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JAN 29 2008

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CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS FOR THE
STATE OF GEORGIA

JOHN CLIFFORD STEWART,)	
Appellant)	APPEAL CASE NO: A08A0883
)	
v.)	
)	
THE STATE OF GEORGIA,)	
Appellee)	

BRIEF ON BEHALF OF APPELLANT

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Georgia Public Defender Standards Council
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THE COURT OF APPEALS OF GEORGIA
STATE OF GEORGIA

JOHN CLIFFORD STEWART,)	
Appellant)	APPEAL CASE NO: A08A0883
)	
v.)	
)	
THE STATE OF GEORGIA,)	
Appellee)	

BRIEF OF APPELLANT

PART I - STATEMENT OF JURISDICTION

The Court of Appeals of Georgia, rather than the Supreme Court of Georgia, has jurisdiction of this case because this is an appeal from the final judgment of a Superior Court in a noncapital felony case and does not come within any of the areas designated to be heard before the Supreme Court under Article VI, Section VI, Paragraph III, Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this court under the provisions of Article VI, Section V, Paragraph III, Georgia Constitution of 1983.

PART I - STATEMENT OF THE CASE

John Clifford Stewart (hereinafter referred to as Appellant) was indicted for one count of kidnapping, one count of false imprisonment, one count of aggravated assault, four counts of terroristic threats, and two counts of cruelty to children in the second degree. (Record of the case, hereinafter referred to as "R", pages 55-72). These charges arose from an incident accused to have occurred on January 24, 2004.

In count one, Appellant was accused of violating O.C.G.A. § 16-5-40 when he, without lawful authority to do so, abducted Deborah Lynn Whitener (R. 55). In count two, Appellant was accused of violating O.C.G.A. § 16-5-41 when he, without lawful authority to do so, detained Deborah Lynn Whitener in violation of her personal liberty (R. 56). In count three, Appellant was accused of violating O.C.G.A. § 16-5-21 when he assaulted the person of Deborah Lynn Whitener with a knife, which when used offensively against a person, is likely to result in serious bodily injury (R. 57). In counts four through seven, Appellant was accused of violating O.C.G.A. § 16-11-37 when he threatened to cause bodily harm to Deborah Lynn Whitener, Bernice Gentry, Derrick Patterson, and Brandon Patterson by threatening to kill them. (R. 58-61). In counts eight and nine, Appellant was accused of violating O.C.G.A. § 16-5-70(c) when he, as the primary aggressor, having knowledge that Derrick Patterson and Brandon Patterson (children under 18) were present and did see and hear the act, commit a felony by

assaulting the person of Deborah Lynn Whitener by holding a knife to her side. (R. 62-63)

At the close of state's evidence, during Appellant's jury trial, trial counsel made a timely motion for directed verdict on the indicted count of kidnapping. (T. 178). The trial judge, after considering arguments from both trial lawyers, granted the defense's motion for directed verdict on kidnapping. (T. 183). Defense counsel also made a motion for directed verdict on the two counts of terroristic threats. (T. 183). After considering arguments from both trial lawyers, trial judge denied defense counsel's motion for directed verdict on the multiple counts of terroristic threats. (T. 184). All of the indicted counts, with the exception of the kidnapping charge, were sent to the jury for consideration.

At the conclusion of Appellant's jury trial, Appellant was convicted of false imprisonment, aggravated assault, one count of terroristic threats against Deborah Whitener, and two counts of cruelty to children in the second degree. (R. 65-72) Appellant was found not guilty of the three counts of terroristic threats against Bernice Gentry, Derrick Patterson, and Brandon Patterson. (R. 65-72).

Appellant was sentenced on July 13th, 2004. (R. 73) As to the false imprisonment, Appellant received five years in the state penitentiary; as to the aggravated assault, Appellant received fifteen years consecutive to the false imprisonment sentence to serve in the state penitentiary and five years on probation; as to the terroristic threats, five years to serve concurrent with the false imprisonment; as to cruelty to children in the

2nd degree, twelve months to serve in the state penitentiary concurrent with the False Imprisonment. (T. 310). The total sentence trial judge imposed upon Appellant was a twenty-five years sentence to serve twenty years in state custody. (T. 310).

