree, Cruelty to Children in the Second Degree, Criminal Attempt to Commit a Felony, to wit: Sexual Exploitation of Children, and Dissemination of Harmful Materials to Minors. In paragraph 1 of his motion for new trial, Harris asserts the State failed to meet its burden of proving him guilty beyond a reasonable doubt.

Regarding the sufficiency of the evidence "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (III-B) (1979) (citation omitted; emphasis in original). "As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the jury's verdict will be upheld." *Miller v. State*, 273 Ga. 831, 832 (546 SE2d 524) (2001) (citations and punctuation omitted). "The testimony of a single witness is generally sufficient to establish a fact."[3]

In was never in dispute that Defendant left his 22-month-old child in a hot car all day on June 18, 2014 and that the child died of hyperthermia. The issue in dispute was whether Defendant did this accidentally or intentionally.

The State provided evidence of Defendant's actions throughout the day of the murder which were sufficient for a jury to determine that he had acted intentionally.

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[3] OCGA § 24-14-8. None of the offenses involved in this case fall within the narrow class of exceptions to the single-witness rule. See, e.g., *id.* (exceptions for treason, perjury, felony cases where the only witness is an accomplice), OCGA § 16-6-3(a) (exception for statutory rape).

The State provided sufficient evidence that Defendant's motive to intentionally murder his own 22-month-old son was to live a life without children, to be able to divorce his wife, and then to have numerous sexual relationships.

The State presented sufficient evidence that Defendant had been texting with a 17-year-old girl over various "apps" and had been asking her to send him a photo of her vaginal area, while he texted sexually explicit and detailed verbal accounts of sexual acts, along with photos of his penis, to her. Thus, the State presented sufficient evidence of the crimes alleged in Counts 6, 7 and 8 of the indictment. T:Vol.20:4644-4737.

The evidence presented at trial was sufficient for the jury to find Defendant guilty of all counts of the indictment. His motion for new trial based on a sufficiency of the evidence argument is denied.

II. This is not an exceptional case calling for this Court to exercise its discretion under OCGA §§ 5-5-20 or 5-5-21.

In paragraph 2 of his motion for new trial, Harris moves this Court to order him a new trial under the discretion granted to this Court in OCGA §§ 5-5-20 and 5-5-21, which is "a discretion that should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates heavily against the verdict[.]" *Allen v. State*, 296 Ga. 738, 740 (2015) (citations, punctuation omitted). This Court, having considered the testimonial conflicts between the State's motive evidence and the Defendant's evidence of accident due to a failure of memory systems, the witnesses' credibility, and the weight of the evidence, finds that the

verdict was neither "decidedly [or] strongly against the weight of the evidence" nor "contrary to the principles of justice." Defendant's motion for new trial on this basis is denied.

III. Enumeration of errors alleging pre-trial errors by this Court.

3: Severance of Counts

This Court did not err by denying Defendant's Motion No. 3 to sever Counts six, seven and eight from the first five counts of the indictment. Where charges in an indictment are based upon a series of acts connected together or constituting part of a single scheme or plan, severance lies within the sound discretion of the Trial Court since the facts in each case are likely to be unique. *Carson v. State*, 308 Ga. 761, 764-65 (2020).

The offenses charged in counts six through eight involved illegal and sexually explicit messaging with minors, which was evidence of Defendant's motive for the murder of his 22-month old child as charged in counts one through five. Defendant disputed the State's contention that counts six through eight demonstrated Defendant's motive and insisted that the counts were joined for the improper purpose of interjecting evidence of bad character. Defendant's Brief page 2. Defendant relies on *Harrell v. State*, 297 Ga. 884 (2015), to support his contention that this Court abused its discretion in not granting severance because the separate crimes did not arise out of the same conduct. However, evidence for counts six through eight were

the Defendant's actions, not only in the months prior to the murder, but also on the day of the murder.

This Court thoroughly reviewed the law on severance and made the appropriate determinations by applying the law to the facts of the case in this Court's order dated November 16, 2015. This Court first correctly determined that the offenses charged in counts six through eight were not joined with the offenses charged in counts one through five solely because of their same or similar character, as the counts were not of the same or similar character.

This Court then determined that severance would not promote a just determination of guilt or innocence as to each offense, because the evidence, related to the offenses charged in counts six through eight, was admissible as both intrinsic and extrinsic evidence of the crimes charged in counts one through five. See *Harrell* at 889.

This Court finds that the evidence for the offenses charged in counts 6 through 8 was intrinsic to the crimes charged in counts one through five. This is because the evidence for the offenses charged in counts 6 through 8 pertained to the chain of events explaining the context, motive, and set-up of the murder, the evidence was linked in time and circumstances with the murder, it formed an integral and natural part of the murder and crimes charged in counts one through five, and was necessary to complete the story of the murder for the jury by explaining both why Defendant left his child in the hot car and what Defendant was doing while the child was in the hot car.

This Court finds that the evidence related to the offenses charged in counts six through eight would be admissible upon the trial of counts one through five as evidence of motive, malice, and Defendant's state of mind outside of the purview of Georgia Rule of Evidence 404(b), because evidence of one set of offenses would be admissible as motive for subsequent offenses, and thus, there was no need to sever the offenses.

In addition, this Court determined that the complexity and nature of the evidence was such that the jury could parse the evidence and apply the law as to each count. See *Harrell* at 889. There is no indication that the combined trial of the charges confused or misled the jury. See *Carson v. State*, 308 Ga. 761, 765 (2020). Therefore, there was no abuse of discretion on the part of this Court in denying the motion to sever. See *Rodriguez v. State*, 309 Ga. 542, 547-548 (2020). Defendant's motion for new trial on this basis is denied.

4: Unlawful Search and Seizure

Defendant contends that this Court erred by denying Defendant's Motion to Suppress No. 4 and his Amended Motion to Suppress filed December 4, 2015, which challenged the search and seizure of his personal property, including his phones, computers and electronic devices. Defendant contended that the search warrants were insufficient on their face, lacked probable cause, that any probable cause in the search warrants was based on misrepresentations by the police, the warrants were illegally and improperly executed, and the warrants failed to comply with O.C.G.A.

§ 17-5-20 through O.C.G.A. § 17-5-25. In this enumeration of error, Defendant challenges this Court's finding of fact and asserts that law enforcement violated Defendant's Fourth Amendment Rights by rummaging at will among his private phones and computers. Defendant's Brief page 4.

This Court held an extensive three-day motions hearing December 14, 15 and 17, 2016, wherein the Trial Court heard wide-ranging testimony from the various police officers who obtained and executed the search warrants. The Trial Court, on January 26, 2016, entered an extensive 37-page order denying Defendant's motion to suppress.

As this Court correctly determined on Page 30 of its order:

> Here, this Court finds that the search warrants obtained by police were supported by probable cause. The evidence obtained from the initial scene response itself provided probable cause for police to search his vehicle and home for evidence of child neglect, at a minimum. Defendant's further admission that he had viewed a video online about deaths in hot cars alone authorized the search and seizure of electronic devices in this case. Similarly, the fact that Defendant claimed in his interview that he "forgot" his child in a hot car alone authorized police to obtain a search warrant to examine his cell phone for evidence of whether or not he was distracted the day of Cooper Harris's death. The subsequent discovery of potential motive evidence (an unhappy marriage, marital infidelity, evidence of criminal sexual activity with a minor the day of the crime, financial issues and life insurance discussions, etc.) only served to strengthen the probable cause for the issuance of the subsequent series of search warrants for the electronic devices, which were obtained prior to any actual searches were conducted on the seized devices, other than Defendant's phone. As police conducted their investigation into the death of Cooper Harris,

> they would add newly discovered evidence to their affidavits and testimony in support of their search warrants for each successive series of search warrants. These search warrants were supported by probable cause under the totality of the circumstances.

This Court went on to determine that the evidence sought by the police was properly the subject of the search warrants issued in this case, including, among other things, evidence of motive. January 26, 2016 Order page 31.

Regarding the scope of the warrants, this Court correctly determined on page 34 of its January 26, 2016 order:

> Here, the initial search warrants issued in this case on June 18 and 19, 2014, met the particularity standard and were not overly broad. Thereafter, each successive series of search warrants became more detailed, and expanded the scope of permissible searches as newly discovered evidence was uncovered by police. Full analysis of the electronic devices in question didn't begin until after July 24, 2014. Prior to that point, only a cursory examination occurred of call detail and messaging from Defendant's phone. Georgia law does not require that the actual search of an electronic device occur within a specified period of time after obtaining a search warrant. See, e.g., *Mastrogiovanni v. State*, 324. Ga. App. 739, 742-43 (2013). By the time police began executing the searches of defendant's devices, search warrants authorizing the broader scoped searches were in place.
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> Having obtained these subsequent search warrants, detectives began searching the data extracted from the electronic devices. Detectives took care to avoid looking at items and evidence that were unrelated to the scope of the permitted search, such as unrelated emails. At the motions hearing, Defendant failed to identify any document, record, or item that was found in any protected area within the electronic devices in question in violation of his constitutional rights. This Court finds that the contested search warrants were not overly broad and there is no evidence that police exceeded the scope of

permissible searches pursuant to them.

Thus, this Court did not abuse its discretion in denying Defendant's motion to suppress the search of his cellphones and computers. Defendant's motion for a new trial on this basis is denied.

5. Non-probative Bad Character Evidence

Defendant contends that the Trial Court erred by denying Defendant's Motion No. 18 and granting the State's motion for 404(b) evidence. On February 4, 2016, the State filed a notice of the State's Intent to Present Evidence of Other Acts Pursuant to O.C.G.A. § 24-4-404 (b). Defendant filed his Motion No. 18 in court on February 22, 2016, seeking to exclude bad character evidence and objecting to the State's 404(b) evidence. Defendant's Motion No. 18 was then filed under seal. A hearing was held on February 22, 2016. The Trial Court entered written orders for both motions on March 14, 2016, granting the State's motion and allowing the evidence of motive, while denying Defendant's Motion No. 18.

This Court did not abuse its discretion when it determined that the State's evidence was admissible as intrinsic evidence for the charges. Defendant's dissatisfaction with his married life, and his desire to have sex with many women outside of his marriage, was shown through his behavior in the year prior to the murder of Cooper Harris, and just before and during the murder, which plainly pertained to the chain of events in the case and was linked by time and circumstance with the charged crimes. Defendant becoming more dissatisfied with his relationship

with his wife, overtly courting sexual encounters with other women, having sexual relations with prostitutes, and stating that Cooper Harris was the one thing getting in the way of a divorce were all intrinsic evidence of the murder. See *Harris v. State*, 310 Ga. 372, 378-379 (2020). This evidence was "necessary to complete the story of the crime for the jury," as it put the crime in the context and served to explain why Defendant murdered his child. See *Williams v. State*, 356 Ga. App. 19, 32 (2020). This Court did not abuse its discretion in admitting this evidence on the basis that it was intrinsic to the crimes.

This Court did not abuse its discretion when it also determined that the State's evidence was admissible as motive evidence for the charged crimes. In was never in dispute that Defendant left his 22-month-old child in a hot car all day and that the child died of hyperthermia. The issue in dispute was whether Defendant did this accidentally or intentionally. The motive evidence the State sought to introduce for the intentional murder his own 22-month-old son was to live a life without children, to be able to divorce his wife, and to have numerous sexual partners. The State was entitled to present this evidence of motive, and since the State was required to rebut the Defendant's affirmative defense of accident, it was essential to the State's case.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." O.C.G.A. § 24-4-401. Here, evidence of Defendant's motive made it more probable that he murdered his son and less probable that it was an accident.

