IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Indictment:
V.	*	CR 2000433
	*	
TRAVIS MCMICHAEL	*	
GREG MCMICHAEL	*	
WILLIAM R BRYAN	*	

1.14

STATE'S RESPONSE TO DEFENDANTS NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO O.C.G.A. § 24-4-404 AND UNIFORM SUPERIOR COURT RULE 31.1

GENERAL OVERVIEW

The character of the victim is hardly ever relevant to the crime of murder, since it is just as illegal to murder a "good" person as it is a "bad" person. Murder is illegal whether the victim regularly served breakfast to the homeless at his church, or regularly stole cars, or did both. The victim's prior crimes or other acts involving third parties do not excuse or mitigate his murder and are generally not relevant to any issue at trial.

The Defendants in this case have motioned to introduce ten different instances of prior acts of Ahmaud Arbery, the victim in this case. None of the prior acts were known to the Defendants on February 23, 2020 when Mr. Arbery was killed. None of the purported purposes listed by the defendants are relevant to an issue in dispute in this case. An issue means the defendant must be trying to prove a fact that the State has placed, or conceivably will place in issue, or a fact that the statutory elements obligate the defendant to prove. See *Green v. State*, 339 Ga. App. 263, 266 (2016) (wherein the defendant challenged the State's ability to show that he knowingly failed to comply with a lawful command of a law enforcement officer),

citing to *United States v. Merriweather*, 78 F3d 1070, 1076 (II) (C) (6th Cir. 1996) ("the government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove"). The State has not placed the character of Mr. Arbery in issue. The State does not dispute that Mr. Arbery entered the location of 220 Satilla Drive on at least four occasions, taking nothing from inside the open and vacant property under construction. The State does not dispute that Mr. Arbery was running in the Satilla Shores neighborhood on February 23, 2020.

Ahmaud Arbery was chased down by men with guns, in two pick-up trucks, who were attempting to unlawfully detain him, even though they had not seen Mr. Arbery commit any crime on February 23, 2020 and they had no immediate knowledge of any felony offense he had committed. Unable to escape the strange men, despite his best efforts to repeatedly run away from them, Mr. Arbery was forced to face the man who was pointing a shotgun at his chest and he was killed. The only purpose for placing the "other acts" of Mr. Arbery before a jury is to is to smear the character of Mr. Arbery and suggest that his murder was deserved..

Ahmaud Arbery's character is not an essential element in any claim of justification nor relevant to any issue in this case.[1] The ten other acts are simply being offered as impermissible propensity evidence and to encourage jury nullification. As the Eleventh Circuit has held, "defense counsel may not argue jury nullification." *United States v. Trujillo*, 714 F.2d 102, 10, (11th Cir. 1983).

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[1] Because O.C.G.A. § 24-4-404(a) and O.C.G.A. § 24-4-405 often get conflated with O.C.G.A. § 24-4-404(b), Appendix B is attached for reference as to character evidence. *Beck v. State*, 2020 Ga. LEXIS 914, *13, 2020 WL 7133063 ("A victim's violent character is pertinent to, but not an essential element of, a defendant's claim of self-defense, so it generally may be proven only by reputation and opinion testimony.") The defendants have also cited to Ga. Unif. Super. Ct. 31.1 and provided the State with "notice of their intention to introduce evidence of specific acts of violence by the victim against third persons." This notice rule in no way abrogates O.C.G.A. § 24-4-401 (relevancy), O.C.G.A. § 24-4-403 (prejudicial analysis) or Rules 404(a) and 405. There are no cases that specifically discuss whether 31.1 is still applicable under the "new" evidence code which was enacted in 2013, or whether O.C.G.A. § 24-4-404 has replaced it.