Appellant's motion for new trial was argued on December 19th, 2006, and Appellant's motion was denied on the same date. (R. 118). The order was filed on August 2nd, 2007. (R. 118), and a notice of appeal was filed on August 23rd, 2007.

STATEMENT OF FACTS

The incident that provided the basis of this appeal occurred on January 24, 2004. On this date Appellant went to the home of Whitener. Whitener testified she was not expecting Appellant to come to her home that evening. (T. 17).¹

Appellant testified he left his home around midnight and went to a gas station to meet a friend. (T. 226). Appellant's intentions were to meet this friend to request a ride to Whitener's home (T. 226). Appellant went to Whitener's home and knocked on the door; at which time he was greeted by Brandon Patterson (hereinafter referred to as "B. Patterson), Whitener's cousin. (T. 226). After entering the residence, Appellant went to Whitener's room. (T. 226). Upon entering the room, Appellant observed two individuals sitting on the Whitener's bed and Whitener in the shower. (T. 226).

Whitener testified at trial she was already asleep when Appellant entered her bedroom and he came up from behind her and held her tightly. (T. 17). She also testified, at Appellant's trial, there were no other individuals in her room. (T. 17). However, five months previous, at Appellant's Probation Revocation hearing, Whitener testified she was in the shower when Appellant came into her room. (P.R. 6). She

¹ This testimony, however, was contradicted by several other witnesses. Rosalee Stewart, Appellant's mother, testified Whitener called Appellant on the night of the incident while Appellant was sleeping (T. 200). Glenda Stewart, Appellant's sister, testified Whitener called Appellant on the night of the incident requesting to speak with Appellant. (T. 207). Appellant testified when Whitener called him on the evening she requested he come to her home. (T. 225). According to Appellant, Whitener called Appellant between 10:00 and 11:00 PM on January 23rd. (T. 225).

further testified at the earlier hearing, just as Appellant asserted, there were two other individuals in Whitener's room. (P.R. 7).

While completely contradicting her prior sworn testimony, Whitener testified she first observed Appellant at 2:30 in the morning. (T. 16). Appellant, according to Whitener, came up from behind Whitener and began to hold her tightly and would not let her go. (T. 17). Whitener testified she was in the room for approximately 5 minutes before she called out for family members. (T. 18). At that time her two cousins, Derrick Patterson and B. Patterson, along with Whitener's mother Bernice Gentry (hereinafter referred to as "Gentry) forcefully opened the door. (T. 18). Gentry then instructed Appellant to release Whitener or she would call 911. (T. 19). Gentry then proceeded to call 911. (T. 20).

Gentry testified when she first saw Appellant at approximately 2:00 A.M., she was seated in the living room (T. 47 and 56). Gentry testified she then went to bed approximately 5 to 10 minutes after Appellant's arrival to the mobile home (T. 48). It was then, no more than 15 minutes after Gentry went to bed, when she was awoken by Whitener's cousins. (T. 49). Gentry, along with Whitener's cousins, went to Whitener's door and tried to open the room door. (T. 49). After forcefully opening the door and failing to convince Appellant to release Whitener, Gentry then called 911. (T. 51).

Similar to Whitener's changing story, the testimony provided by Gentry contradicts her prior sworn testimony given at Appellant's Probation Revocation Hearing. At the revocation hearing, Gentry testified that when Appellant arrived at

Whitener's home she was already asleep. (P.R. 13). At trial Gentry testified that she was in the living room. (P.R. 13 & T. 56)

Deputy Dean Minter was working on January 24th, 2004. (T. 92). Deputy Minter started his shift that morning at 6 AM and was dispatched at 6:04 A.M. to Whitener's home for a domestic disturbance call. (T. 93). Deputy Minter exited his vehicle and was approached by Whitener's cousin and quickly briefed as to the situation inside the home. (T. 95). Deputy Minter went inside the mobile home and observed the room where Whitener and Appellant were located (T. 98). Deputy Josh Ogles provided back up for Deputy Minter. (T. 97). Deputy Minter testified he observed Whitener in front of Appellant on the bed. (T. 98). According to Minter, Appellant instructed the officer to leave the residence. (T. 100). During this time Deputy Minter had his weapon drawn and instructed Appellant to drop his weapon. (T. 100). In an attempt to calm Appellant, Deputy Minter and Appellant had a conversation (T. 102). Deputy Minter eventually observed a knife in Appellant's left hand. (T. 103). Appellant requested to speak with Deputy Minter's supervisor and at that moment Deputy Minter stepped back out of sight. (T. 105).

