

COURT OF APPEALS OF GEORGIA

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June 11, 2015

To: Thomas S. Robinson, III, Robinson & Associates, Post Office Box 390728, Snellville, Georgia 30039

Case Number: _____ Lower Court: _____ County Superior Court _____

Court of Appeals Case Number and Style: A15A1818. Erik Ferguson v. The State

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divesting this Court of jurisdiction. The case decision is therefore final.
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- Electronic filing is mandatory in this Court. The following Rule 46 became effective January 1, 2015.**

XXII. ELECTRONIC FILING OF DOCUMENTS

Rule 46. Electronic Filing of Documents.

Counsel is required to use the Court's electronic filing system and to follow the policies and procedures governing electronic filing as set forth in the Court's electronic filing instructions. The Clerk of Court may grant a request for exemption from mandatory electronic filing for good cause shown. An adverse decision by the Clerk of Court may be appealed by motion to the Court via a paper filing.

Rule passed October 21, 2014 - effective January 1, 2015

ROBINSON & ASSOCIATES

Attorneys at Law P.C.

P.O. Box 390728
Snellville, Georgia 30039
(404) 285-8367
Fax (678) 344-6462

June 9, 2015

Clerk of State Court, Court of Appeals
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Atlanta, Georgia 30334

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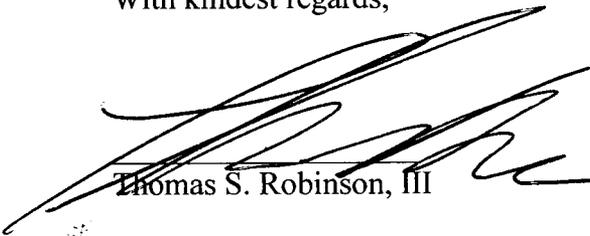
Re: Ferguson v. State A151818A0054

Dear Clerk:

Enclosed please find an original and three copies of my Brief in the above-styled case. Please file the original and return one copy, stamped filed, in the enclosed self-addressed envelope.

Thank you for your cooperation.

With kindest regards,


Thomas S. Robinson, III

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

CASE NO. A15A1818

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ERIK FERGUSON

V.

THE STATE

BRIEF OF APPELLANT

Thomas S. Robinson, III
Attorney for the Appellant
State Bar No. 610670

P.O. Box 390728
Snellville, Georgia 30039
(404) 285-8367

Erik Ferguson
GDC # 1267471
Macon State Prison
P.O. Box 426
Oglethorpe, Georgia 31068

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

ERIK FERGUSON

Case No. A15A1818

v

THE STATE

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BRIEF OF APPELLANT

PART ONE

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this case because this is an appeal from a final order of a superior court under O.C.G.A. §§ 5-6-33 and 5-6-34.

STATEMENT OF THE CASE

Appellant Erik Ferguson (hereinafter Appellant) was indicted by a DeKalb County grand jury and charged with committing the offenses of Trafficking of Persons for Sexual Servitude, Criminal Attempt to Commit a Felony (Counts 2-3), Pimping (Counts 4-5), Conspiracy to Commit Pimping (Counts 6-7), Enticing a Child For Indecent Purposes (Count 8) and Conspiracy to Commit Sexual Exploitation of Children (Counts 9-17). The case was tried before a jury between January 23, 2012 and January 27, 2012. The jury found Appellant guilty on all counts except count four. The Honorable Gregory Adams sentenced Appellant to sixty years in prison. Appellant's timely Motion for new trial was denied on March 17, 2014. A timely Notice of Appeal was filed on April 17, 2014.

STATEMENT OF FACTS

Catherine McCullough testified that she is employed with the Juvenile Justice Fund as the stop the commercial exploitation of children manager. T. II, 272. She is the campaign director of the Campaign of A Future Not A Past a program designed to stop the prostitution of children in Georgia. As a part of that work AFNAP commissions studies to measure the scope of the problem. T. II, 274. She also trains law enforcement. She was allowed over objection to testify as an expert in the commercial exploitation of children. T. II, 284. She testified as to the scope of child prostitution. T. II, 286. She testified to the rate that child runaways are approached by pimps. T. II, 293.

Officer Bernadette Hooker, DeKalb County Police Department, testified that on January 9, 2009, she responded to 2004 Candler Road, DeKalb County. T. II, 299. She stopped at the corner of Candler and McAfee to investigate. Four females were passing out adult entertainment business cards, T. II, 302. Allante Green admitted that the business cards were hers. T. II, 307. Allante Green was charged with enticing minors because the other girls were minors.