The defendants did not know Mr. Arbery prior to killing him, nor did they know about any of the ten "other acts." In self-defense cases, the only time the victim's prior acts may become relevant to the issue of whether it was murder or not is when the defendant knew of the victim's prior acts, or even the victim's reputation for violence, such that it affected the defendant's actions or reaction to the victim's actions. *Avila v. Knight*, 475 F. Supp. 1054, 1055 (S.D.N.Y. 1979) (ruling, in an excessive force case, that evidence of the victim's criminal records and disciplinary history was not relevant "because at the time of the incident, [the defendant-officer] had no knowledge of [the victim's] alleged acts of prior assault or violence").

In the recent case of *Strong v. State*, 309 Ga. 295, 314 (2020), at footnote 22, the Georgia Supreme Court noted:

> Although this Court has not yet decided whether, under the current Evidence Code, **a victim's specific acts of violence of which the defendant had personal knowledge may be admissible to show the defendant's state of mind with respect to a claim of self-defense**, we have repeatedly noted that possibility. See, e.g., *White v. State*, 307 Ga. 882, 885 (828 SE2d 828) 2020 WL 609638, at *3 (2020); *Williams v. State*, 301 Ga. 712, 715 n.3 (804 SE2d 31) (2017); *Mohamud*, 297 Ga. at 536 n.2. Federal courts have upheld the admission of such evidence. See, e.g., *United States v. Bordeaux*, 570 F3d 1041, 1051 (8th Cir. 2009) ("[E]vidence of victim's prior bad acts 'is only admissible to the extent a defendant establishes knowledge of such prior violent conduct at the time of the conduct underlying the offense charged.' " (citations omitted)); *United States v. Saenz*, 179 F3d 686, 689 (9th Cir. 1999) (holding that "a defendant claiming self defense may show his own state of mind by testifying that he knew of the victim's prior acts of violence" and by presenting "extrinsic corroborating evidence of the victim's [known] acts of violence"). Additionally, because these two threats were against Appellant, they may have been admissible to show Maurice and Appellant's relationship. Cf. *Flowers v. State*, 307 Ga. 618, 621 (837 SE2d 824) (2020) (holding that evidence of a defendant's prior acts toward a victim may be admissible where the nature of the relationship between the defendant and the victim sheds light on the

defendant's motive in committing the charged offense). (Emphasis added.)

The Defendants did not know Mr. Arbery, they had no prior relationship with him and knew nothing about the ten prior acts they now seek to admit. The ten prior acts have no relevancy on the issue of the reasonableness of their actions, since any such prior acts by Mr. Arbery did not escalate their fear of him nor inform the defendants decision-making process to shoot him. Thus, this motion should be denied.

OVERVIEW OF O.C.G.A. § 24-4-404(b)

In determining the admissibility of "other acts" evidence under Rule 404(b), the Supreme Court of Georgia, in *State v. Atkins*, 304 Ga. 413, 416 (2018), adopted the test set out by the Eleventh Circuit of the United States Court of Appeals in *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008).[2] Under this test, in order for the victim's other acts to be admissible, the trial court must find:

(1) there is sufficient proof so that the jury could find that the victim committed the other act in question;

(2) the other acts evidence is relevant to an issue other than the victim's character;

(2A) What is the issue that is in dispute?

(2B) How is this evidence relevant as to that issue?

(3) the probative value of the other acts evidence is not substantially outweighed by its unfair prejudice, thus, the evidence must satisfy the four part analysis and requirements of O.C.G.A. § 24-4-403.

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[2] The majority of cases on this subject involve the State motioning for the introduction of other acts of the defendant to show intent, motive or for some other permissible purpose. For the purposes of this response, the State will cite to the appropriate legal tenants but substitute "defendants" for the "State" and "victim" for "defendant" where appropriate.

SUFFICIENT PROOF

1) Is there is sufficient proof so that the jury could find that the victim committed the other acts in question?