Richie Harrell (hereinafter referred to as "Harrell), crisis negotiations team leader with the Bartow County SWAT team, arrived at the Whitener residence at approximately 6:00 AM. (T. 147). Upon entering the room, Harrell observed Appellant and Whitener together on the bed. (T. 149). Harrell initiated a conversation with Appellant, and during that conversation, Harrell noticed Appellant appeared to be under the influence of drugs.

(T. 162).² Despite Appellant's irrational behavior, Harrell was able to calm Appellant down. (T. 155). During this period of discussion, Harrell observed drug paraphernalia in Whitener's bedroom. (T. 163). Several other officers also noted the presence of drug paraphernalia in Whitener's bedroom. Despite its presence in the bedroom, officers never searched the room further for additional paraphernalia. (T. 113).

Harrell, under the request of Appellant, provided Appellant with a bottle of water. (T. 156). When Harrell threw the bottle of water on the bed the tactical team executed their plan. (T. 156). Deputy Sheriff Kevin Hubbard, a member of the Bartow County Sheriff's Office Patrol Division, helped execute the SWAT plan by employing a flash bang device to distract Appellant. (T. 167). The flash bang device creates a bright light and loud bang, and with the distraction in place, Officer Hubbard gained control of Appellant and the weapon. (T. 168). Whitener, unharmed, was also escorted out of the residence. (T. 156).

Kevin Price, Deputy Sheriff with Bartow County Sheriff's Office, was working as the booking officer when Appellant arrived at Bartow County Jail. (T. 189). Appellant did not have any recollection of the night nor did he understand why he was being arrested. (T. 191).

Some time after being processed by the jail, Appellant testified he requested a medical consult for his infected arm. (T. 232). Appellant testified he was injected in the arm by Whitener. (T. 229). Appellant testified that while he was sleeping at Whitener's

² Officer Minter testified Appellant appeared to be under the influence of drugs. (T. 113). Officer Josh Ogles also testified Appellant appeared to be under the influence of drugs. (T. 137)

home, she injected him on his hand with a substance that rendered him unconscious. (T. 229). Appellant testified the next thing he recalls is being in the middle of the hostage situation (T. 230). Several officers testified they observed Appellant to be under the influence of drugs. Appellant was treated at the jail for his infection arising from the evening of January 24, 2004. (T. 232).

At sentencing, Appellant's trial counsel made a motion for directed verdict on the counts which Appellant was found guilty by jury verdict (T. 304). Trial counsel explained Appellant's trial strategy consisted of presenting the affirmative defense of involuntary intoxication. (Id.) Because of the trial strategy, Appellant was unable to make a motion for directed verdict at the close of state's evidence. (R. 304). Trial counsel explained the basis of the motion resulted from speaking to some of the jurors after the trial. (T. 305). The jurors indicated that had they been able to hear evidence about the needle and syringe Appellant claims to have been injected with; it would have made their decision a lot more difficult. (T. 305). Trial counsel concluded the jury did not use the proper standard by holding the state responsible for disproving the affirmative defense of involuntary intoxication. (T. 306). Trial judge denied defense's motion for directed verdict on the grounds provided by trial counsel. (Id.).

PART II - ENUMERATION OF ERRORS

I.

BECAUSE THE STATE FAILED TO DISPROVE APPELLANT'S AFFIRMATIVE DEFENSE OF INVOLUNTARY INTOXICATION; THE EVIDENCE IS INSUFFICIENT TO WARRANT APPELLANT'S CONVICTION.

PART V - ARGUMENT AND CITATION OF AUTHORITY

When sufficiency of the evidence is questioned, the appropriate standard of review is whether there is enough evidence to enable a rational trier of fact to find this Appellant guilty beyond a reasonable doubt of the offenses charged. Jackson v. Virginia, 443 U.S. 307 (1979). On appeal of conviction, evidence must be viewed in light most favorable to support the verdict, and defendant no longer enjoys the presumption of innocence. The appellate court determines evidence sufficiency and does not weigh evidence or determine witness credibility. Pardo v. State, 215 Ga. App. 317 (1994). Further, 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. Jessup v. State, 224 Ga. App. 176, 177 (1996).

