

IN THE SUPERIOR COURT OF GLYNN COUNTY

CLERK SUPERIOR COURT

STATE OF GEORGIA

STATE OF GEORGIA

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CR-2000433

*

V.

*

Judge Walmsley

*

WILLIAM RODERICK BRYAN

**STATE'S BRIEF ON DEFENDANT'S INTENTION TO CALL
JOYETTE HOLMES AS A WITNESS**

COMES NOW THE STATE OF GEORGIA, by and through the undersigned Assistant District Attorney, and objects to defendant calling Joyette Holmes, District Attorney Pro Tempore, as a witness for any of his pending motions currently scheduled for Friday, July 17, 2020 at 10:00 A.M.

1.

Defendant was indicted on June 24, 2020 with one count of Malice Murder, four counts of Felony Murder, two counts of Aggravated Assault, one count of False Imprisonment and one count of Criminal Attempt to Commit A Felony for the killing of Ahmaud Arbery on February 23, 2020.

2.

Defendant filed his Motion to Strike Illegal appointment of Joyette Holmes on June 4, 2020 and his Motion For Relief from Prejudicial Public Statements on May 27, 2020. The State opposes both motions based on the fact that the defendant lacks standing, in either instance, and this court lack authority to grant his motions. Both motions are legal issues that may be decided on argument alone.

3.

On Monday July 13, 2020 at 4:27 PM the State received the attached email from defense attorney Kevin Gough containing the line “Can we arrange for service for Joyette Holmes and/or Vic Reynolds or should I send people to their personal residences?” The State replied at 5:49 PM informing defense counsel that Ms. Holmes would be attending the motions hearing on Friday and there was no need to have her personally served to secure her attendance, however, the State informed defense counsel that it would be objecting to the District Attorney Pro Tempore being called as a witness.

4.

The Georgia Court of Appeals summarized the position the Georgia Supreme Court has taken, when criminal defense attorneys call the prosecutor as a witness in their client’s case, in *Goodwin v. State*, 320 Ga. App. 224, 231 (2013).

““The practice of trial attorneys testifying is not approved by the courts except where made necessary by the circumstances of the case.” *Timberlake v. State*, 246 Ga. 488, 500 (7) (271 SE2d 792) (1980). “[T]he advocate as a witness poses innumerable threats to the integrity and reliability of the judicial process.” *Castell v. Kemp*, 254 Ga. 556, 557 (331 SE2d 528) (1985). “[C]ourts have properly refused to permit a prosecutor to be called as a defense witness unless there is a compelling need.” (Citations and punctuation omitted.) *United States v. Roberson*, 897 F2d 1092, 1098 (IV) (F) (11th Cir. 1990). “Trial courts are generally held to have discretion on whether to allow a party to call opposing counsel as a witness, on the view that attempting to call opposing counsel to establish some fact that can be readily proved in a different manner should be discouraged.” *Louisiana v. Tuesno*, 408 S2d 1269, 1272 (La. 1982), quoting Pirsig & Kirwin, Professional

Responsibility, pp. 378-379 (3rd ed. 1976).” *Goodwin v. State*, 320 Ga. App. 224, 231 (2013).

In 2016 the Georgia Supreme Court determined that it was not error to quash a subpoena, when the defendant was seeking to secure the attendance of the county solicitor to have her then explain her thinking behind why she filed a motion for nolle prosequi. “Because King failed to demonstrate a compelling need for the prosecutor to be called as a defense witness, the trial court did not err by quashing this subpoena.” *King v. State*, 300 Ga. 180, 183 (2016).

United States v. Campbell, 2005 U.S. Dist. LEXIS 47046, *26-30, 2005 WL 6436621 explained “compelling need” since the Court recognized that a prosecutor must not act as both prosecutor and witness. “Compelling need may be shown to exist, for example, where the prosecutor has knowledge relating to the essential underlying facts and events that are put at issue by the criminal indictment.” See *United States v. Prantil*, 764 F.2d 548, 551-54 (9th Cir. 1985) (AUSA should have been disqualified where he “was a witness to, and indeed a participant in, some aspect of all of the events alleged in the indictment”); but compare *United States v. Hosford*, 782 F.2d 936, 938-39 (11th Cir. 1986) (while presenting close case, it was not error for prosecutor to participate despite his involvement in the creation and execution of immunity agreement that was “keystone” of defense).

The Court in *United States v. Campbell*, went on to point out, “[c]onversely, such need tends not to exist where other witnesses are available to testify to the same subject, or where the defense intends to call the prosecutor as a means to achieve “duplicative impeachment.””

This Court is authorized to sustain the State’s objection when the defendant has failed to establish that the District Attorney has any information which is essential to the motions and which could not be obtained through means other than

calling her as a trial witness. See also *United States v. Ashman*, 979 F.2d 469, 494 (7th Cir. 1992) (Holding that the district court did not abuse its discretion in declining to disqualify the prosecutor where there had been no showing that the testimony of the lead prosecutor was necessary to the defendant's case, or that similar information could not have been obtained from another source); *United States v. Brothers*, 856 F. Supp. 388, 391 (M.D. Tenn. 1993) (Holding that "a defendant has an obligation to exhaust other available sources of evidence before a court should sustain a defendant's efforts to call a participating prosecutor as a witness").

The Court in *United States v. Campbell* was not persuaded by the argument that the prosecutor had extensive involvement with the investigation and was especially needed to explain her decision making in the plea agreements of witnesses against him.

5.

The trial court exercises its discretion and decides what evidence is relevant under O.C.G.A. §§ 24-4-401, 24-4-402 and 24-4-403 if there is “danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” In addition, the trial court controls the mode and presentation of witnesses under O.C.G.A. § 24-6-611, in order to “(1) Make the interrogation and presentation effective for the ascertainment of the truth; (2) Avoid needless consumption of time; and (3) Protect witnesses from harassment or undue embarrassment.”

6.

While a defendant may use subpoena power under O.C.G.A. § 17-7-191 to compel a witness to court, it cannot be used to harass, intimidate, inconvenience, punish, retaliate or purposefully create a conflict of interest for the opposing side. If defense counsel can't provide the semblance of a compelling reason to have

subpoenaed Joyette Holmes, the State contends that this flagrant abuse of subpoena power should result in consequences for defense counsel.

7.

WHEREFORE, the State objects to defendant Bryan calling Joyette Holmes, the District Attorney Pro Tempore in his case, as a witness.

This the 14th day of July, 2020.

/s/ Linda J. Dunikoski

Linda J. Dunikoski

Senior Assistant District Attorney

State Bar # 233887

Office of the District Attorney, Cobb Judicial Circuit

70 Haynes Street

Marietta, GA 30090

Tel. (770) 528-3080

Linda.Dunikoski@CobbCounty.org

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above STATE'S BRIEF ON DEFENDANT'S INTENTION TO CALL JOYETTE HOLMES AS A WITNESS by emailing a copy of the same to:

Mr. Kevin Robert Gough
Kevin Gough Firm LLC
PO Box 898
Brunswick, GA 31521
kevingough.firm@gmail.com
(912) 242-5114

This the 14th day of July, 2020.

/S/ Linda J. Dunikoski
Linda J. Dunikoski
Senior Assistant District Attorney
State Bar # 233887
Office of the District Attorney, Cobb Judicial Circuit
70 Haynes Street
Marietta, GA 30090
Tel. (770) 528-3080
Linda.Dunikoski@CobbCounty.org

RE: Subpoenas

Evans, Jesse

Sent: Monday, July 13, 2020 5:49 PM**To:** Kevin Gough [kevingough.firm@gmail.com]; Dunikoski, Linda; Holmes, Joyette

Greetings:

Joyette (cc'd) will be attending Friday's hearing. There is no need for you to have her personally served. In fact, considering currently implemented security measures here in Cobb, we'd advise against it. Should our travel plans change, I assure you as an officer of the court that I will let you know so we can make alternative arrangements. Know, however, that her presence at the hearing should not be mistaken as our acquiescence in her testimony. The State will object to her being called as a witness should you attempt to do so. But, she will be there.

We do not work for the GBI. I'd suggest you coordinate with Director Reynolds's office as to how he wishes to respond to the below inquiry.

Sincerely,

Jesse Evans**Deputy Chief Assistant District Attorney****Cobb Judicial Circuit****Major Crimes / Homicide****(770) 528-3068****From:** Kevin Gough [mailto:kevingough.firm@gmail.com]**Sent:** Monday, July 13, 2020 4:27 PM**To:** Evans, Jesse <Jesse.Evans@cobbcounty.org>; Dunikoski, Linda <Linda.Dunikoski@cobbcounty.org>; Holmes, Joyette <Joyette.Holmes@cobbcounty.org>**Subject:** Subpoenas

Greetings:

Attached please find subpoenas for AG Chris Carr, DA Joyette Holmes, DA Tom Durden and GBI Director Vic Reynolds.

DA Durden was served earlier today. The Attorney General's office refused to accept his subpoena or otherwise assist with effectuating service. I have people on the way to his residence now to effectuate service. Guessing you cannot help me with that one. Can we arrange for service for Joyette Holmes and/or Vic Reynolds or should I send people to their personal residences?

I would point out that there has been no response nor scheduling of a hearing on the pending motion regarding defense utilization of compulsory process in this case.

-- Kevin Gough

CAUTION: This email originated outside Cobb County Government. Please exercise caution when opening links/attachments in this email.