This Court did not abuse its discretion when it determined that the State's evidence was admissible as "Other Act Evidence" pursuant to Georgia Rule of Evidence 404(b), and that it was being admitted for purposes other than to show the bad character of the Defendant. This Court performed a Rule 403 analysis and determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The United States Supreme Court has explained that "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U. S. 172, 180 (II) (B) (1) (117 SCt 644, 136 LE2d 574) (1997). Defendant engaging in sexual activities, outside his marriage, with prostitutes, is not of the nature to inflame or outrage the jury nor motivate the jury to convict him of murdering his child based solely on the other act evidence.

This Court made a commonsense assessment of all the circumstances surrounding the other acts. *Castillo-Velasquez v. State*, 305 Ga. 644, 648 (2019); *Olds v. State*, 299 Ga. 65, 75-76 (2016); *Brannon v. State*, 298 Ga. 601, 606 (2016); *United States v. Perez*, 443 F3d 772, 780 (11th Cir. 2006).

Here, the other acts all took place in the year prior to the murder, they added considerably to the proof of motive for the murder and were needed by the State to rebut Defendant's affirmative defense of accident. Without this evidence to rebut Defendant's claim of accident the State would not be able to demonstrate to the jury the depth of the motive that would lead a man to kill his own child. See *Armstrong*

v. State, 852 S.E.2d 824, 830-831 (2020) (holding it was not error for the State to tender evidence of gang activity to establish the motive for a murder especially when the motive would have been unclear without the evidence). This Court did not abuse its discretion in admitting the State's 404(b) evidence, and properly conducted a Rule 403 analysis, as the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant's motion for a new trial is denied on this basis.

6. Unlawful Compulsion to Disclose Confidential Notes

Defendant contends that he was denied a fair trial and due process of law when this Court granted the State's Motion to Compel and ordered Defendant to provide, what Defendant calls "confidential work-product notes of his trial consultant."[4] This Court finds that three pages of typed notes from Dr. Diamond were not "confidential work-product notes of his trial consultant," but were notes Dr. Diamond typed up from his interview with the Defendant on April 30, 3016, upon which he was basing his expert opinion. MNT:32, 34-44, 93, 99; MNT D-1.

Dr. Diamond was Defendant's expert in behavioral neuropsychology. Defendant served the State with "Defendant's Notice of Reciprocal Discovery" on April 6, 2016, listing Dr. Diamond as an expert witness. The discovery provided to the State consisted of the C.V. of Dr. Diamond (MNT S-1), a 22-slide PowerPoint

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[4] Defendant also claims that his Sixth Amendment right to effective assistance of counsel was denied, since his attorneys had to decide whether to call Dr. Diamond as a witness, after the State knew the underlying basis of Dr. Diamond's expert opinion. However, the decision to call a witness is a strategic one. See *Horton v. State*, 310 Ga. 310, 329-330 (2020). See Amended Motion for New Trial Enumeration of Error One below for detailed factual and credibility determinations.

presentation (MNT S-3), to be used in conjunction with Dr. Diamond's testimony, and a two-paragraph summary of his anticipated testimony (MNT S-2).

The two-paragraph summary of the anticipated testimony of Dr. Diamond stated that Dr. Diamond was basing his expert opinion, in part, on conversations he had with Defendant, along with his review of the discovery. MNT S-2. The two-paragraph summary also stated that, "[h]e is anticipated to provide **expert opinion** that Defendant's failure to take Cooper Harris to daycare **was not intentional** but a failure of memory systems." (Emphasis added.)

Dr. Diamond testified that Defense Exhibit One was his outline based on conversations with the defense attorneys but also based on his prior conversation with Defendant, the discovery and his own personal questions for the Defendant. MNT:34-44. As noted in *McKelvin v. State*, 305 Ga. 39, 43 (2019), the Georgia Supreme Court has held that the attorney-client privilege does not apply to communications, related to the matters on which legal advice is being sought, between the attorneys and an expert, when that expert is to serve as a witness for the Defendant at trial.

Dr. Diamond testified at the Motion for New Trial hearing that he uses the interview with the person charged in the crime to try to understand the circumstances around the crime in order to form his opinion. MNT:19. Dr. Diamond testified that he could not have an expert opinion in this case unless he interviewed the Defendant. MNT:117. Dr. Diamond also testified that it was very important to interview the Defendant and hear what he had to say, since that formed

the basis of his opinion. MNT:117. Thus, Dr. Diamond was not a "trial consultant" but an expert witness for Defendant and communications between the expert and trial counsel are not privileged.

Defendant claims that by granting the State's motion, "the court also greatly expanded the statutorily required pretrial disclosure under O.C.G.A. § 17-16-7 and O.C.G.A. § 17-16-4." Defendant's Brief page 8. However, that it not true, as "[t]he purpose of the Criminal Discovery Act is to promote fairness and efficiency in criminal proceedings and to prevent surprise and trial by ambush. Our legal system is not simply an elaborate game of 'Gotcha!'" *Williams v. State*, 356 Ga. App. 19, 28 (2020).

O.C.G.A. § 24-7-705 states, "An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination."

While O.C.G.A. § 24-7-705 does not require pre-trial disclosure of the underlying facts or data, it does not prohibit the Trial Court from requiring pre-trial disclosure, especially when "the underlying facts or data" must be revealed on cross-examination. The State based its motion on the need for the Trial Court to make a full and complete determination as to the admissibility of Dr. Diamond's testimony, which in turn necessitated full disclosure of all information upon which Dr. Diamond relied, since his testimony would potentially violate O.C.G.A. §§ 24-4-403

(probative vs. prejudicial), 24-7-704 (limitation on expert opinion) and 24-8-801 (hearsay).

This Court did not err in directing Defendant to comply with the discovery statute OCGA § 17-16-4 (b) (2) and O.C.G.A. § 24-7-705 as there is no constitutional significance that the discovery statute provides for discovery before trial rather than after a witness has testified. *State v. Lucious*, 271 Ga. 361, 364 (1999). In this case, Dr. Diamond was going to opine as to Defendant's situation being consistent with "a failure of memory systems," entitling the State to know exactly what Defendant said to Dr. Diamond that led Dr. Diamond to opine that expert opinion. This Court correctly determined that the State was entitled to the written documentation, created by Dr. Diamond, containing the statements of the Defendant, which were based on Dr. Diamond's interview with Defendant, upon which Dr. Diamond was going to rely for his expert opinion.

Ultimately, Defendant waived this error. Defendant served the State with Dr. Diamond as an expert, along with his C.V. and Dr. Diamond's PowerPoint presentation on April 6, 2016. The Trial Court compelled the discovery of Dr. Diamond's notes from his interview with Defendant, upon which he based his opinion. Defendant then made the decision to not call Dr. Diamond to testify. This waived any error as to the Trial Court's ruling.[5]

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[5] The State filed a Motion to Exclude the Testimony of Dr. Diamond at the Motion for New Trial hearing, on December 10, 2020. The State contended that the proffer of Dr. Diamond's testimony in 2020 was wholly inadequate to illustrate how his testimony would have resulted in a different outcome at trial in 2016, under the second prong of *Strickland.*

In *McAllister v. State*, 351 Ga. App. 76, 86-87 (2019), the defendant sought to limit the State's cross-examination of his expert witness, and when his motion in limine was denied, he chose not to call his expert. The Court of Appeals ruled that he waived the alleged error by the trial court when he did not call his expert to testify at trial. This is the same situation we have here.

The Court of Appeals explained:

> Indeed, without the benefit of the witness's testimony, our review would be entirely speculative when (1) we do not know what the trial testimony would have been; (2) the trial court might have altered its initial ruling as the case unfolded; (3) the State might not have cross-examined the expert as planned; and (4) even without these other difficulties, we would be unable to conduct "harmless error" review because we cannot discern the impact any allegedly erroneously admitted evidence would have had.

McAllister at 86-87.

Thus, in the absence of testimony from Defendant's expert at trial, this enumeration presents nothing for appellate review. See also *Warbington v. State*, 316 Ga. App. 614, 618d19 (2012) ("The record consequently is not amenable to meaningful appellate review. Because [defendant] declined to testify, we will not speculate on the substantive merits of his contention that the trial court's pretrial ruling was prejudicial error."); *Lowery v. State,* 310 Ga. 360, 364 (2020) (because the defendant did not then make any effort to lay the proper foundation and tender his character evidence, any argument that the trial court erred, by requiring the defendant to lay the proper foundation, lacked merit).

Trial Counsel Kilgore testified that he and the State discussed the State's objections to Dr. Diamond's updated powerpoint presentation. It is obvious from the testimony of Trial Counsel Kilgore, where he speculated extensively on what the prosecution may have asked and how Dr. Diamond may have responded, that it is unknown exactly what would have taken place at trial had Dr. Diamond testified. MNT:188-89, 193-95, 205-06. It would be pure speculation for this Court to guess as to what objections the State would have made at trial, what Trial Counsel's response and arguments would have been, what the Trial Court's rulings would have been, and what the cross-examination would have revealed.

Given both the waiver of any error by Defendant, since Dr. Diamond did not testify at trial, and the determination by this Court that (1) the State was entitled to know the basis of Dr. Diamond's expert opinions and (2) that Dr. Diamond's outline was not attorney work product, there was no error by this Court and Defendant's motion for a new trial on this basis is denied.

7. Unlawful Identification Testimony

The testimony of Ms. Danielle Doerr was presented as intrinsic motive evidence of Defendant's desire to engage in sexual relations with women outside of his marriage. Defendant filed his Motion No. 28, Motion to Exclude Identification Testimony, on September 12, 2016. After jury selection, just prior to the State's opening statement, on October 3, 2016, Det. Ralph Escamillo (hereinafter Escamillo) testified about the identification procedure. T:Vol.10:2384 -2423.

Escamillo testified that he did not prepare a "six-pack" photo line-up for Ms. Doerr as he was not trying to identify an unknown suspect in a stranger-on-stranger crime, but was merely confirming the information already contained in Defendant's cellphone call logs. T:Vol.10:2402. Escamillo denied that he was having Ms. Doerr make a photo identification from a single photo, instead he was asking her whether Defendant looked familiar or not to her, based on the phone calls and the date. T:Vol.10:2403. After hearing argument from both the defense and the State, this Court denied Defendant's Motion No. 28, finding that Escamillo was having Ms. Doerr make a confirmation rather than an identification, and that if it were a show-up for identification purposes there was not a substantial likelihood of misidentification. T:Vol.10:2440. This Court made that determination by utilizing the factors from *Lindsey v. State*, 182 Ga. App. 10, 13-14 (1987) when this Court noted that Ms. Doerr spent a half an hour with Defendant, in an intimate sexual encounter, that Ms. Doerr remembered Defendant because he was white, and she was 90% certain about her identification. The sexual encounter took place on May 31, 2014, and Escamillo met with Ms. Doerr on September 18, 2014, three and a half months later.

In addition, "...whether the witness knows the defendant is a critical factor in determining the reliability of an identification." *State v. Hattney*, 279 Ga. 88, 89 (2005). See also *Walker v. State*, 295 Ga. 688, 692-693 (2014) (holding that when a victim or witness has known the person previously, but may only know their street name or nickname, showing the witness a single photograph of the person merely

confirms a previous identification of him and creates no substantial likelihood of misidentification); *Jackson v. State*, 279 Ga. 449, 454-455 (2015) (holding that showing one photo to a witness who knew the defendant by his initials was not an independent identification but a confirmation and there was no error in permitting testimony of the photo-lineup identification).