I. BECAUSE THE STATE FAILED TO DISPROVE APPELLANT'S AFFIRMATIVE DEFENSE OF INVOLUNTARY INTOXICATION; THE EVIDENCE IS INSUFFICIENT TO WARRANT APPELLANT'S CONVICTION.

Unlike the appellate process, a criminal defendant upon entering a trial is presumed to be innocent until proven guilty. Further, there is no burden of proof upon the defendant, and the burden never shifts to the defendant to introduce evidence or to provide innocence.

An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. State v. Moore, 237 Ga. 269 (1976). By asserting an affirmative defense Appellant has not admitted to the criminal intent to commit the crime. Graham v. State, 239 Ga. App. 429 (1999). After evidence of an affirmative defense is presented, the state bears the burden of disproving that defense beyond a reasonable doubt. Manning v. State, 231 Ga. App. 584 (1998).³

In the case at bar, Appellant presented evidence of the affirmative defense of involuntary intoxication. Under Georgia law:

A person shall not be found guilty of a crime when, at the time of the conduct constituting the crime, the person because of involuntary intoxication did not have sufficient mental capacity to distinguish between right and wrong in relation to the criminal act. Involuntary intoxication means intoxication caused by (a) consumption of a substance through excusable ignorance or (b) the correction, trick, or contrivance of another person. O.C.G.A. § 16-3-4.

³ Appellant's trial counsel indicated to the trial judge and prosecuting attorney of her intention to use the affirmative defense of involuntary intoxication. (T. 30). Trial judge then acknowledges the affirmative defense. (T. 31)

a. **Deborah Lynn Whitener's testimony does not qualify as competent evidence to refute the affirmative defense of involuntary intoxication.**

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. Ferguson v. State, 221 Ga. App. 415, 419 (1996).

In the case at bar, the only competent evidence provided at trial disproving the affirmative defense of involuntary intoxication is Whitener's lone statement that she did not inject Appellant with methamphetamine. (T. 263). Concededly, the appellate process grants great deference to the verdict provided at the trial level as noted in Ferguson and Jessup. Under precedence provided by Ferguson and Jessup, a lone statement by a witness, even though contradicted, refuting an affirmative defense would be sufficient to sustain a conviction.

To impeach a witness is to prove that the witness is unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified. O.C.G.A. § 24-9-82. The case at bar is distinguished from applicable case law in that this witness's testimony was contradicted by not only other witnesses, as discussed in Ferguson and Jessup, but by her own prior sworn testimony. ⁴

⁴ Whitener testified at trial she was asleep at the time Appellant entered her bedroom. At a hearing 5 months previous, Whitener testified she was taking a shower when he entered the bedroom. (T. 17 and P.R. 6). Whitener also testified at trial there were no other individuals in the room when Appellant entered

As a result, even though this argument would be normally a considered a jury issue; the evidence disproving Appellant's affirmative defense would not stand as competent evidence.

b. The state did not investigate and provide into evidence sufficient evidence to overcome the affirmative defense of involuntary intoxication.

The state, not the defense, has the burden of disproving the affirmative defense beyond a reasonable doubt. In this case, a juror spoke to Appellant's trial lawyer and indicated that had they been able to hear more evidence about the needle and syringe Appellant claims to have been injected with; it would have made their decision a lot more difficult. (T. 305).

With the exception of one witness's impeached testimony, there was no further evidence refuting Appellant's affirmative defense. There was testimony at trial by law enforcement officials indicating they observed drug paraphernalia in the room, however did not investigate any further. (T. 113).

Concededly under Georgia law an affidavit of jurors may be taken to sustain, but not to impeach their verdict. O.C.G.A. § 17-9-41. However, the issue brought upon by the juror is noteworthy as it tends to show the jury was confused to the burden of proof. As this court is aware, when an affirmative defense is raised the burden is on the state to

the room. However, contradictory to that testimony Whitener testified at an earlier hearing there were two other individuals in the room. Whitener's testimony was also contradicted by other witnesses including Rosalee Stewart, Glenda Stewart, and Appellant.

disprove it beyond a reasonable doubt. State v. Moore, 237 Ga. 269 (1976). Based upon the juror's statement the state did not meet their burden.