While the defense has provided descriptions of the "other acts," the State has concerns about what has been proffered and the defense characterization of the other acts evidence. Examples include assertions that Mr. Arbery was "canvassing the interior of property and valuables contained within" or that simply being angry during an encounter with the police, and using curse words when talking to the police, is somehow relevant in this situation, wherein Arbery never said a word to the McMichaels or Bryan, none of whom were police officers. At least three of the "other acts" evidence (#5, 9, 10) are based solely on hearsay. In addition, certain facts have been left out. An example is in other act number one, wherein the defense left out the fact that, in 2013, other men drove in two cars to the college campus where Mr. Arbery was located, arrived with baseball bats and that when the fight ensued (mutual combat) Mr. Arbery was hit in the head with a baseball bat. Thus, the State has attached Appendix A as a supplemental overview of the other acts.

PROPER PURPOSE: RELEVANT TO AN ISSUE IN THE CASE

2) Is the other acts evidence relevant to an issue in the case, other than the victim's character? This can be broken down into two parts:

(2A) What is the issue that is in dispute between the Defendants and the State that has nothing to do with the victim's character?

(2B) How is this evidence relevant as to that issue?

The killing of Ahmaud Arbery was captured on video. The actual physical events of February 23, 2020 are not in dispute. Based on the motions of the Defendants, what is in dispute is whether the defendants were justified or were unlawfully acting as vigilantes, who did not bother to call the police, before trying to hit Mr. Arbery with their trucks, "trap him like a rat," and point a shotgun at him to force him stop, thus committing several felonies.

The State believes that the defendants will attempt to claim self-defense.[3] Thus, what is in dispute is whether the defendants were acting in self-defense at the time Defendant T. McMichael pulled the trigger on his racked and loaded shotgun, killing Mr. Arbery, or whether they murdered an unarmed jogger who was entitled to defend himself against the defendants' initial use of force against him.

The State's evidence is that the defendants chased down Ahmaud Arbery, who they labeled, without any basis, as a criminal in their minds, since Mr. Arbery had gone into 220 Satilla Drive,[4] a vacant and open house under construction (devoid of doors, a garage door, appliances or plumbing), and looked around inside on three prior occasions, including October 25, 2019, November 18, 2019 and February 11, 2020.[5] There is no evidence that Mr. Arbery ever stole anything from 220 Satilla Drive, per the statement of owner Larry English to Officer Rash on February 11, 2020.

It is not in dispute that Defendant T. McMichael shot and killed Ahmaud Arbery with a shotgun, while Defendant G. McMichael watched from the bed of Travis' pick-up truck, as Defendant Bryan filmed the murder. Thus, identity of the parties is not at issue.

It is not in dispute that none of the defendants knew Ahmaud Arbery personally, nor did not have any knowledge of any of the ten "prior acts" they seek to introduce as evidence.

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[3] O.C.G.A. § 16-3-21 (a) "…a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony."

[4] This property was not owned by any of the defendants. It was owned by Larry English.

[5] The State agrees that Mr. Arbery entering 220 Satilla Drive on October 25, 2019, November 18, 2019 and February 11, 2020 are all intrinsic acts relevant to the case.

No Evidence Mr. Arbery committed a Felony in February of 2020.

Mr. Arbery did not commit a felony on February 23, 2020. On February 23, 2020, Defendant Greg McMichael simply saw Mr. Arbery running down the street and claims he thought he recognized him from the prior 220 Satilla Drive videos, the last one from February 11, 2020, twelve days prior to the murder. (See Appendix C for the statements of Greg McMichael.) The actions of the defendants do not qualify as a "citizen's arrest" as no crime was committed in their presence on February 23, 2020.[6]

In addition, the defendants had no immediate knowledge that Arbery committed a felony and was fleeing, as is required under O.C.G.A. § 17-4-60.[7] When Defendants G. McMichael and T. McMichael met with Glynn County Police Officer Rash on February 11, 2020 in front of 220 Satilla Drive, they were told by Officer Rash that Mr. Larry English, the owner of the house, had never seen Arbery take anything from inside the house. Defendant G. McMichael then asserted that going inside the house was criminal trespass and Rash responded by stating that it is at least loitering and prowling. (See Axon Body 2 Video X81034268 2020-02-11 193436 at 14:37 minutes.) Thus, any assertion by defendants that Defendant G. McMichael was conducting a felony citizen's arrest, of a fleeing felon based on his