While Ms. Doerr did not take the stand and testify during the motion to suppress about any independent origin for her in-court identification, she did testify at trial about the extent of her three sexual encounters with Defendant, why she remembered him and the identification process with Escamillo. T:Vol.15:3615-19, 3622, 3630, 3634. Thus, even if her pretrial identification was tainted, her in-court identification was not constitutionally inadmissible since it had an independent origin (the three separate sexual encounters) and did not depend upon the prior identification of the one photo shown to her by Escamillo. See *Marchman v. State*, 299 Ga. 534, 540-41 (2016). This Court did not err in allowing Ms. Doerr to identify defendant as the man she engaged in sex with on three occasions in May of 2014. The Defendant's motion for new trial on this basis is denied.

8. Defective Indictment: Special Demurrer to Count 6: Multiple Subsections Claim

This Court did not err in denying Harris' Special Demurrer to Count 6. In Defendant's Motion No. 8, subsection 5, filed October 27, 2014, Defendant asserted that "the manner in which the offense is alleged in Court 6 does not sufficiently put

Defendant on notice of the manner in which § 16-12-100 was committed, and therefore is not perfect as to form by not providing the accused with the information to which he is entitled." However, a charge of criminal attempt does not require that all the elements of the underlying crime being attempted be laid out in the indictment, as long as the indictment informs the defendant of the actions he allegedly took that were a substantial step toward the commission of the underlying crime. *Chapman v. State*, 318 Ga. App. 514 (2012); *Dennard v. State*, 243 Ga. App. 868 (2000); *Livery v. State*, 233 Ga. App. 332 (1998). "The indictment at issue here was sufficient to survive [Defendant's] special demurrer because it contained the elements of the crime, informed [Defendant] of the charges against him, and was specific enough to protect him from double jeopardy." *State v. Marshall*, 304 Ga. App. 865, 866 (2010). After a hearing on September 14, 2015, this Court properly denied Harris' Motion No. 8 in its September 30, 2015 Order and denies Defendant Motion for New Trial on this basis.

9. Defective Indictment: Special Demurrer to Count 6: Failure to Specify Date

This Court did not err in denying Harris' second Special Demurrer to Count 6 seeking a more specific date for the crime. During the motions hearing on October 12, 2015, Det. Phil Stoddard testified that Defendant communicated electronically with the minor victim over a long period of time and asked her several times for a photo of her genital area, using common, and sometimes vulgar, words. (See October

12, 2015 Motions Transcript: 31-41) Thus, the State produced evidence at the hearing that it could not more specifically identify a specific date for the criminal attempt, since Defendant's actions were an ongoing criminal attempt, with multiple communications and multiple requests by Defendant, over a period of time, seeking to obtain a photo of the minor's genital area.

This Court properly denied Harris' Amended Motion No. 8 in its January 26, 2016 Order and this Court denies his Motion for New Trial on this basis.

IV. The following enumeration of errors are Constitutional Challenges.

10. Constitutional Challenge to OCGA § 16-12-100 based on Privacy

This Court did not err in denying Harris' Amended Motion No. 09 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-100 on the grounds of violating the right to privacy. After a hearing on September 14, 2015, this Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's Motion for New Trial on this basis is denied.

11. Constitutional Challenge to OCGA § 16-12-100 based on Speech

This Court did not err in denying Harris' Amended Motion No. 10 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-100 on the grounds of violating his freedom of speech. After a hearing on September 14, 2015, this Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's

Motion for New Trial on this basis is denied.

12. Constitutional Challenge to OCGA § 16-12-103 based on Privacy

This Court did not err in denying Harris' Amended Motion No. 11 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-103 on the grounds of violating the right to privacy (as to Count 7). After a hearing on September 14, 2015, this Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's Motion for New Trial on this basis is denied.

13. Constitutional Challenge to OCGA § 16-12-103 based on Speech

This Court did not err in denying Harris' Amended Motion No. 12 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-103 on the grounds of violating his freedom of speech (as to Count 7). After a hearing on September 14, 2015, this Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's Motion for New Trial on this basis is denied.

14. Constitutional Challenge to OCGA § 16-12-103 based on Privacy

This Court did not err in denying Harris' Amended Motion No. 13 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-103 on the grounds of violating the right to privacy (as to Count 8). After a hearing on September 14, 2015, this Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's Motion for New Trial on this basis is denied.

15. Constitutional Challenge to OCGA § 16-12-103 based on Speech

This Court did not err in denying Harris' Amended Motion No. 14 to Quash Indictment and Challenge the Constitutionality of OCGA § 16-12-103 on the grounds of violating his freedom of speech (as to Count 8). After a hearing on September 14, 2015, the Trial Court properly denied Harris' motion in its October 8, 2015 Order. Defendant's Motion for New Trial on this basis is denied.

16. Constitutional Challenge: Failure to Close Courtroom

This Court did not abuse its discretion in denying Harris' Amended Motion No. 16 to Protect Defendant's Right to a Fair Trial by Limited Closure of Courtroom for Pretrial Motions, which was based on an assertion that Defendant would be denied a fair trial and due process. *Mullis v. State*, 292 Ga. App. 218, 221 (2008) ("We review the trial court's closure of a courtroom for an abuse of discretion.") A motion hearing was held on September 14, 2015 (Motion Transcript:13-88) and Defendant's motion for partial closure of the courtroom was denied. This Court entered its order on September 30, 2015.

This Court followed the appropriate standards for partial closure of a courtroom. "A partial closure occurs when some members of the public are permitted to attend, while a total courtroom closure involves exclusion of all members of the public." *Spikes v. State*, 353 Ga. App. 454, 455-456 (2020). As stated in *Waller v. Ga.,* 467 U.S. 39, 48-49, 104 S. Ct. 2210, 2216-2217 (1984), "the

party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." However, *Scott v. State*, 306 Ga. 507, 514-516 (2019) acknowledged that the Eleventh Circuit determined a partial closure has a lower standard than a full courtroom closure.

This Court correctly determined that Defendant failed to carry his burden of showing a "clear and present danger" to his right to a fair trial because Defendant was simply seeking to prevent publicity about potential, unspecified evidence that might be presented during the motion hearings. Defendant did not specify which pre-trial motions were going to reveal this unspecified evidence to the public. Nor did Defendant name or categorize any specific evidence that was going to be revealed that would cause a "clear and present danger" to his right to a fair trial. As Defendant pointed out in his exhibits, and as the Trial Court found, almost everything about the case had already been reported in the media and was available for anyone, at any time, to review.

This Court went on to conclude that there were alternatives to closure sufficient to safeguard Defendant's right to a fair trial including appropriate jury selection and change of venue. Defendant cited extensively to *Southeastern Newspapers Corp. v. State*, 265 Ga. 223, 454 S.E.2d 452 (1995), however three justices joined in a lengthy dissent in that case noting that qualified jurors need not

be totally ignorant of the facts and issues involved in a case. See *Chancey v. State*, 256 Ga. 415, 425 (1986),

The venue for the trial was changed to Glynn County, Georgia, in the Brunswick Judicial Circuit. There is no assertion that Defendant was unable to obtain a fair and impartial jury when the case went to trial on September 12, 2016, a year after the motion hearing. Thus, Defendant has failed to show that he was denied a fair trial or deprived of due process.

This Court did not abuse its discretion in denying Harris' Amended Motion No. 16 and this Court denies his Motion for New Trial on this basis.

V. The following enumeration of errors allege trial errors by the Court.

17: Defendant was Denied the Right to Present his Defense and Challenge the Credibility of Law Enforcement

This Court did not abuse its discretion when it granted the State's Motion in Limine to prevent the defense from eliciting hearsay testimony from Det. Shawn Murphy. Trial Counsel Lumpkin wished to ask Det. Murphy about his statements to a magistrate judge when he applied for search warrants in the summer of 2014. However, Det. Murphy' statements to the magistrate were not based on his personal knowledge. They were based on information that Det. Murphy was given by other detectives, who obtained it from the witnesses or Defendant himself, which Det.

Murphy then included in his search warrants, making the statements hearsay within hearsay.

Defendant specifically took exception with Det. Murphy's characterization that Defendant had "researched" hot car deaths and the temperatures in hot cars. The defense characterized this as "misinformation, misleading, misstatements and outright lies" to the magistrate judge who then issued the search warrants. T:Vol.25:5863. However, the defense admitted that they did not know if Det. Murphy was the person responsible for the information, and how it was characterized, in the search warrants. T:Vol.25:5863. Trial Counsel Lumpkin testified at the Motion for New Trial hearing that they were trying to put Det. Murphy's search warrants before the jury "to try to figure out where did that information come from, why was that created, who created it and why was it told to a magistrate when the evidence did not bear it out." MNT:265.

The rules of evidence regarding the credibility of witnesses, and the character of witnesses, apply to all witnesses, including law enforcement. See O.C.G.A. §24-6-621, O.C.G.A. §24-6-613, O.C.G.A. §24-6-622, O.C.G.A. §24-4-405; O.C.G.A. §24-6-608, O.C.G.A. §24-6-609; *Belcher v. State*, 344 Ga. App. 729, 734-35 (2018).

This very issue was addressed in *Smith v. State*, 251 Ga. App. 32, 33 (2001), where the defendant was not allowed to cross-examine an officer about hearsay information that formed the basis of his search warrant. There, the Trial Court resolved the question of the warrant's validity as a matter of law. This made the defendant's inquiry before the jury irrelevant. The Court in *Smith* went on to state

that "the right to a thorough and sifting cross-examination is not abridged where the excluded testimony would be based upon speculation or hearsay." Id.

The defense asserted that Det. Murphy's statements to the magistrate judge were not hearsay, as they were not being offered for the truth of the matter, but were being offered to "explain his conduct and what he did going forward in investigating the case." T:Vol.25:5780.

"While it is true that hearsay information can in certain instances provide a basis for a search warrant, the existence of probable cause for a search warrant is a legal issue for the court, not the jury." (Citations omitted.) *Foster v. State*, 314 Ga. App. 642, 647 (2012). The Court of Appeals in *Foster* went on to state that "in nearly every case, the motive of the police officer will not be a critical issue needing proof at trial" and "it is error to permit an investigating officer to testify, under the guise of explaining the officer's conduct, to what other persons related to the officer during the investigation. Therefore, even where an appellate court suggests that the jury may find police behavior so inexplicable as to cast doubt on the prosecution, or where a confidential informant has provided information which initiates an investigation, hearsay evidence is inadmissible to explain police conduct." (Citations and punctuation omitted.) Id.

The evidence proffered by Defendant was improper impeachment[6] as there is no legal basis for hearsay "to explain conduct" under the evidence code as a guise

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[6] Per the assertion of Trial Counsel Lumpkin at the Motion for New Trial, part of the defense was to go after the credibility of law enforcement, by showing the jury "actual evidence of the lack of credibility that we saw in this investigation." MNT:259, 264.

for an attack upon "law enforcements" credibility. The Trial Court did not abuse its discretion in granting the State's Motion in Limine and this Court denies Defendant's Motion for New Trial on this basis.

18: Interference with Presentation of Defense

This Court did not abuse its discretion when it granted the State's Motion in Limine to prevent the defense from subjecting Det. Shawn Murphy to cross-examination when the defense called Det. Murphy as a witness in their case-in-chief.

O.C.G.A. § 24-6-611(c) states, "[l]eading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

"The scope of cross-examination is within the sound discretion of the trial judge and will not be disturbed absent manifest abuse. The exclusion of hearsay evidence elicited during cross-examination is proper." (Citations and punctuation omitted.) *Wash. v. State*, 251 Ga. App. 206, 210 (2001).

"Like most questions about the admissibility of evidence, the scope of cross-examination is committed in the first instance to the sound discretion of the trial court, and we review a limitation of cross-examination only for an abuse of that discretion. See *Nicely v. State*, 291 Ga. 788, 796 (4) (733 SE2d 715) (2012). That discretion is circumscribed, of course, by our Evidence Code, which provides that

the accused is entitled to a "thorough and sifting cross-examination" of witnesses for the prosecution." *Lucas v. State*, 303 Ga. 134, 136-38 (2018).

In this case, Det. Murphy was not a "witness for the prosecution" but was called by Defendant for the specific purpose of attacking his credibility, with specific instances of conduct, in order to put the entire police investigation on trial. MNT:259, 264. Therefore, as a defense witness, he was not subject to cross-examination, unless during his testimony the trial court determined that he was "hostile."

Det. Murphy's personal feelings about Defendant, or his partiality and bias toward Defendant, could have been explored, but the defense did not ask those questions, and there is no reason to believe Det. Murphy had any personal feelings or bias about Defendant. There was no evidence that Det. Murphy was a "hostile" witness during his testimony on direct examination. T:Vol.25:5814-74.

"Trial courts retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, interrogation that is only marginally relevant. Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish." (Citation and punctuation omitted). *Lucas v. State*, 303 Ga. 134, 136-38 (2018).

This Court did not abuse its discretion when it granted the State's motion and required the defense to ask non-leading questions, of its own witness, on direct examination. This Court denies Defendant's Motion for New Trial on this basis.

19: Trial Court Barred Defendant from Confronting the State's Computer Forensics Expert with a Thorough and Sifting Cross-Examination

The Trial Court did not err in refusing to allow Defendant to cross examine Jim Persinger, the State's expert witness on digital evidence (cellphones and computers) with State's Exhibit 601 or Defendant's Exhibits 88-90, both being Defendant's "Google chats," of which Persinger had no knowledge. Trial Counsel did perform a thorough and sifting cross-examination of Persinger, attacking his credibility and pointing out that Persinger should have known about Defendant's "Google chats," thus showing his bias and diminishing his credibility.

"Although the Sixth Amendment right to confrontation secures the right of cross-examination, the right of cross-examination is not an absolute right that mandates unlimited questioning by the defense. To the contrary, trial courts retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things interrogation that is only marginally relevant. The permissible scope of cross-examination is committed to the sound discretion of the trial court, and we review a limitation of the scope of cross-examination only for abuse of discretion." (Citation and punctuation omitted). *Nicely v. State*, 291 Ga. 788, 796 (2012). Accord *Patterson v. State*, 350 Ga. App. 540, 544 (2019).

Under Georgia law, "[a] witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party." O.C.G.A. § 24-6-611 (b). However, trial courts are authorized to "exercise

reasonable control over the mode and order of interrogating witnesses and presenting evidence." OCGA § 24-6-611 (a).

"A witness may be impeached by disproving the facts testified to by the witness." OCGA § 24-6-621. "It is improper, however, to confront or attempt to impeach a witness with facts that are not within his personal knowledge." See *Cowards v. State*, 266 Ga. 191, 194 (3) (a) (465 SE2d 677) (1996) (improper to cross-examine police officer regarding facts not personally known to the officer, but contained in the case investigation file); *Cody v. State*, 222 Ga. App. 468, 473 (1996) ("the trial court did not err by refusing to admit the documents during cross-examination of a witness who had no knowledge of the documents"). Accord *Tran v. State*, 340 Ga. App. 546, 556 (2017).

"The Supreme Court of Georgia recently held that the right of cross-examination includes a right to inquire into the partiality and bias of witnesses. The right to inquire into partiality and bias, however, is not without limits. The accused is entitled to a reasonable cross-examination on the relevant issue of whether a witness entertained any belief of personal benefit from testifying favorably for the prosecution. In analyzing whether a defendant suffered harm from limitations placed on the cross-examination of a witness, we examine factors such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, the overall strength of the prosecution's case." (Citation

and punctuation omitted). *Pruitt v. State*, 349 Ga. App. 101, 107 (2019).

Persinger was tendered as an expert in forensic evaluation of electronic devices without objection T:Vol.24:5517. As Defendant pointed out on cross-examination, the two main tasks requested by the Cobb County District Attorney's Office had been for Persinger to locate when or how Defendant viewed the veterinarian hot car video, by examining the Lenovo computer, and to determine if Defendant had created the meme in State's Exhibit 399. T:Vol.24: 5553, 5561,5568-70. Persinger also looked at Defendant's iPhone 5 and reviewed the "Whisper chat" Defendant had with the person who posted, "I hate being married with kids," confirming that the chat took place the morning of the homicide. T:Vol.24:5563; SE400.

Trial Counsel conferred with the State about cross-examining Persinger concerning "Google chats" that Defendant had with his colleagues regarding his web development business and Griffin Psychology as a client, wishing to tender Defendant's Exhibits 88-90. T:Vol.24:5597; DE88-90.[7] The State questioned Persinger first. T:Vol.24:5597-98. Persinger had not reviewed any documents from Google in relation to this case, he had not looked at any Google chats, and he had no familiarity with any screen names nor any "Google chats" in State's Exhibit 601. T:Vol.24:5598. The State objected to questions about the "Google chats" since the witness had no personal knowledge about the defense exhibits, having not reviewed

[7] See T:Vol.24:5530-32, 5538-39, 5541, 5547-51, 5553, 5556, 5561, 5564, and 5595-96 for the testimony and objections leading up to this discussion.

nor analyzed the content. T:Vol.24:5598, 5600.

Despite sustaining the State's objection, Trial Counsel was able to ask seven follow up questions that showed Persinger did not know that Defendant had in fact been a web developer for Griffin Psychology since February of 2013, that Defendant and his friends had created a new web development company called Ninth Hour Development, and that Persinger did not tell the State that he was going to use the www.griffinpsychology.com website as an example in his testimony. T:Vol.24:5600-01.

This Court finds Defendant's reliance on O.C.G.A. § 24-7-707 for cross-examination about what an expert did not do is misplaced. O.C.G.A. § 24-7-707 states, "In criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." See OCGA § 24-6-621, *Cowards* and *Tran* above, holding that one can impeach a witness but not with facts not within the witness's personal knowledge. In this case, simply demonstrating that Persinger had no knowledge of Defendant's relationship with Dr. Griffin, and no knowledge that Defendant had his own web development business, was enough to contradict and impeach Persinger's testimony that Defendant going to Dr. Griffin's web site, and then later deleting the browsing history, was suspicious.

Defendant did not suffer harm from the limitation placed on the cross-examination of Persinger, which was only to restrict the use of State's Exhibit 601 or Defendant's Exhibit 88-90, based on the factors found in *Pruitt v. State*, 349 Ga.

App. 101, 107 (2019). The testimony of Persinger, the second to last witness, was of slight importance to the prosecution's case, as his main testimony on direct examination was that Defendant did in fact review a veterinary video on hot car deaths, something Defendant had admitted to the police. T:Vol.24:5553.

While there was evidence, previously admitted, that contradicted the testimony of Persinger on the suspicious nature of deleting the browsing history including Griffin Psychology, this was not a material point in the case. Trial Counsel was allowed extensive cross-examination into Persinger's choice of pointing out the browsing history of Griffin Psychology to impeach his credibility. T:Vol.24:5547-51. The strength of the prosecution's case was good as it was not in dispute that Defendant left his child in the hot car all day and that resulted in the child's death. The defense strategy, to put the credibility of the police and the prosecution witnesses on trial, was not impeded by the Trial Court's ruling, as shown by the extensive cross-examination and re-cross examination of the witness.

This Court did not abuse its discretion in disallowing the use of the "Goggle chat" exhibits, since the witness had no knowledge about the Google chats, nor knowledge that Defendant was a web developer with his own business, and admitted as much on the stand at least four times. Regardless, Trial Counsel was able to perform a complete and comprehensive cross-examination of Persinger, ask the questions he requested of the Trial Court in his proffer, attack the credibility of Persinger by showing bias, and he even repeated his points without objection from the State. See *Pruitt v. State*, 349 Ga. App. 101, 109-10 (2019) (Holding that even if

the trial court erred in excluding texts messages as not being relevant, appellant did explore the witness' potential motive, biases and lack of credibility, and thus Appellant was not substantially or prejudicially precluded from relevant inquiry). Thus, this Court denies Defendant's Motion for New Trial on this basis.

20: Discovery and Subpoena Violation

Defendant claims that he was denied a fair trial and due process of law when the Trial Court ruled that the State did not have to provide the defense with a copy of publicly available articles complied by the Federal Bureau of Investigation, which had been given to the Cobb County Police Department over a year after the murder, as part of reciprocal discovery.

Defendant attempted to use a subpoena, on October 21, 2016, instead of going through reciprocal discovery, to obtain documents that were provided to the Cobb County Police Department on December 1, 2015 by the Federal Bureau of Investigation (hereinafter the FBI File). The FBI File was a summary review of the literature on Hyperthermia Child Deaths in Vehicles. T:Vol.21:4774-75, 4778-79; CE31. Defendant asserts that the material in the FBI File contained Brady material and that the Trial Court abused its discretion by quashing Defendant's subpoena for the FBI File, and by refusing to compel discovery of the FBI File from the prosecutors. At the time the defense gave Det. Stoddard a subpoena, during the 20th day of trial, Friday, October 21, 2016, Det. Stoddard no longer had the FBI File in his possession, having given it to the prosecuting attorneys. T:Vol.21:4778-79.

The FBI File was not subject to reciprocal discovery as it was data to be used for impeachment by the State, if an expert such as Dr. Diamond testified, and was thus not required to be turned over under OCGA § 17-16-1 et seq. O.C.G.A. § 17-16-4(a)(1)(B)(3)(A) states in part that the State shall "permit the defendant … to inspect and copy or photograph books, papers, documents, … or copies or portions thereof …. which are within the possession, custody, or control of the state or prosecution **and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial."** (Emphasis added.) The FBI File was for use as impeachment of any possible defense expert witness during Defendant's case in chief, and thus it was not required to be turned over by the discovery statute. The Trial Court ruled that it was not going to require the State to turn over the information. T:Vol.21:4781.

The FBI File was not *Brady* material. It was not relevant or material to the defense as it was not exculpatory evidence for Defendant, nor impeaching evidence of anyone, except Dr. Diamond. See *Young v. State*, 290 Ga. 441, 442-43 (2012) (holding that failure to turn over a management report to impeach an officer was not an abuse of discretion as the management report was not material, it was neither exculpatory for the defendant nor impeaching of the officer, and the management report did not raise a reasonable probability that the outcome of the trial would have been different, as the report was hearsay and inadmissible). The FBI File contained a research complication of public articles (none about Defendant) and as such was hearsay and inadmissible.

Defendant's *Brady* claim fails as he is unable to show that the copies of news articles and academic papers, especially those written by his own expert Dr. Diamond, were material to his defense as either exculpatory evidence or impeaching evidence.

It must be noted that, "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). As the United State Supreme Court held, in *Strickler v. Greene*, 527 U.S. 263, 280-82 (U.S. 1999), "strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

Evidence is only material if there is a reasonable probability that if Defendant had the FBI File, containing the material written by Defendant's own expert, the result of the proceeding would have been different. *Zamora v. State*, 291 Ga. 512, 515-16 (Ga. 2012). As Defendant can make no such showing of materiality, his *Brady* claim fails. Having applied the criteria for *Brady* found in *Biggins v. State*, 322 Ga. App. 286 (2013) this Court finds that the FBI File was not Brady material.