PART VI – CONCLUSION

At the conclusion of Appellant's jury trial, Appellant was convicted of false imprisonment, aggravated assault, one count of terroristic threats against Deborah Whitener, and two counts of cruelty to children in the second degree. (R. 65-72) For the reasons listed above, Appellant's convictions should be reversed.

Respectfully Submitted, this 28th day of January, 2008



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Attorney for Appellant
State Bar Number 141798

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CERTIFICATE OF SERVICE

This is to certify that I have this day, prior to filing, served all interested parties with a copy of the above and foregoing BRIEF ON BEHALF OF APPELLANT by depositing the same in the United States Mail with adequate postage attached and properly addressed as follows:

Joseph T. Campbell
District Attorney
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Cartersville, GA 30120.

John Clifford Stewart
GDC ID: 0000506530
Macon State Prison
PO BOX 426
Oglethorpe, GA 31068

This 28th day of January, 2008.



Edward Dettmar
Attorney for Defendant
Ga. Bar. No. 141798

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FILED BY CERTIFIED MAIL

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IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

JOHN CLIFFORD STEWART,
Appellant,

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*

CASE NO. A08A0883

vs.

STATE OF GEORGIA,
Appellee.

*

BRIEF ON BEHALF OF
STATE OF GEORGIA,
APPELLEE HEREIN

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STATE BAR NO. 106950

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IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

JOHN CLIFFORD STEWART,
Appellant,

*

CASE NO. A08A0883

*

vs.

*

STATE OF GEORGIA,
Appellee.

*

PART I

STATEMENT OF THE CASE

The Appellant, John Clifford Stewart, was indicted by a Bartow County Grand Jury in April 2004 for kidnapping, false imprisonment, aggravated assault, four (4) counts of terroristic threats, two (2) counts of cruelty to children in the 2nd degree. (R. 55-72).¹ Appellant was tried before a jury on June 21, 2004. (T., Vols. I). The jury convicted Appellant of false imprisonment, aggravated assault, on(1) count of terroristic threats against Deborah Whitener, and two counts of cruelty to children in the second degree. (R. 65-72). Appellant was sentenced on July 13, 2004 to a total of twenty five years with twenty to serve incarcerated by the Honorable David K. Smith. (T. 310).

The Appellant filed a motion for a new trial on August 11, 2004. (R. 96-97). A hearing was held on December 19, 2006 and at that time, the Appellant's motion for new

¹ All references to the clerk's record for this appeal are denoted as "R.," all references to the trial transcript are hereafter denoted "T.,"

trial was denied. (R. 139-140). Appellant filed a notice of appeal on August 23, 2007. (R. 1-2). This appeal follows.²

PART II

STATEMENT OF FACTS

During the early morning hours of January 24, 2004, the Appellant went to the home of Deborah Lynn Whitener. (T. 16, 226). Ms. Whitener's cousin Brandon Patterson let Appellant into the home where he went directly to the bedroom of Ms. Whitener. (T. 226).

Ms. Whitener was in the bedroom asleep when Appellant crawled into the bed and grabbed her. (T. 16-17). He was holding her tightly and "was just talking crazy, I don't know exactly what he said. It kind of scared me." (T. 18, Lines 2-3). Mr. Whitener told Appellant he was hurting her and began to yell. Her mother, Bernice Gentry, and two minor relatives, Brandon and Derrick Patterson, forcefully entered the room. (T. 19, 82, 89).

Once they entered the room they observed Appellant and Ms. Whitener at the back of the bed with Appellant's hand at Ms. Whitener's neck. (T. 50). Appellant stated he would kill everyone if they did not leave. (T. 50-51). Ms. Gentry instructed Appellant to release Ms. Whitener; when he refused she called 911. (T. 20, 51).

² A copy of the order by this Court extending the undersigned Assistant District Attorney's deadline to file this brief is attached as Exhibit A.

Deputy Dean Minter with the Bartow County Sheriff's Office was dispatched to the incident location about 6:00a.m. (T. 93). Upon arrival he was met outside by Derrick Patterson who advised him Appellant was inside the residence holding a knife to Whitener's throat. (T. 95). After entering the bedroom, Deputy Minter observed Ms. Whitener seated in front of Appellant holding a knife with a three to four inch blade to her throat. (T. 100, 103). Appellant ordered Deputy Minter to leave or he would kill Ms. Whitener. (T. 100).

During Deputy Minter's initial encounter, the Appellant was talking crazy. (T. 24). He discussed the television "videoing him or something like trying to get him in trouble or something." (T. 28 lines 4-6). He told Ms. Whitener "he was in the Vietnam War, or something and he even told one of the officers that he wanted to go work for the DA's office." (T. 39 lines 1-3).

Deputy Richie Harrell crisis negotiator with the Bartow County Sheriff's Office arrived at the location. (T. 147). He entered the bedroom to talk with Appellant and observed his arm around Ms. Whitener holding a large knife. (T. 149). He initiated conversation with the Appellant, and noticed he appeared to be under the influence of methamphetamine. (T. 162).

Based on his collique with the Appellant, Deputy Harrell was able to get him to close the knife and the S.W.A.T. team entered the bedroom. (T. 155-156). A distraction device was thrown into the room and law enforcement was able to gain control of the

Appellant and the weapon. (T. 167-168). Ms. Whitener left the room unharmed and the Appellant was taken into custody. (T. 156, 169).

The Appellant testified he was injected with an unknown substance by Ms. Whitener which rendered him unconscious. (T. 229). Ms. Whitener testified that night she was not in possession of any drugs. She also stated there were no syringes in her possession or in her room. (T. 32). Ms. Whitener did not give anything to render him under the influence, "he woke me up that way." (T. 38 line 9).

PART III

ARGUMENT AND CITATION TO AUTHORITY

SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL FOR A RATIONAL TRIER OF FACT TO OVERCOME THE AFFIRMATIVE DEFENSE OF INVOLUNTARY INTOXICATION

The appropriate standard of review is whether there is enough evidence for a rational trier of fact to find the Appellant guilty beyond a reasonable doubt of the offense charged. Jackson vs. Virginia, 443 U.S. 307 (1979). On appeal, this Court must view the evidence in the light most favorable to the verdict and the Appellant no longer enjoys the presumption of innocence. The appellate court determines evidence sufficiency and does

not weigh evidence or determine witness credibility. Williams vs. State, 217 Ga. App. 636 (1995).

An affirmative defense is a defense that admits all of the elements of the crime except intent. Graham vs. State, 239 Ga. App. 429 (1999). After evidence of an affirmative defense is presented, the State bears the burden of disproving the defense beyond a reasonable doubt. Manning vs. State, 231 Ga. App. 584 (1998); Grace vs. State, 231 Ga. 113 (1973). “The determination as to an affirmative defense, is solely within the purview of the jury and will not be disturbed . . . as it is supported by sufficient evidence.” Graham vs. State, 239 Ga. App. at 253.

The Appellant presented evidence of the affirmative defense of involuntary intoxication. The Appellant testified at trial he was injected with something by Ms. Whitener. (T. 229). The trial court instructed the trial jury as to an affirmative defense and between voluntary and involuntary intoxication. (T. 292). The Courts instructions to the jury were that “once the issue of an affirmative defense is raised, the burden is on the state to disprove it beyond a reasonable doubt.” (T.292 lines 17-19).

At trial Ms. Whitener testified she was awakened by the Appellant talking crazy. (T. 24, 38). She also testified she did not have methamphetamine or syringes in her possession that night. (T. 32).

The Appellant’s trial counsel thoroughly questioned Ms. Whitener as to where she was when Appellant came into the house. She testified, “I had took a shower and had

been lying there just a few minutes and just went to sleep (T. 32 lines 6-7). Her testimony was consistent throughout the trial, and was evaluated by the jurors in the case.

Trial counsel brought to the court's attention a juror who after deliberation had desired more evidence, particularly the syringe. (T. 305). Although at no point did they say that alone would have changed their decision, or resulted in an acquittal (T. 305). Also taking the testimony of Ms. Whitener as well as the other witnesses, the jury was able to determine the State had met its burden of disproving the affirmative defense of involuntary intoxication.