William Clinton testified that he was the Craigslist Custodian of Records. T. II, 324. He authenticated certain Craigslist ads. T. II, 326-352.

Sergeant Carlton Tripp, DeKalb County Sherriff's Office authenticated certain phone calls made by Appellant from the DeKalb County Jail. T. II, 367, 371.

Allante Green testified that she moved in with Appellant when she was sixteen years old. T. II, 375. Green testified that Appellant was her pimp. T. II, 387. According to Green, Appellant created the Addicted Pleasure Models escort service. Green would pass out business cards and recruit other women. T. II, 403. She would also do stripper flyers. T. II, 423. She would also post on the internet. T. II, 410. Her mother came to live with her and when she found out Green was

prostituting she asked her to stop. T. II, 430. Green and the other girls were arrested passing out business cards. T. II, 431.

Kawanis Pitts testified that she met Appellant in January of 2009 at a bar in Underground Atlanta. She spent the next week living at Appellant's house. Over objection photographs of Pitts were admitted. T. 3, 606. On January 9, 2009, Pitts along with Appellant, Allante Green and Kamillah Love were on Candler Road at a bus stop. T. III, 610. A car approached and Green suggested they give the driver a business card. They did not solicit sex and were not asked to solicit sex. T. III, 617. The police came and she was arrested. T. III, 611. No prostitution took place. T. III, 617.

Investigator Boykin Jones, DeKalb County District Attorney's Office, testified that he attempted unsuccessfully to locate Kamillah Love. T. III, 622.

Lieutenant D.N. Woods, DeKalb County Police Department, testified that on January 9, 2009 he was driving on Candler Road and saw four scantily clad young ladies passing out business cards. T. III, 625. The police ran their identification and discovered that Kamillah Love and Kawannis Pitts were minors. T. III, 627. A camera and lap top were confiscated. T. 3, 630.

Angela James, former detective with DeKalb County Police Department testified that arrived on the scene of Candler Road. T. III, 635.

Tiffany Green testified that she is the mother of Allante Green and Kya Lovett. T. III, 645. At some point Allante went to live with Appellant. Then her mother came to live with them. T III, 649. She suspected Allante was prostituting and talked with her about it. T III, 655. Appellant called the police and reported that Kya was not going to school and was hit by her mother. T. III, 659.

Kya Lovett testified that she was aware of her sister's prostitution. T. III, 674. She saw her sister give Appellant money. T. III, 676.

Investigator Latara Jones, DeKalb County Solicitor's Office, testified that after reports from Appellant she arrested Tiffani Greed for educational neglect. Appellant also contacted the police who set up a sting. T. III, 680. Appellant called again to report that Tiffani Green was beating Kya and Investigator Jones got a warrant for simple battery. T. III, 681. Kya was taken out of the house. Allante was arrested for prostitution. Jones pulled the jail phone calls between Allante and Appellant and secured a warrant against him for contributing to the delinquency of a minor. T. III, 683. Jones investigated further and found sexual advertisements by Allante on Craigslist. T. III, 684. She spoke with Kya. T. III, 685.

Anique Whitmore testified, without objection, as an expert in forensic psychotherapy specializing in girls who have been commercially sexually exploited. T. III, 694. She did not speak with any of the alleged victims in the case. T. III, 695. She also testified concerning the pimping / prostituting culture. T. III, 696-700.

Appellant testified in his own defense. When he met Allante she told him she was eighteen and showed him a Georgia identification card. T. III, 713. They became boyfriend and girlfriend. Appellant testified that he was incarcerated from October 2007 through January 2008. T. III, 716. While they were living together he suspected Allante was prostituting. but she said she just did massages. T. III, 719. He later found out she was prostituting and confronted her. T. III, 722. He also contacted the police who set up a sting. T. III, 723. He was never present the day the girls got arrested on Candler Road.

PART TWO

ENUMERATION OF ERRORS

- I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.
- II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES TO THE INDICTMENT.
- III. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON ACCOMPLICE CORROBORATION.
- IV. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL INASMUCH AS COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON ACCOMPLICE CORROBORATION.

PRESERVATION OF ERRORS

1.

This enumeration is preserved by Appellant's Amended Motion for New Trial.

2.

This enumeration is preserved by Appellant's objections pretrial.

3.

This enumeration is preserved by Appellant's Amended Motion for New Trial.

4.

This enumeration is preserved by Appellant's Amended Motion for New Trial.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

A. Standard of Review

The standard is whether, after viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Short v. State*, 234 Ga. App. 633, 634 (1) (507 S.E.2d 514) (1998).