In addition, Defendant cannot show that any prejudice ensued, as Dr. Diamond did not testify at trial. This Court denies Defendant's Motion for New Trial

on this basis.

21: Jury View of the Car

This Court appropriately granted the State's motion for a "Jury View" of the murder weapon, Defendant's 2011 Hyundai Tucson, which was seized as evidence in the case, in an order filed on August 29, 2016, after a motions hearing on August 19, 2016. The details about the circumstances under which the jury view would be conducted were later determined, after numerous discussions during trial, in an order dated October 26, 2016.

"There are at least two types of jury views. The 'evidentiary view' is designed to allow the jury to view evidence introduced in the case that is too large or affixed and cannot be brought into the courtroom. The 'scene view' allows the jury to view the premises relevant to the case to better understand the testimony and evidence introduced in court. A view of the scene is not evidence in the case." *Hensley v. Henry*, 246 Ga. App. 417, 421 (2000). In this case, the Trial Court allowed the State to conduct an "evidentiary view" of the 2011 Hyundai Tucson which was too large to bring inside the courtroom.

While *Ledford v. State*, 289 Ga. 70, 84 (2011), refers to a "scene view," the principles still apply. In *Ledford*, the Georgia Supreme Court determined that a Trial Court does not abuse its discretion by allowing a scene view over objection, where the scene view may aid the jurors in their understanding of the evidence, despite not being exactly in the same location as when the murder took place, because the jurors

are able to see the original condition of the murder scene in the photographs in evidence. See also *Flynt v. State*, 153 Ga. App. 232, 234 (1980) ("A jury view is a matter within the trial court's discretion."); *Berryhill v. Daly*, 348 Ga. App. 221, 225 (2018) (It was not an abuse of discretion to allow the jury to see a reconstructed deer stand set up in front of the courthouse).

Defendant objected numerous times during the trial conferences on this issue (T:Vol.22:5178-98; Vol.23:5254-61, 5311-12, 5364-77) and asked for a mistrial after the jury viewed the 2011 Hyundai Tucson parked in front of the Glynn County Courthouse. T:Vol.24:5475-92; 5670-71.

This Court is not persuaded by Defendant's arguments: that since the car seat was placed inside the Hyundai Tucson, as it was when Cooper Harris was killed, that the vehicle had been manipulated; that jurors looked inside the car from all angles and from their particular height; and that, the jurors actually seeing the vehicle, was somehow contrary to the actual evidence shown on the Home Depot videos. None of these contentions provide a basis for error, since murder weapons, such as guns, knives and belts, are routinely tendered into evidence, and go back with the jury during their deliberations, at which time the jury can touch and examine the evidence in any manner that they find to be of assistance in their deliberations.

Defendant cited to *Esposito v. State*, 273 Ga. 183, 187 (2000). However, this Court provided strict instructions to the jury prior to the "evidentiary view" of the 2011 Hyundai Tuscan. T:Vol.24:5479-82. This Court also determined that seeing

the 2011 Hyundai Tucson would assist the jury in their determination of guilt or innocence.

Upon returning to the Courtroom, Defendant moved for a mistrial, but not due to an irregularity during the "evidentiary view." Defendant claimed that the evidentiary view was really a demonstration, and that because several jurors were short, and peered inside the vehicle, they now must misunderstand the evidence. T:Vol.24:5483-94. The motion for mistrial was denied based on the fact that the 2011 Hyundai Tucson was in evidence and the jurors had a right to see it. T:Vol.24:5491-92; SE650.

In this case, the Trial Court had strict control over the evidentiary view of the 2011 Hyundai Tucson, with all parties present, and no irregularities occurred. The Trial Court did not abuse its discretion in allowing the controlled view of the 2011 Hyundai Tucson, a piece of evidence in the case, by the jury. This Court denies Defendant's Motion for New Trial on this basis.

22: Admission of Misleading Animated Recreation

Defendant claims that he was denied a fair trial and due process of law when the Trial Court denied both his Motion No. 21 and his Motion No. 29, to exclude the 3D graphic animations of the 2001 Hyundai Tuscan. However, this Court did not manifestly abuse its discretion in allowing the 3D graphic animation. See *Williams v. State*, 255 Ga. 97, 101 (1985) (Holding that a trial court's exercise of its discretion in ruling on the admissibility of photographs will not be reversed unless manifestly

abused).

Defendant analogized the 3D animations to re-enactments.[8] However, this Court finds that a 3D animation is just the next step in the future of crime scene diagrams, as 3D scans and subsequent graphic animations are more similar to a diagram or drawing of the scene, than they are to reenactments in motion pictures or videos, with actors portraying the victims or defendants at a staged scene.[9] The only requirement for admissibility of such evidence is that someone testify that the 3D animation is what it purports to be, which is what is required for photographs, videos and hand drawn diagrams of a crime scene. See O.C.G.A. §§ 24-4-401, 24-4-403, 24-6-611 and 24-9-901.

This Court, in its order signed September 2, 2016, determined that the evidence was admissible because it was not a simulation or re-enactment but could be used to illustrate testimony as a demonstrative aid. August 19, 2016 (Motions Transcript: 4-12; 62-197). This Court, in its September 2, 2016 order, following *Smith v. State*, 299 Ga. 424, 435 (2016), stated, "[e]ven if the objected to demonstrative aids were found to be reenactments, simulations, or experiments, they

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[8] Defendant primarily sited to outdated case law that covered the utilization of simulations or re-creations, such as *Pricken v. State*, 269 Ga. 453 (1998) and *Chance v. State*, 291 Ga. 241 (2012). These are now inapplicable in the face of the evidence code. *Rickman v. State*, 304 Ga. 61, 63-65 (2018) (holding he admission of demonstrative evidence is not controlled by cases decided under the old Evidence Code, such as *Pickren* and *Eiland*).

[9] Instead of a detective taking measurements at a scene and then creating a hand-drawn image, usually an ariel view and not to scale, a computer takes actual scans of the scene, or in this case the inside and outside of a vehicle, and compiles them into an animation that allows the viewer to see all aspects of the scene or object. See MNT:461, Joint Exhibits:D-5/S-7 which are the youtube videos of the testimony showing what was presented and explained to the jury.

are still admissible as such as they will be helpful to the jury, are substantially similar, and the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." September 2, 2016 Order: Page 2. Thus, this Court made an appropriate Rule 403 analysis.

A 3D animation, just like a photo, video or diagram of the actual crime scene, is evidence that is provided to the jury in effort to assist the jury in their determinations. Here the actual 2011 Hyundai Tucson was scanned with computer technology. This 3D animation did illustrate the prior testimony of several witnesses who had previously testified before the jury. David Dustin, who prepared the 3D animation (i.e. diagram) based it upon scans (i.e. measurements) taken at the scene and testified that it accurately represented the scene it purported to depict. *Estep v. State*, 159 Ga. App. 582, 583 (1981); See also *Waters v. State*, 169 Ga. App. 290, 294 (1983) (Holding it was not error to admit a rough diagram of the crime scene, although it was not drawn to scale).

However, the evidence code controls the admission of evidence in this case and the applicable statutes are O.C.G.A. §§ 24-4-401, 24-4-403, 24-6-611 and 24-9-901. Defendant cites to no authority in our evidence code that creates a different standard for crime scene diagrams or drawings, that would then also apply to the admission of 3D graphic scans, since both are based on measuring or scanning the actual piece of evidence or scene, and producing an image that may be viewed by the jury to assist them in their deliberations. This Court properly made its ruling on the admissibility of the 3D graphic animation based on these rules of evidence.

Defendant claims that the "scan and animation unfairly and misleadingly manipulated all information in a way to depict all critical or contested facts as contended by the state." Defendant's Brief page 26. However, this Court finds that the State met the requirements as laid out in *Rickman v. State*, 304 Ga. 61, 63-65 (2018) providing a fair comparison in respect to the particular issue to which the 3D graphic amination was directed, which was the murder weapon.

In analyzing the admissibility of a crime scene diagram, any claimed prejudice due to inaccuracies is minimized by the witness' explanation of how the diagram was created, when it was created, the basis upon which it was created and the limitations or inaccuracies it contains. See *Rickman* at 64-65. That was done in this case during the testimony of Det. Grimstead and David Dustin.

Both the State and the defense spent more time on how the animation was created, what points-of-view were estimated, and the limitations of the animation, than they did on the jury seeing the animation itself. See T:Vol.25:5727-5730 for the actual presentation of the graphic animation; See T:Vol.23:5415-68 (Det. Grimstead); Vol.24:5506-12 (Det. Grimstead), 5654-5670 (David Dustin); Vol.25:5679-5768 (David Dustin); MNT:461; Joint Exhibits:D-5/S-7 which are the youtube videos of the testimony showing what was presented and explained to the jury.

The probative value of the evidence, the jury being able to see the angles of the car and the interior, was not substantially outweighed by the danger of unfair prejudice. The defense thoroughly cross-examined Det. Grimstead and David Dustin

about the problems with the original scans, the correction that was made, and whether or not the scans accurately depicted the car at the time of the homicide. Here the Trial Court's exercise of its discretion, in ruling on the admissibility of the 3D animation, was not manifestly abused. Defendant's motion for a new trial on this basis is denied.

23: Court Failed to Give Jury Charges on Lesser Included Offenses

Defendant requested, in his jury charges 6, 7, 8 and 9, that the jury be given the charge of Homicide by Vehicle in the Second Degree for using his cellphone while driving, as a lesser included charge of Felony Murder based on Cruelty to Children in Count 3 of the indictment.

Defendant requested, in his jury charges 10, 11 and 12, that the jury be given the charge of Involuntary Manslaughter for doing a lawful act in an unlawful manner, that being his failure to use the child safety seat correctly while driving, as a lesser included charge of Murder in Counts 1, 2 and 3 of the indictment.

Defendant requested, in his jury charges 13, 14 and 15, that the jury be given the charge of Contributing to the Depravation of a Minor, as a lesser included charge of Felony Murder based on Cruelty to Children in Count 3 of the indictment,.

This Court finds that the facts of the case and the evidence presented at trial did not support any of the requested jury charges. Defendant cited to *Shah v. State*, 300 Ga. 14 (2016), however in that case the defense attorney had been arguing, since opening statement, that the death of the baby, who had been left in the care of her

14-year-old sister in a house with extreme heat, was accidental or reckless on the part of the defendant mother. Here Defendant never made any arguments during trial related to any of the requested jury charges. The requested jury charges were submitted to this Court at approximately 2:00 p.m. on the day of the charge conference. T:Vol.30:6784-85; 6787, 6792-6796.

Defendant argued accident at trial. No evidence was presented that Defendant consciously disregarded danger to Cooper Harris and knowingly just left him in the hot car, thinking or hoping that Cooper would be fine, such as in *Shah* and *Castro-Moran v. State,* 356 Ga. App. 248, (2020). And Defendant did not argue, and there was no evidence, that Defendant could tell Cooper Harris was suffering inside the hot car but went back to work, relying on his belief and prayer that Cooper Harris would be fine, such as in *Landell v. State*, 357 Ga. App. 207 (2020).

Regarding the specific charges requested by Defendant, there was no argument, nor evidence, that Cooper Harris' cause of death was due to Defendant using his cellphone while driving or using the car safety seat improperly while driving, since the medical examiner testified that his cause of death was from hyperthermia (excessive heat), having been left in the hot car all day. T:Vol.17:4023, 4028-29. Nor was there argument from Defendant, or evidence, that Defendant had abused and neglected Cooper Harris, or purposely abandoned him, such that Cooper Harris would be a "dependent child." This Court did not err in refusing to give these jury charges as there was not even slight evidence to support the charges and Defendant's motion for a new trial on this basis is denied.

24: Court Erred by Instructing the Jury as to State's Requested Charge No. 10 on Sexual Exploitation

Defendant objected to State's Request to Charge 10, which was taken directly from the statute, OCGA § 16-12-100, asserting it was error to allow the jury to return a verdict on Count 6 of the indictment, Criminal Attempt to Commit Child Sexual Exploitation, because the attempted offense could be considered completed under multiple subsections of OCGA § 16-12-100.

This Court finds that State was only required to prove that Defendant took a substantial step toward the crime. The State did prove this through evidence that Defendant repeatedly asked a minor for photos of her genital region. Thus, the jury needed to be appraised of the elements of the underlying crime that Defendant was attempting to commit, which fell under both Subsection (b)(1) and (b)(8) of OCGA § 16-12-100. It was appropriate for this Court to provide the jury with the narrowly tailored jury charge that laid out the relevant sections of OCGA § 16-12-100. *Daniels v. State*, 310 Ga. App. 562, 565 (2011) ("Trial courts should tailor their charges to match the allegations of indictments, either by charging only the relevant portions of the applicable Code sections or by giving a limiting instruction that directs the jury to consider only whether the crimes were committed in the manner alleged in the indictment.")

Because Count 6 of the indictment, Criminal Attempt to Commit Child Sexual Exploitation, was an attempt, the State specifically requested the provision for Criminal Attempt, per the pattern jury charge under 2.01.10, in State's Request to

Charge No. 9. Pattern jury charge 2.01.10 requires the definition of the underlying attempted offense, which has to be appropriately tailored to the facts and evidence in the case.

State's Request to Charge 10, since it was narrowly tailored, did not allow a conviction based upon proof of less than what was alleged in the indictment. *Binns v. State*, 296 Ga. App. 537, 542 (2009). Thus, it is highly unlikely that the jury found Defendant guilty of committing the offense, the attempt, in some other manner than that charged in the indictment. See *Osorto-Aguilera v. State*, 307 Ga. App. 575, 576 (2011); *Taylor v. State*, 344 Ga. App. 122, 134-135 (2017). This Court did not err in giving State's Request to Charge No. 10 and Defendant's motion for new trial on this basis is denied.

VI. Defendant's Amended Motion for New Trial: Ineffective Assistance of Counsel Claims.

OVERVIEW

To prevail on any of his ineffective assistance of counsel claims, Defendant must show both that his counsel's performance was constitutionally deficient and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U. S. 668, 687 (1984). To establish deficient performance, Defendant must "overcome the strong presumption that counsel's performance fell within a wide range of reasonable professional conduct, and that counsel's decisions were made in the exercise of reasonable professional judgment." *Simmons v. State*, 299 Ga.

370, 375 (2016) (citation and punctuation omitted). Decisions made as a matter of trial strategy and tactics do not amount to ineffective assistance of counsel unless "they were so patently unreasonable that no competent attorney would have followed such a course." Id.

To prove that Defendant was prejudiced by any deficient performance of his lawyers, Defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Shaw v. State*, 292 Ga. 871, 874 (2013) (quoting *Strickland*, 466 U. S. at 694). Where Defendant fails to meet his burden in satisfying one prong of the Strickland test, this Court need not review the other, as a failure to meet either of the prongs is fatal to an ineffectiveness claim. See *Lawrence v. State*, 286 Ga. 533, 533-534 (2010).

"The decision whether to present an expert witness, like other decisions about which defense witnesses to call, is a matter of trial strategy that, if reasonable, will not sustain a claim of ineffective assistance. And for a defendant to establish that a strategic decision constitutes deficient performance, a defendant must show that no competent attorney, under similar circumstances, would have made it." *Horton v. State*, 310 Ga. 310, 329-330 (2020). Accord *Sullivan v. State*, 308 Ga. 508, 511-512 (2020); *Neely v. State*, 302 Ga. 121, 125-126 (2017); *Matthews v. State*, 301 Ga. 286, 289 (2017); *McNair v. State*, 296 Ga. 181, 184 (2014); *Davis v. State*, 290 Ga. 584, 585-586 (2012).

In enumeration of error number one, in Defendant's Amended Motion for New Trial, filed December 2, 2020, Defendant claims that Trial Counsel was ineffective for making the decision to not call Dr. David Diamond as a witness for the Defendant at trial. This Court finds that Trial Counsel was not ineffective, that Trial Counsel made a knowing, intelligent, and strategic decision to not call Dr. Diamond, that such decision was reasonable and the decision to not call Dr. Diamond did not prejudice Defendant. In addition, this Court finds that Trial Counsel was not ineffective for pursing a reasonable trial strategy, to discredit the State's witnesses, and attempting to put before the jury hearsay testimony from Det. Stoddard and Det. Murphy, as this one piece of evidence was not the entire basis for this particular strategy, as alleged by Defendant in his enumeration of error number two.

Amended Motion for New Trial: Enumeration of Error One

At the Motion for New Trial Hearing, Defendant presented the testimony of Dr. David Diamond, an expert in memory systems, and also called all three of his Trial Counsel to testify. Trial Counsel Kilgore testified that the defense had two prongs: the legal defense of accident, that was based on memory failure (MNT:121), and to undermine the motive theory of the State by challenging the credibility of the law enforcement officers and the State's experts (MNT:122, 170, 186). Trial Counsel Kilgore claimed that the only reason he did not have Dr.

Diamond testify for Defendant, was that the Trial Court granted the State's Motion to Compel. MNT:121, 163, 207, 234, 252.

Trial Counsel Kilgore testified that, based on the order of the Court, dated August 29, 2016 and its ruling from September 15, 2016, he turned over three pages of type written notes and three pages of handwritten notes, created by Dr. Diamond, to the State on September 19, 2016, the sixth day of trial. Defendant now contends that the three pages of type written notes were Attorney Work Product, and as such, in the hands of the State, Trial Counsel Kilgore had no choice but to not call Dr. Diamond as a witness. Thus, Defendant contends that this Court erred in compelling the Defendant's statements (See Enumeration of Error #6) and that this Court's (erroneous) ruling "forced" Trial Counsel Kilgore to be ineffective when he decided to not call Dr. Diamond to testify.

However, making decisions about which witnesses to call in the face of rulings by the Trial Court, does not make Trial Counsel ineffective. Nor does a knowing, intelligent and strategic decision to not call a witness make counsel ineffective. The record, the testimony of Trial Counsel Kilgore and the testimony of Dr. Diamond at the Motion for New Trial Hearing, show that Trial Counsel Kilgore's decision to not have Dr. Diamond testify was a matter of reasonable trial strategy. MNT:231-33.

As the Georgia Supreme Court has previously explained, "[i]nformed strategic decisions do not amount to inadequacy under *Strickland*. The fact that appellant and his present counsel now disagree with the difficult decisions

regarding trial tactics and strategy made by trial counsel does not require a finding that appellant received representation amounting to ineffective assistance." (Citation and punctuation omitted.) *Starks v. State*, 283 Ga. 164, 167-168 (2008). See also *Guzman-Perez v. State,* 853 S.E.2d 76, 81 (2020) (Holding that trial counsel's decision not to hire an expert in forensic pathology was a matter of reasonable trial strategy when counsel felt that it would have been extremely difficult to convince a jury that the victim's death was an accident based on the facts of the case, which included Appellant's numerous conflicting statements to witnesses and law enforcement and his attempt to conceal the body). Because Defendant cannot show that Trial Counsel Kilgore acted deficiently his claim of ineffective assistance of counsel fails.

This Court also finds that Defendant's claim of ineffective assistance of counsel fails on the prejudice prong, as Defendant had Dr. Gene Brewer testify at trial, on November 3, 2016 to the failure of memory systems. MNT:124, 132. See his testimony at Trial Transcript Volume 29. Trial Counsel testified, at the Motion to New Trial Hearing, that he was going to have Dr. Diamond testify to his personal experience in interviewing dozens of parents who had left their children in cars and relating those hearsay conversations to the jury while comparing what those other parents said they did, to what Defendant said he did in this case, in order to conclude that Defendant's actions were consistent with those other cases. MNT:124-25, 131-133. Such testimony would have been inadmissible, and Trial Counsel Kilgore acknowledged that he anticipated objections from the State and

an unfavorable ruling by this Court. MNT:194-95, 233-34. Dr. Diamond was also going to testify about news media articles, and the facts contained therein, to compare them to the actions of Defendant, including airplane crashes, police dogs being left in hot cars, the Lyn Balfour case, and his personal conversation with a Tampa police detective who left his gun in a bathroom at a movie theater. MNT:72-74; MNT D-3. Such testimony would have been inadmissible, and Trial Counsel Kilgore acknowledged that he anticipated objections from the State and an unfavorable ruling by this Court. MNT:194-95, 233-35. Thus, there is no prejudice to Defendant in the failure to call Dr. Diamond to testify, as part of his testimony would have been cumulative of Dr. Gene Brewer's testimony and the other two parts of his testimony would have been inadmissible.

FINDINGS OF FACT AND CREDIBILITY

1. Timeline of the Motions

Defendant filed his reciprocal discovery on April 6, 2016, listing Dr. Diamond as a witness. The discovery, provided to the State, consisted of the C.V. of Dr. Diamond (MNT S-1), a 22-slide PowerPoint presentation (MNT S-3), to be used in conjunction with Dr. Diamond's testimony, and a two-paragraph summary of his anticipated testimony (MNT S-2). The two-paragraph summary of the anticipated testimony of Dr. Diamond stated that Dr. Diamond was basing his expert opinion, in part, on conversations he had with Defendant, along with his review of the discovery. MNT:130; MNT S-2. Trial Counsel Kilgore testified that

he provided Dr. Diamond with a tremendous amount of data on the case, including recordings, videos and reports. MNT:126-27.

After speaking with Dr. Diamond on April 6, 2016, the State filed its Motion to Compel on April 11, 2016. The State's motion asserted that Dr. Diamond revealed to the Assistant District Attorney that Dr. Diamond had memorialized his conversation with Defendant in written form but would not provide the State with his documentation or notes about his conversation with Defendant. (See the State's Motion to Compel, filed April 11, 2016 and the August 19, 2016 Motions Transcript:21-22.)

The State's Motion to Compel sought either the statements of the Defendant or the notes that contained the statements Defendant made to Dr. Diamond, upon which Dr. Diamond was basing his opinion. No hearing was ever held on the State's Motion to Compel, nor were the statements of the Defendant given to the State, prior to the case proceeding to trial for the first time on April 12, 2016. A mistrial was declared on Monday May 2, 2016, and the second trial was then scheduled to begin on September 12, 2016 in Brunswick, Georgia, after the granting of Defendant's Motion for Change of Venue the same day.

Dr. Diamond interviewed Defendant a second time on April 30, 2016 and typed into his outline Defendant's responses and statements. MNT:34-44; MNT D-1. Dr. Diamond then used these three pages in developing his improved Powerpoint (which was provided to the State during the second trial) and his hypothesis as to how Cooper Harris was left in the car. MNT:93, 99.

On August 19, 2016, prior to the start of the second trial, a hearing was held on the State's Motion to Compel. August 19, 2016 Motions Transcript:14-22. At that time, Trial Counsel stated, "Dr. Diamond apparently told [the assistant district attorney] he had some notes. That's work product." T:18. Trial Counsel admitted that, "If there is some particular statements out there, they interviewed Dr. Diamond. They can very directly ask him, well, what statements. What did he tell you." T:19. Trial Counsel went on again to say, "The fact that a witness may be taking some notes about anything and everything about what he's doing, that's work product, Judge." Per the motions hearing transcript, Trial Counsel is referring to the notes of Dr. Diamond as "work product," but he does not say that it is in any way his "attorney work product."[10] Defendant cites to no statute or ruling that makes an expert's work product, especially work product upon which he will base his opinion, "confidential" or not subject to discovery. As noted in *McKelvin v. State*, 305 Ga. 39, 43 (2019), the Georgia Supreme Court has held that the attorney-client privilege does not apply to communications, related to the matters on which legal advice is being sought, between the attorneys and an expert, when that expert is to serve as a witness for the Defendant at trial.

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[10] This Court notes that Dr. Diamond was not a consultant for the defense, he was an expert witness who had produced a powerpoint presentation and rendered an expert opinion in the case. Thus, this case is not like *Neuman v. State*, 297 Ga. 501, 508 (2015) (Holding "the attorney-client privilege is vital in cases such as this one where the defendant's sanity is at issue because the privilege allows the attorneys to consult with the non-testifying expert in order to familiarize themselves with central medical concepts, assess the soundness and advantages of an insanity defense, evaluate potential specialists, and probe adverse testimony.")

At the August 19, 2016 motions hearing, Trial Counsel Kilgore denied that the defense was in possession of any statements of the defendant given to Dr. Diamond. August 19, 2016 Motions:19. Trial Counsel did cite to various discovery statutes and argued that the defense was not required to turn over Defendant's statements. August 19, 2016 Motions:18-20. The State was very clear that they were seeking the "statement of the defendant in this case, which [Dr. Diamond] has taken and is going to rely on in his testimony." August 19, 2016 Motions:21. The State pointed out to the Court that, "He flat out told me he has it and he wasn't going to give it to me and I'd have to talk to the defense." August 19, 2016 Motions:21. This Court granted the State's motion.

On September 6, 2016, prior to the second trial, Trial Counsel filed a Motion to Reconsider and the State filed a second Motion to Compel. On the fifth day of trial, September 16, 2016, during jury selection, a second hearing on the Motion to Compel was held. T:Vol:5:1325-36. At the second Motion to Compel Hearing, Trial Counsel Kilgore stated to this Court, "What the State is asking for here, Judge, are statements of Mr. Harris purportedly made to our expert Dr. Diamond. What they're looking for are the words of the defendant for his statement." T:Vol.5:1325. This Court finds that Trial Counsel Kilgore understood perfectly what the State was seeking. Once again, at the second Motion to Compel Hearing, Trial Counsel only cited to various discovery statutes and argued that the defense was not required to turn over Defendant's statements. T:Vol.5:1326-31.

On the morning of October 4, 2016, just before opening statements, the State announced to the Trial Court that Defendant had complied with the Motion to Compel on September 19, 2016. T:Vol.11:2529-2530. Out of an abundance of caution, the State had an uninvolved Assistant District Attorney from the Brunswick Judicial Circuit review the six pages provided by the defense, prior to the Cobb County prosecutors seeing them. The uninvolved Assistant District Attorney determined that three of the pages could be considered attorney work product and they were placed in a sealed envelope and made an exhibit. T:Vol.11:2528; SE1; See also MNT D-2. The State then showed trial counsel the three remaining pages, that contained the typed outline by Dr. Diamond containing the Defendant's statements. T:Vol.11:2529-2530; See also MNT D-1.

2. Assertion of Attorney Work Product

This Court heard, for the first time, at the Motion for New Trial Hearing, the assertion by Trial Counsel Kilgore that the three typed pages were "attorney work product" communicated by the lawyers to Dr. Diamond. MNT:136-38, 215, 225, 227-28, 188. This is concerning for a number of reasons. First, at no time, at either motion hearing, on August 19, 2016 or on September 6, 2016, did Trial Counsel assert that Dr. Diamond intermingled the defendant's statements with what had been told to him about the defense strategy, opinions and concerns in his interview outline. Second, Trial Counsel failed to request redaction of the three pages of type-written notes or have this Court perform an in camera review of the notes, which

he now wishes to assert contain "attorney work product." MNT:227. Third, Dr. Diamond testified that it was his outline based on conversations with the defense attorneys but also based on his prior conversation with Defendant, the discovery and his own personal questions for the Defendant. MNT:34-44.

At the Motion for New Trial Hearing, Dr. Diamond testified that he did not take any notes, or memorialize in any way, the initial three-hour meeting he had with Defendant on August 10, 2015. MNT:23, 29, 97, 136, 245. Trial Counsel Kilgore recalled Dr. Diamond having his laptop open and working on it during this first interview with Defendant on August 20, 2015. MNT:251. Dr. Diamond testified that he had a handwritten outline in preparation for his meeting with Defendant in August of 2015. MNT:86[11]; MNT D-2. All of this places Dr. Diamond's credibility in question, as this testimony is in direct conflict with the discovery provided by Defendant on April 6, 2016, the State's Motion to Compel from April 11, 2016 and Dr. Diamond being prepared to testify at the first trial, which began April 12, 2016. This Court finds it hard to believe that Dr. Diamond prepared three pages of handwritten notes of topics to cover with Defendant, and then failed to record Defendant's answers, but afterward he was able to prepare a 22 slide powerpoint presentation for his testimony and opinion.

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[11] Defendant's Exhibit 2 from the Motion for New Trial Hearing (MNT D-2) contain no statements of the defendant. Page one is titled "Criteria to Testify Memory Based Error." Page two is titled Justin Ross Harris Issues/Questions" and Page three is titled "Ever heard of FBI?" Trial Counsel Kilgore also testified that MNT D-2 was the "work product of David Diamond" and that Dr. Diamond told him that it was "notes that he used in preparation to talk to Ross Harris." MNT:161.

This Court also finds Dr. Diamond's credibility lacking because he testified at the Motion for New Trial hearing that he uses the interview with the person charged in the crime to try to understand the circumstances around the crime in order to form his opinion. MNT:19. Dr. Diamond testified that could not have an expert opinion in this case unless he interviewed the Defendant. MNT:117. Dr. Diamond also testified that it was very important to interview the Defendant and hear what he had to say, since that formed the basis of his opinion. MNT:117. Trial Counsel Kilgore testified that Dr. Diamond told him that he did not have a recordation of any specific responses that Defendant had given him. MNT:136.

This Court has grave concerns about Dr. Diamond as an expert, who was going to opine that the death of Cooper Harris was an accident based a failure of memory systems, without having noted, recorded or memorialized anything Defendant specifically told him. As Trial Counsel Kilgore testified, "I definitely knew that was going to be a problem with his credibility." MNT:137.

Dr. Diamond testified at the Motion for New Trial hearing that he interviewed Defendant again on April 30, 2016. MNT:32. This would have been after the first trial started and a mistrial was declared. At that interview, Dr. Diamond used an outline, Defendant's Exhibit One (D-1) which he typed up, based on "conversations with Maddox and his team, based on my interview with Ross Harris the first time, based on all that I had seen in discovery and based on questions that I also had." MNT:34; MNT:D-1. Thus, according to Dr. Diamond, D-1 was not "attorney work product" but his own outline in preparation for his

interview with Defendant, despite it partially being based on information he learned from Trial Counsel. MNT:34-44.

This Court has grave concerns about Trial Counsel Kilgore repeatedly attempting to make Dr. Diamond's outline into the lawyers' work product. MNT:137-38, 188. Trial Counsel Kilgore testified that "Dr. Diamond explained to us that those kind of things, you know, were part of his analysis of whether or not there was a memory failure, and so that's -- I mean, that's why we discussed that with him." MNT:147. Trial Counsel Kilgore indicated that Dr. Diamond was the one asking questions about the content of the evidence for his analysis. MNT:148, 156-58, 160. When asked, Trial Counsel Kilgore repeatedly stated that he "talked" to Dr. Diamond about the case. There was never an indication that specific work product created by the attorneys was given to Dr. Diamond nor that the attorneys created or authored Dr. Diamond's outline. MNT:142-144, 146. "The mere fact that an attorney has drafted or participated in the drafting of a certain document does not mean that the document is privileged." *Chua v. Johnson*, 336 Ga. App. 298, 305 (2016).

All of the items or topics in the outline were provided to the Defense, by the State, in discovery, or were already issues in dispute in the case and known to the State. MNT:34-44, 126-27,152, 188, 191. One such example was the issue of Defendant going back to his car in the middle of the day ostensibly to place the purchased lightbulbs inside the car. MNT:152. This Court finds that MNT D-1 was not attorney work product.

This Court finds that Defendant's Motion No. 26, filed September 6, 2016, clearly noted that Trial Counsel Kilgore knew the State was only seeking the statements of Justin Ross Harris to Dr. Diamond. MNT:214-15. Trial Counsel Kilgore reiterated at the Motion for New Trial hearing that he believed the State just wanted to get to the Defendant's statements and he believed the State was not entitled to the Defendant's statements. MNT:222. This Court notes that Defendant did make a video statement to the police, which was given to Dr. Diamond, and played at trial. MNT:188. Trial Counsel Kilgore also knew that this Court's Order was only for Defendant's statements which the State was going to be able to inquire into upon the cross-examination of Dr. Diamond, as they were the basis of his opinion. T:Vol.5:1325; MNT:219, 226.

This Court takes special note of the fact that the State repeatedly asserted, in front of Trial Counsel, that it wanted the statements of Dr. Diamond regarding his documentation of his conversations with Defendant. T:Vol:5:1332-33. The State specifically stated that it did not want the work product of the defense attorneys and that redaction was acceptable. T:Vol:5:1334-35. The State pointedly stated to this Court that it feared Trial Counsel would come back later and claim that he was ordered to turn over "attorney work product." T:Vol:5:1335-36.

The State was so concerned that Trial Counsel was trying to interject reversible error into the case that it then performed its own in camera review. T:Vol.11:2528-29; SE1. Out of an abundance of caution, during trial, the State had an uninvolved Assistant District Attorney from the Brunswick Judicial Circuit

review the six pages provided by the defense on September 19, 2016, prior to the Cobb County prosecutors seeing them. T:Vol.11:2528-29. The uninvolved Assistant District Attorney determined that three of the pages, those handwritten (MNT D-2) could be considered attorney work product, not having any statements of the defendant listed, and they were placed in a sealed envelope, without the State's trial attorneys seeing them, and made an exhibit. T:Vol.11:2528-29; SE1. The State then showed Trial Counsel Kilgore the three remaining pages, which contained Defendant's responses to Dr. Diamond's questions during the April 30, 2016 interview. T:Vol.11:2529-2530; MNT D-1.

The State's fear was realized during the Motion for New Trial hearing when Trial Counsel Kilgore both asserted that the notes were "attorney work product" and that he was ineffective in his decision to not call Dr. Diamond to testify because he was forced to provide them to the State. This Court concludes that providing the type-written notes of Dr. Diamond to the State, failing to assert that Dr. Diamond's notes contained "attorney work product" during both motion hearings, failing to seek redaction or an in camera review and then deciding to not call Dr. Diamond to testify for the Defendant were all part of Trial Counsel's on-going decision making in conjunction with his trial strategy during the trial, were reasonable decisions under the circumstances and not a result of carelessness or negligence on the part of Trial Counsel.

3. Trial Counsel was Not Ineffective: Reasonable Decision

Based on the record and the testimony from the Motion for New Trial hearing, this Court finds that there were numerous other reasons for Trial Counsel to strategically, intelligently, and knowingly not put Dr. Diamond on the stand, despite the adamant testimony of Trial Counsel Kilgore to the contrary.