The Appellant's testimony he was injected involuntarily in Ms. Whitener's room was refuted by the testimony of Ms. Whitener that she did not have drugs or syringes in her possession. That testimony was sufficient evidence, when taken along with the court's charge for a jury to overcome the affirmative defense of involuntary intoxication. The trial jury's verdict of not guilty as to two counts of Terroristic Threats shows the jury's ability to evaluate all the evidence and listen to the court's charge of the law. (R.73,74).

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Appellee prays that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,
this 18 day of February, 2008.

Office of District Attorney
Cherokee Judicial Circuit

T. Joseph Campbell
District Attorney

BY: Rosemary Greene Heidmann
Rosemary Greene Heidmann
Assistant District Attorney
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IN THE COURT OF APPEALS
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vs.

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STATE OF GEORGIA,
Appellee.

*

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing
BRIEF ON BEHALF OF APPELLEE, prior to filing the same, by depositing a
copy thereof,
postage prepaid, in the United States Mail, properly addressed, upon:

Ed Dettmar
Attorney for Appellant
114 W. Cherokee Avenue
Cartersville, GA 30120

This 18 day of February, 2008.

OFFICE OF DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT

BY: *Rosemary Greene Heidmann*
ROSEMARY G. HEIDMANN

BARTOW COUNTY DIVISION
135 WEST CHEROKEE AVENUE
SUITE 368
CARTERSVILLE, GA 30120

**Court of Appeals
of the State of Georgia**

ATLANTA, JANUARY 28, 2008

The Court of Appeals hereby passes the following order:

COURT OF APPEALS CASE NO. A08A0883
JOHN CLIFFORD STEWART V. THE STATE

RECEIVED
JAN 30 2008
DISTRICT ATTORNEYS OFFICE

Upon consideration of the motion for an extension of time in which to file enumeration of errors and brief for appellant in the above stated case, it is ordered that an extension be granted until FEBRUARY 22, 2008.

Appellee may have 20 days from actual filing date of appellant's brief in which to file the brief of appellee.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta JAN 28 2008

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Willi I. Mat; [Signature]

**FOURTH DIVISION
SMITH, P. J.,
MIKELL and ADAMS, JJ.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>**

June 5, 2008

In the Court of Appeals of Georgia

A08A0883. STEWART v. THE STATE.

AD-033c

ADAMS, Judge.

John Clifford Stewart was tried and convicted of false imprisonment, of aggravated assault, of terroristic threats, and on two counts of cruelty to children. On appeal he contends the State failed to disprove his affirmative defense of involuntary intoxication and that, as a result, the evidence was insufficient to support the convictions.

“On appeal from a criminal conviction, the evidence must be construed in the light most favorable to the verdict, and the appellant no longer enjoys a presumption of innocence. An appellate court determines only the legal sufficiency of the evidence adduced below and does not weigh the evidence or assess the credibility of the witnesses.” (Citations and punctuation omitted.) *Brown v. State*, 265 Ga. App. 613

(594 SE2d 770) (2004). To sustain a conviction, the evidence must be sufficient to enable a rational trier of fact to find the appellant guilty of the crimes charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

Construed in favor of the verdict, the evidence shows that Stewart went to Deborah Whitener's home around midnight and accosted her and held her captive by threatening her with a knife. When she called out for help, two minor cousins and her mother forcefully opened the door. The mother called the police, who, upon arrival, witnessed the same scene. After using a crisis negotiator and a distraction explosion, the officers eventually disarmed Stewart and arrested him.

Stewart's defense was based on Georgia's involuntary intoxication statute, which provides:

(a) A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act.

(b) Involuntary intoxication means intoxication caused by:

(1) Consumption of a substance through excusable ignorance; or

(2) The coercion, fraud, artifice, or contrivance of another person.

(c) Voluntary intoxication shall not be an excuse for any criminal act or omission.