B. Factual Background

Allante Green testified that Appellant was her pimp. T. 2, 387. However, Green also testified that she was a part of the Addicted Pleasure escort service.

C. Legal Argument

Allante Green was clearly an accomplice in the alleged criminal sex traffic operation called Addicted Pleasure Models. As an accomplice her testimony had to be corroborated to be legally sufficient to authorize a conviction.

Appellant was convicted in Count One of providing Allante Green for the purpose of sexual servitude. This occurred between the 15th of October and the 31st of January, 2008, the exact date being unknown. However, Appellant was incarcerated from October 2007 through January 2008. T. III, 716. Further, only Allante Green testified as to these particular allegations. Since Green was an accomplice and the testimony was not corroborated, but in fact refuted by the evidence of Appellant's incarceration, the evidence was insufficient to support a conviction of Count One,

Appellant was convicted of Count Two and Three for attempting to traffic Kamillah Love and Kawannis Pitts for the purpose of sex. The alleged substantial step was the act of having

Love and Pitts pass out business cards soliciting sex. However, it was Green who suggested the girls give the driver a business card. They did not solicit sex and were not asked to solicit sex. T. III, 617. In fact, Kawannis Pitts testified that they were on Candler Road because they were catching the bus to go shopping. T. III, 610, 8. The trial court erroneously concluded that Pitts testified Appellant “had them distribute ‘Addicted Pleasure Models’ business cards for the purpose of soliciting men to buy sex acts from them.” Trial Courts Order p. 2-3. Since there was no evidence to corroborate Green’s assertion that Appellant directed Love and Pitts to pass out business cards or solicit sex there can be no conviction on Counts Two and Three.

Appellant was convicted in Counts Six and Seven of Conspiring to Commit Pimping. His co-conspirator was Allante Green. Appellant allegedly aided Kamillah Love and Kawannis Pitts commit prostitution by “having her pass out cards advertising Addicted Pleasure Models in order to recruit men to pay for sex acts” with Love and Pitts. The testimony of Pitts was that they passed out one business card on their way to go shopping. T. III, 610. They were not directed by Appellant to pass out the business card and they did not solicit sex. T. III, 617. Thus, there was no overt act to the alleged conspiracy. Further, the only testimony presented that Appellant had the girls pass out the cards came from Green. Appellant cannot be convicted on the uncorroborated testimony of Green.

Appellant was convicted of Count Eight which alleged that he solicited Love to Candler Road for prostitution. The evidence is uncontroverted that Love and the others were on Candler Road not for prostitution, but to catch a bus. She was not solicited to Candler Road and there was no prostitution there. The trial court erred in finding that “Ms. Pitts testified as to Defendant’s solicitation of Ms. Love, who was under the 16 at the time, to prostitute herself for Defendant’s benefit. Trial Court Order p. 3. Pitts testified Love was under 18 years of age, not under 16. T.

III, 608, 1-2. The evidence from Pitts and Green is clear that there was no prostitution on Candler Road. Thus, Appellant should have been acquitted of Count Eight.

Appellant was convicted of Conspiracy in Counts 9-17. His alleged co-conspirator Allante Green offered the only testimony to support the existence of a conspiracy, that it was designed to sexually exploit children, and that Green possessed the pictures in furtherance of the conspiracy. Appellant cannot be convicted on the uncorroborated testimony of Green. Appellant did not take the pictures, possess them or direct that anything be done with them. The pictures were on Allante Green's camera. Appellant did not direct that the pictures be taken or determine how the exhibition should be done. Therefore, Appellant should have been acquitted of Counts 9-17.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES TO THE INDICTMENT.

A. Standard of Review

The standard of review is an abuse of discretion.

B. Factual Background

Appellant, through trial counsel, raised a pretrial challenge to the indictment. Appellant's challenge was denied by the trial court. T. I, 219.

C. Legal Argument

Appellant was entitled to an indictment perfect in form. As pointed out by trial counsel the indictment in this case was not perfect in form. The indictment failed to allege specific dates when more specific dates could be alleged. This deprived Appellant of a potential alibi defense as he was incarcerated for the greater part of the period alleged in the indictment.