The initial plan had been to have Dr. Diamond opine that Defendant did not leave Cooper Harris in the car intentionally, but that it was an accident due to a failure of memory systems. MNT:121, 125; Initial 22-slide PowerPoint presentation: MNT S-3. However, this Court ruled, on August 29, 2016, under O.C.G.A. 24-7-704, that Dr. Diamond could not opine to the ultimate issue about Ross Harris's intent, as that was an issue for the jury. "No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." O.C.G.A. 24-7-704.

Defendant had Dr. Gene Brewer testify to the failure of memory systems on November 3, 2016. T:Vol.29. According to the testimony of Trial Counsel Kilgore, Dr. Diamond was only going to testify to two additional things, over and above those items to which Dr. Brewer testified. MNT:131-32. Trial Counsel Kilgore testified that he told Dr. Diamond a number of reasons for not calling him as a witness. MNT:233-34. These included Trial Counsel Kilgore's concern that

this Court would rule against him if the State objected to Dr. Diamond's testimony and his belief that the State's case had been lousy. Id. Dr. Diamond testified that he was told that Trial Counsel felt confident about the case and that the Defendant would be acquitted, so his testimony was not needed. MNT:104.

Trial Counsel Kilgore testified that he had many legitimate reasons for not calling Dr. Diamond to testify including fear of the State's cross-examination of Dr. Diamond, that the State would put words in the Defendant's mouth, that the Trial Court had ruled against the defense on matters of law, and that the State could object to Dr. Diamond's opinion especially about comparing this case to other cases upon which he had worked. MNT:153, 164, 168.

And finally, Trial Counsel Kilgore's assertion that the only reason he did not have Dr. Diamond testify was because he was forced to turn over three pages of notes, is belied by his actions after the notes were turned over to the State on September 19, 2016. Trial Counsel did not immediately inform Dr. Diamond that he was not going to testify at the trial. MNT:229-31. Trial Counsel testified that trial was a fluid situation and that he wanted to keep his options open. MNT:233. Dr. Diamond continued to work on his PowerPoint presentation as evidenced by MNT D-3, which contains a slide referencing legislation introduced on September 15, 2016 about hot car deaths, despite Dr. Diamond's testimony that he gave the Powerpoint to Trail Counsel Kilgore on September 3, 2016. MNT:101.

Trial Counsel Kilgore was in ongoing conversations with the State about the contents of Dr. Diamond's testimony. MNT:235, 241. Dr. Diamond traveled from

Tampa to Brunswick, Georgia, and was sequestered in a room in the courthouse, in preparation for his testimony on November 2, 2016 and November 3, 2016. MNT:45, 102-03, 231-32. After the testimony of Dr. Brewer, which concluded at 11:48am November 3, 2016, Trial Counsel Kilgore asked for a break to discuss with the other lawyers and the witness, "Whether or not we're going to put [Dr. Diamond] on the stand." T:Vol.29:6553-54. A recess was taken from 11:57am to 1:10pm. Mr. Kilgore then reported back to this Court that he had no other witness for that afternoon and only one more witness for the next day. T:Vol.29:6555. MNT:233.

Based on the trial transcript, the motions and the testimony from the Motion for New Trial, this Court finds that Trial Counsel knowingly and strategically decided to not call Dr. Diamond to testify for Defendant at trial and such decision was reasonable. Trial Counsel's decision not to call Dr. Diamond as a witness was not outside the range of reasonable professional assistance. Thus, Defendant has failed to establish his counsel's performance was deficient.

4. Trial Counsel was Not Ineffective: No Prejudice

Based on the trial transcript, the motions and the testimony from the Motion for New Trial, this Court finds that Trial Counsel was able to put up evidence, in the form of the expert testimony of Dr. Gene Brewer, to support the defense theory that the death of Cooper Harris was accidental. T:Vol.29. Dr. Gene Brewer testified to the mechanics of memory systems and how they fail. Having put that

testimony before the jury on November 3, 2016, Dr. Diamond's testimony would have been cumulative.

But it also could have hurt the Defendant if Dr. Diamond contradicted Dr. Brewer's testimony. For instance, Dr. Brewer testified that there were many possible "cues" that could have alerted Defendant that Cooper Harris was in the car. T:Vol.29:6515-6519. However, Dr. Diamond testified at the Motion for New Trial hearing that there were no "cues." MNT:65. In addition, Dr. Diamond testified at the Motion for New Trial hearing that all the factors for a failure of memory systems were present in this case: A change in routine, poor sleep, chronic stress, distraction during the drive and lack of cues that the child was in the car. MNT:55, 58, 60-61, 62, 65. However, this actually would have contradicted the evidence in the case and even the statement of the Defendant to the police on the night of the murder when he said he was not tired, distracted nor stressed.

Based on the trial transcript, the motions and the testimony from the Motion for New Trial, this Court finds that Defendant did not suffer any prejudice from not having Dr. Diamond testify as Dr. Brewer testified supporting the Defendant's theory of accident.

Amended Motion for New Trial: Enumeration of Error Two

In enumeration of error number two, in Defendant's Amended Motion for New Trial, Defendant claims that Trial Counsel was ineffective for "relying on their belief that certain evidence would be admissible at trial and making this the

basis of their defense." This Court finds that Trial Counsel's strategy "to undermine the motive theory of the State...by challenging the credibility of the State's witnesses, primarily law-enforcement officers and the State's experts" was reasonable trial strategy. MNT:122.

This Court finds that Trial Counsel was not ineffective for trying to put before the jury the hearsay statements made by Det. Murphy to the magistrate judge in the search warrant affidavits because this was a part of their reasonable attempt to discredit Det. Murphy and the Cobb County Police Department. The fact that this Court appropriately sustained the State's hearsay objection, in no way makes Trial Counsel ineffective. This Court also finds that Trial Counsel did not make Det. Murphy, nor the hearsay statements in the search warrant affidavits, the basis of Defendant's defense. Therefore, the exclusion of this hearsay testimony did not prejudice the Defendant nor keep him from attacking the credibility of the law enforcement witnesses in this case.

1. Trial Counsel was Not Ineffective

Trial Counsel Lumpkin testified at the Motion for New Trial hearing that the primary focus of the defense was to show that Defendant had no intention to harm his child and that he was a good father. MNT:258, 268-69. The second part of the defense was to go after the credibility of law enforcement, by showing the jury "actual evidence of the lack of credibility that we saw in this investigation." MNT:259, 264. In other words, Trial Counsel Lumpkin believed that law enforcement arrested Defendant before they had all the information and they

decided, based on information about him that they did not like, that they would just make him out to be a horrible guy and not look at his relationship with his child. MNT:273. Trial Counsel Lumpkin had successfully used both of these strategies in previous cases. MNT:270.

Trial Counsel Lumpkin considered information contained in the original search warrants to be misleading and not based on the evidence. MNT:261. Trial Counsel Kilgore testified that he believed Det. Murphy gave false testimony to the magistrate judge in order to obtain search warrants.[12] MNT:243. However, the alleged false information in the search warrant came from Det. Stoddard's interview with the Defendant. Since Det. Murphy did not conduct the interview with the Defendant, Trial Counsel speculated that Det. Murphy must have either listened in on the interview or been given the information by someone else. MNT:243-44. Therefore, Trial Counsel wanted to show that some detective was lying about what was said in the interview room. MNT:244.

Trial Counsel was frustrated in their attempt to question Det. Stoddard, about the hearsay in Det. Murphy's search warrants, when this Court properly sustained the State's hearsay objection. MNT:263. Trial Counsel Lumpkin acknowledged, at trial and during the Motion for New Trial hearing, that this Court had already ruled on the validity of the search warrants and that was not an issue. MNT:264.

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[12] See Enumeration of Error 17 above. Defendant specifically took exception with Det. Murphy's characterization that Defendant had "researched" hot car deaths and the temperatures in hot cars.

Trial Counsel Lumpkin testified that they were not trying to get hearsay from Det. Murphy. MNT:265. However, Trial Counsel Lumpkin then testified that they were trying to put Det. Murphy's search warrants before the jury "to try to figure out where did that information come from, why was that created, who created it and why was it told to a magistrate when the evidence did not bear it out." Id. Thus, Trial Counsel knew that the information did not come from Det. Murphy's personal knowledge and knew this after the pre-trial Motion to Suppress Hearings. But that did not stop Trial Counsel from trying to put the evidence before the jury, which is a reasonable trial strategy, as the State may not have objected to the evidence.

Trial Counsel Lumpkin admitted that he was using Det. Murphy to "address this very issue of the credibility of the investigation." MNT:265. However, Trial Counsel Lumpkin also admitted that the defense had no intention of calling Det. Murphy to testify and only called him when the rules of evidence precluded them from questioning Det. Stoddard about the hearsay statements in Det. Murphy's search warrants. MNT:267. During the bench conference about the objection, the State informed Trial Counsel Kilgore that he could call Det. Murphy but that his testimony would have to be relevant and not hearsay. MNT:238.[13]

During the cross-examination of Det. Stoddard, Trial Counsel was able to put before the jury the fact that Det. Stoddard had to rewrite the search warrants that Det. Murphy had written because he did not like the wording or the language

[13] Trial Counsel Kilgore testified at the Motion for New Trial that the State lied to him or somehow fooled him into believing that they would not object to hearsay from Det. Murphy, but this is belied by the record. MNT:174, 238.

in them. In addition, Trial Counsel was able to put before the jury the fact that Defendant never told Det. Stoddard that he "researched" hot car deaths.

2. Defendant was not prejudiced by the lack of this information.

This Court finds that Trial Counsel was able, through effective cross-examination of many witnesses, including Det. Stoddard and Det. Grimstead, to introduce their trial strategy questioning the credibility of the State's witnesses. Det. Stoddard was on the stand for four days and Trial Counsel Kilgore testified that he was able to cross-examine him about his false testimony at the probable cause hearing. MNT:173. Trial Counsel Kilgore testified that Trial Counsel Lumpkin was able to destroy Det. Grimstead on cross-examination. MNT:175.

Trial Counsel Lumpkin testified that Trial Counsel Kilgore "certainly did attack the credibility of Det. Stoddard and was able to get him to, at least to some extent, admit to some false statement he had previously given." MNT:269. Trial Counsel Kilgore also testified that he covered all of the credibility issues with Det. Stoddard. MNT:237.

Based on the trial transcript, the motions and the testimony from the Motion for New Trial, this Court finds that Defendant did not suffer any prejudice from not introducing the hearsay statements contained in Det. Murphy's search warrant affidavits, since Trial Counsel did in fact attack the credibility of law enforcement through the cross-examination of both Det. Stoddard and Det. Grimstead, thus supporting the defense theory of bias in law enforcement's investigation of the case.

VII. Conclusion.

THIS COURT, having reviewed Defendant's Motion for New Trial, Amended Motions for New Trial, the State's Responses and having heard testimony and oral argument on December 14 and 15, 2020, and March 30, 2021, hereby DENIES Defendant's Motion for New Trial.

It is so ORDERED this 20 day of May, 2021.

Mary Staley Clark

JUDGE MARY STALEY CLARK
Judge, Superior Court of Cobb County

Prepared by ADA L. Dunikoski

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of: Order Denying Defendant's Motion For New Trial in case 14-9-3124 by: ( ) Personal Service, (x) Statutory Electronic Service, ()Interoffice Mail or ( ) placing a copy in the United States mail in a properly addressed envelope with adequate postage thereon to:

Dunikoski, Linda - Linda.Dunikoski@cobbcounty.org

Mitch Durham Mitch Durham mitch.durham.attorney@gmail.com

This the 20 day of May, 2021.

Brian Phillips
Judicial Administrative Assistant to
The Honorable Mary Staley Clark
Judge, Cobb Judicial Circuit