OCGA § 16-3-4. At trial, Stewart testified that he was asleep with Whitener and woke up to find Whitener had stuck a needle into his hand and injected him with something that rendered him unconscious. He remembers very little about the following events that led to his arrest. At the county jail, Stewart did not have any recollection of the night nor did he understand why he was being arrested. The officers testified that Stewart was “talking crazy” and that he appeared to be under the influence of methamphetamine or other drugs. One officer saw drug paraphernalia in Whitener’s bedroom. Stewart testified that sometime after the incident, his hand became infected where Whitener injected him and he was treated for it at the jail. Whitener testified that she was not using drugs that night, that she did not possess any drugs or syringes, and that she did not give Stewart any drugs. Stewart also raised questions about Whitener’s credibility.

“Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.” OCGA § 16-2-3. “And, a defendant [asserting

involuntary intoxication] bears the burden of showing, by a preponderance of the evidence, that he was not mentally responsible at the time of the alleged crime.” *Rauschenberg v. State*, 161 Ga. App. 331 (291 SE2d 58) (1982). See also *Foster v. State*, 283 Ga. 47, 48 (656 SE2d 838) (2008) (“A defendant claiming insanity has the burden of proving this affirmative defense by a preponderance of the evidence.”). If the defendant meets that burden, the State must present sufficient evidence to show beyond a reasonable doubt that the defendant was not involuntarily intoxicated. See *Carter v. State*, 248 Ga. App. 139, 140 (2) (546 SE2d 5) (2001); *Strickland v. State*, 258 Ga. 764, 765 (373 SE2d 736) (1988). The ultimate resolution of the issue is for the finder of fact. See, e.g., *Carter*, 248 Ga. App. at 140. The judge charged the jury with the applicable law.

Stewart contends that the lone statement by Whitener that she did not inject him with drugs, combined with the evidence impeaching her credibility, was insufficient to overcome his own and the officers’ testimony suggesting that he had been injected with something and that he was not acting rationally. But “[c]onflicts in the testimony of the witnesses, including the State’s witnesses, are a matter of credibility for the jury to resolve. 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.” (Citations and punctuation omitted.) *Prudhomme v. State*, 285 Ga. App. 662, 663 (1) (647 SE2d 343) (2007). Because there was evidence to support the jury’s conclusion, we must affirm.

Judgment affirmed. Smith, P. J., and Mikell, J., concur.

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, JUNE 05, 2008

The Court of Appeals having met, the following judgment was rendered:

**COURT OF APPEALS CASE NO. A08A0883
JOHN CLIFFORD STEWART V. THE STATE**

This case came before this court on appeal from the SUPERIOR Court of BARTOW County; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

SMITH, P.J., MIKELL AND ADAMS, JJ., CONCUR.

LC NUMBERS: 04572

Court of Appeals of the State of Georgia

*Clerk's Office, Atlanta, **JUN 24, 2008***

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Willi L. Mantz

*Court of Appeals Cost \$80.00. O.C.G.A. Sec. 5-6-10.
No costs are payable to the Court of Appeals.*

COURT OF APPEALS OF GEORGIA
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: AGGRAVATED ASSAULT

CASE NUMBER: A08A0883 DATE OF DOCKETING: JANUARY 08, 2008

STYLE: JOHN CLIFFORD STEWART V. THE STATE

LOWER COURT SUMMARY INFORMATION:

BARTOW County SUPERIOR COURT 04572

TRIAL JUDGE: HON. DAVID K. SMITH

RECORDS	DESCRIPTION:	PARTS:
2008-01-08	LOWERCOURT RECORDS.	01
2008-01-08	TRANSCRIPTS.	02

DATE OF JUDGMENT: 2007-08-02 NOTICE OF APPEAL DATE: 2007-08-03

COURT OF APPEALS CODE: 94-033 C
TERM: Apr. Cal. Mo.: APR/08

DIVISION 4 PANEL CIR PATH: 90, 92, 94.
DIVISION 4 PANEL CIR PATH: 90, 92, 94, 95, 97, 99, 96.

COURT OF APPEALS OF GEORGIA
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APPEAL SUMMARY PAGE

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STYLE: JOHN CLIFFORD STEWART V. THE STATE

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NOTICE OF DOCKETING

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APPEAL CASE NUMBER: A08A0883 DATE OF DOCKETING: JANUARY 08, 2008

STYLE: JOHN CLIFFORD STEWART V. THE STATE

IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the \$80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on APR 03, 2008, before the FOURTH Division: Smith, P.J., Mikell, J., Adams, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

**FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.
IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK

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