Citing *Pullen v. State*, 199 Ga. App. 881 (1991), trial counsel argued that Counts One, Two and Three of the indictment failed to allege facts of sexually explicit conduct or performance by Allante Green, Kamilah Love or Kawannis Pitts. T. I, 207. Without such specific allegations, Appellant had no notice of what he should be defending himself against. T. I., 217. Counsel also argued that Counts Six and Seven failed to allege facts that Love or Pitts engaged in any acts of prostitution. T. I, 208. Citing *Roe v. State*, 166 Ga. App. 836 (1983), counsel argued that Counts Nine through Sixteen alleged a conspiracy when the underlying facts go to the substantive charge of sexual exploitation of children. Since the indictment alleged both the conspiracy and underlying substantive charge it was flawed. T. I, 209.

The trial court erred in denying Appellant's pretrial challenge to the indictment. T. I, 219.

III. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON ACCOMPLICE CORROBORATION

A. Standard of Review

The standard of review for claims of error is the jury charge is plain error.

B. Factual Background

The trial court failed to charge the jury on the legal principle of accomplice testimony thereby depriving them of rendering an informed verdict.

C. Legal Argument

In felony cases where the only testimony connecting a defendant to a crime comes from an accomplice, the testimony of that witness is not sufficient and must be supported by the testimony of another witness or corroborating circumstances. *Johnson v. State*, 288 Ga. 803 (2011). The corroborating evidence must directly connect the defendant with the crime. *Hamm v. State*, S13A1696 (3/17/2014).

The only testimony connecting Appellant with Counts 2-3, and 6-17 came from Allante Green. The evidence as a whole, as well as the allegations of the indictment support a finding that Green was an accomplice in the Addicted Pleasure sex business. Therefore, a jury instruction on accomplice corroboration was demanded. To authorize a jury instruction, there need only be slight evidence supporting the theory of the charge. *Scott v. State*, 291 Ga. 156 (2012). The evidence presented at trial was clearly sufficient to authorize a charge on accomplice testimony.

The trial court erred by not recognizing that the evidence necessitated a charge on accomplice testimony and informing the jury of the appropriate manner to consider the evidence. Further, Appellant's sole defense at trial was to attack the credibility of Green. Green faced the same exposure as Appellant, yet she received a sentence of 12 months followed by three years of probation. T. II., 442, 23-23. Appellant is serving a 60 year sentence. Appellant's sole defense relied upon convincing the jury that Green should not be believed. An accomplice testimony jury charge would have instructed the jury that they could not rely on Green's testimony solely in convicting Appellant. The jury would have to weigh that testimony in light of the other testimony to determine if the other evidence corroborated Green's testimony. Without the accomplice testimony instruction the jury was not given adequate guidance on how to apply the law to the facts of the case.

III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL INASMUCH AS TRIAL COUNSEL FAILED TO REQUEST A JURY CHARGE ON ACCOMPLICE CORROBORATION

A. Standard of Review

The standard of review for claims of ineffective assistance of counsel is clearly erroneous. *Cleveland v. State*, 290 Ga. App. 835 (2008).

B. Factual Background

Trial counsel failed to request a jury instruction on accomplice corroboration.

C. Legal Argument

In order to establish a claim of ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that he was actually prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). In order to show prejudice a defendant must prove that there is a reasonable probability that the outcome of the trial would have been different. *Braithwaite v. State*, 275 Ga. 884 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Miller v. State*, 285 Ga. 285 (2009).

In certain situations prejudice is presumed and a defendant does not have to show actual prejudice to him. For example, prejudice is presumed when there has been an actual or constructive denial of assistance of counsel altogether. *Edwards v. Lewis*, 283 Ga. 345 (2008). Constructive denial of assistance of counsel occurs when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Turpin v. Curtis*, 278 Ga. 698 (2004); *State v. Heath*, 277 Ga. 337 (2003). A defendant is entitled to have counsel who acts as an advocate. A complete breakdown in the adversarial process occurs when counsel, without a defendant's

permission, admits the defendant's guilt during trial. *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995).

In felony cases where the only testimony connecting a defendant to a crime comes from an accomplice, the testimony of that witness is not sufficient and must be supported by the testimony of another witness or corroborating circumstances. *Johnson v. State*, 288 Ga. 803 (2011). The corroborating evidence must directly connect the defendant with the crime. *Hamm v. State*, S13A1696 (3/17/2014).

The only testimony connecting Appellant with Counts 2-3, and 6-17) came from Allante Green. The evidence as a whole as well as the allegations of the indictment support a finding that Green was an accomplice in the Addicted Pleasure sex business. Therefore, a jury instruction on accomplice corroboration was demanded. To authorize a jury instruction, there need only be slight evidence supporting the theory of the charge. *Scott v. State*, 291 Ga. 156 (2012). The evidence presented at trial was clearly sufficient to authorize a charge on accomplice testimony.

Appellant's trial counsel not only performed deficiently, but the deficient performance prejudice Appellant. Trial counsel failed to request a jury instruction on accomplice testimony. Had counsel requested a jury instruction on accomplice testimony the trial court would have been required to so instruct the jury. The trial court erroneously concluded that "because Ms. Green's testimony was independently corroborated ... a jury instruction of corroboration was not required." Trial Court Order p. 7. Regardless of whether there was or was not corroborating evidence, the jury should have been instructed on accomplice testimony. Had counsel requested the instruction the trial court would have erred in not giving the instruction. *Hamm v. State*, S13A1696 (3/17/2014). The jury was entitled to proper guidance on how to decide whether Green was an accomplice and how to consider her testimony as well as any allegedly

corroborating evidence. Trial counsel's failure to do so deprived the jury of the opportunity to determine if Green was an accomplice and the weight to be given to her testimony.

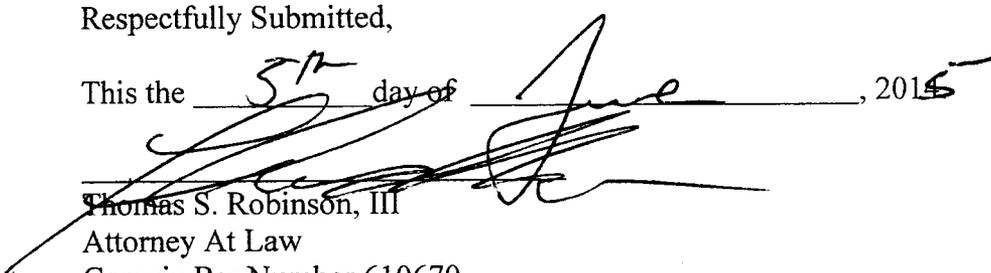
Trial counsel's error was not harmless. The evidence against Appellant was not overwhelming, but circumstantial. Pitts did not testify that Appellant told her and the other girls to pass out business cards (T. III, 610), whereas Green did. (T. II, 432 18-20). Pitts did not testify that Appellant took pictures of her or directed her how to pose or indicate the pictures were to be placed on the internet (T. III, 605), whereas Green did (T. II, 440). Pitts did not testify that they were on Candler Road for the purpose of prostitution (T. III, 610, 8), whereas Green did (T. II, 431, 20-24). There was a conflict as to the core of the State's allegations, between the testimony of Green and Pitts. Since Pitts was the only witness in a position to corroborate much of Green's self-serving testimony, a properly instructed jury would have discerned that Pitt's testimony did not corroborate Green's testimony, but in fact contradicted Green's testimony. There is a reasonable probability that the jury, applying the accomplice testimony instruction, would have found insufficient corroboration as to some if not all of the counts of which Appellant was convicted.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the DeKalb County Superior Court's denial of his Motion for New Trial and remand the case to the DeKalb County Superior Court for a new trial.

Respectfully Submitted,

This the 5th day of June, 2015


Thomas S. Robinson, III
Attorney At Law
Georgia Bar Number 610670

IN THE COURT OF APPEALS
STATE OF GEORGIA

ERIK FERGUSON

Case No. A15A1818

v

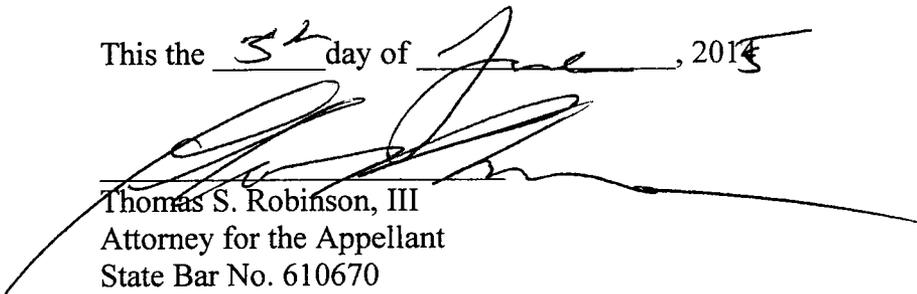
THE STATE

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CERTIFICATE OF SERVICE

This is to certify that I have on this date served a copy of the enclosed Brief of Appellant upon the following: DeKalb County District Attorney's Office, 556 N. McDonough Street, Decatur, Georgia 3020030.

This the 31 day of June, 2015


Thomas S. Robinson, III
Attorney for the Appellant
State Bar No. 610670

ROBINSON & ASSOCIATES
P.O. Box 390728
Snellville, Georgia 30039
(404) 285-8367