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[6] The State is concerned that part of the defense strategy will be to try to claim that the defendants reasonably believed that they were making a "citizen's arrest" and it is not their fault that they did not know the law (that it is the crime of false imprisonment to make a "citizen's arrest" outside the immediate commission of the crime and a citizen may only chase down a perpetrator if the crime is a felony). The State believes this will be part of the defense strategy since defendants propound the unsupported claim that Ahmaud Arbery was "casing" 220 Satilla Drive or "canvassing the interior of property and valuables contained within" as a way for the defendants to make his entry into the property into "criminal trespass." But even that is not a felony, so they have to try to make it criminal attempt to commit burglary. But Mr. Arbery did not attempt take anything, he only looked around. Regardless, while defendant G. McMichael characterized Mr. Arbery's actions as "burglary" to the police in his statements, he stated that he did not see or know that Mr. Arbery had committed any crime that day, only that Mr. Arbery had been inside the open, vacant property at 220 Satilla Drive previously, the last time 12 days prior to the murder.

[7] O.C.G.A. § 17-4-60 states, "A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion."

belief that Arbery had previously committed the felony of Criminal Attempt to Commit Burglary is unsupported by any evidence and the defendants' own statements.

Not a Legitimate Citizen's Arrest

Attempting to detain Mr. Arbery, in order to "talk to him" about whether he previously entered into the vacant and open structure at 220 Satilla Drive, constitutes Criminal Attempt to Falsely Imprison him. *Smith v. State*, 314 Ga. App. 583, 585 (2012) (Affirming a conviction for false imprisonment, "Significantly, Smith testified that he was not present when the money was allegedly taken. His suggestion that the victim had committed the theft was based upon mere speculation. Smith's claim that he wanted "to question" the victim reflected that he was uncertain and did not have immediate knowledge that the victim had been the perpetrator of the alleged theft, as required for a lawful citizen's arrest.")

Assaulting and detaining Mr. Arbery at the point of a shotgun, in order to figure out if he was in fact the person who entered 220 Satilla Drive on February 11, 2020, constitutes the crimes of False Imprisonment and Aggravated Assault. Attempting to strike Mr. Arbery with a pick-up truck in order to detain him is Aggravated Assault. Thus, under the law, all the actions taken by the Defendants were crimes and did not constitute a legitimate "citizen's arrest." See *McWilliams v. Interstate Bakeries, Inc.*, 439 F.2d 16, 17 (5th Cir. 1971) (Finding that it was false imprisonment, when the citizen arrest took place four days later, holding, "Moreover, the arrest must occur immediately after the perpetration of the offense. … If the observer fails to make the arrest immediately after the commission of the offense his power to do so is extinguished, and a subsequent arrest is illegal."); *Arbee v. Collins*, 219 Ga. App. 63, 66 (1995) ("The existence of probable cause standing alone is not a complete defense in a false imprisonment case because, even if probable cause to believe a crime has been committed exists, a warrantless arrest would still be illegal unless it was accomplished pursuant to one of the "exigent circumstances" … applicable to private persons as set forth O.C.G.A. § 17-4-60."); *Raif v. State*, 109 Ga. App. 354, 358 (1964) ("There is no authority in Georgia under

which a citizen may be arrested without a warrant and held for investigation to determine if he has committed some crime merely because the person making the arrest has a suspicion that the person arrested may have committed some then unknown crime.");

The Use of Unreasonable Force is not a part of a Legitimate Citizen's Arrest

Mr. Arbery, who had no obligation to stop for these unknown men, who were pursuing him and assaulting him, was forced to run around the passenger side of Defendant T. McMichael's pickup truck, away from Defendant T. McMichael who was still pointing his loaded and racked shotgun at Arbery. When Arbery got to the front of the truck, per Defendant T. McMichael's own statement, he shot Mr. