Fulton County Superior Court
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Che Alexander, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DAVID JAMES SHAFER	Indictment No. 23SC188947

ORDER DENYING SPECIAL DEMURRER AND MOTION TO STRIKE

Defendant Shafer challenges the indictment arguing it contains several improper legal conclusions. He specifically targets the averments referencing "duly elected and qualified presidential electors," "false Electoral College votes," and "lawful electoral votes." (Shafer Doc. 87, filed 2/5/24). The State responded, and the Court heard arguments at the Defendant's request on March 28, 2024.

As further detailed in a prior order,[1] a special demurrer challenges the sufficiency of the form of the indictment. *Kimbrough v. State*, 300 Ga. 878, 880-81 (2017); *State v. Cerajewski*, 347 Ga. App. 454, 455 (2018). While special demurrers typically contend the charging instrument contains insufficient detail, here, the Defendant does not complain that the indictment is defective because it lacks necessary information. Instead, he suggests certain charges must be dismissed because they contain *too much*, and that what they contain is legally inaccurate.[2] Pretrial, the Defendant is not required to make a showing of prejudice, and any materially defective count should be quashed.

[1] *See* Order on Defendants' Special Demurrers (Trump Doc. 150, March 13, 2024).

[2] This argument would take the form of a motion to strike in federal practice under Fed. R. Crim. P. 7(d) ("Upon the defendant's motion, the court may strike surplusage from the indictment or information.").

Wagner v. State, 282 Ga. 149, 150 (2007). If the identified defect is immaterial, however, the trial court should strike out or otherwise correct the defect. *Id.*[3]

As an alternative procedural vehicle, even if an averment is not considered a defect, Georgia law provides the trial court with the inherent power —indeed the obligation — to redact an indictment that contains prejudicial surplusage or extraneous material. *See Pope v. State*, 157 Ga. App. 154, 154 (1981) (reversal mandated where trial court failed to excise objectionable material from the indictment, such as the co-defendant's guilty plea); *see also Evans v. State*, 253 Ga. 331, 333 (1984) ("proper course of action" is to keep prior criminal record from jury's knowledge by redacting indictment); *Salem v. State*, 228 Ga. 186, 188 (1971) (finding "better practice" to erase or conceal a former verdict on the indictment); *Chandler v. State*, 143 Ga. App. 608, 609 (1977) (trial court can redact indictment to remove the name of a co-defendant); *Stubblefield v. State*, 101 Ga. App. 481, 482-83 (1960) (notation within the accusation referencing the defendant's fingerprint created the inference of a prior criminal record which "ha[d] no proper place" and "should [have been] deleted"). The inclusion of "mere surplusage" — that is, allegations not essential to prove the charged offense — does not invalidate an indictment. *Roseberry v. State*, 251 Ga. App. 856, 858 (2001); *Malloy v. State*, 293 Ga. 350, 360 (2013). Language that accurately describes the offenses and makes the charges more easily understood by the defendants and the jury should not be labeled as surplusage. *Brown v. State*, 295 Ga. 804, 806 (2014); *Malloy,* 293 Ga. at 360.

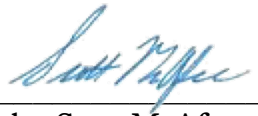
These procedural alternatives make no difference here. An indictment is not subject to a demurrer or redaction simply because it contains unproven allegations or the State's legal

[3] Immaterial defects include the misnaming of a code section, the misspelling of a drug or grand juror's name, and the omission of the defendant's middle initial. *See Green v. State*, 292 Ga. 451, 452 (2013).

conclusions, even if "repeated [and] disputed." The very purpose of an indictment is to join issue on these issues. The pattern jury instructions confirm this framework. During voir dire, this Court's practice is to instruct the array of prospective jurors that the indictment is not evidence. Ga. Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 0.01.00 (Preliminary Jury Instructions). Before opening statements, the Court advises the selected jury that "[t]he charges in the indictment and the plea of not guilty are not evidence of guilt, and you may not conclude that the Defendant is guilty based on the charges or the not guilty plea." *Id.* And finally, during the charge at the conclusion of the evidence, the jury is instructed a third time that the indictment should not be considered as evidence. *Id.* at § 1.10.20 (Indictment/Accusation).

The Defendant has not identified a defect or surplusage, prejudicial or otherwise. A demurrer raising special objections to an indictment should be construed strictly against the pleader and liberally interpreted in favor of the State. *Malloy*, 293 Ga. at 360. Under this standard, the challenged language is not prejudicial because it accurately describes the alleged offenses and makes the charges more easily understood by providing a basis to differentiate the allegedly lawful and unlawful acts of presidential electors (as theorized by the State). *See id.* A defendant retains the opportunity to challenge the entire indictment at trial. Because the Court finds no legal basis to strike this language, the Defendant's claim that certain counts must be dismissed also fails, and the motion is denied.

SO ORDERED, this 4th day of April, 2024.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit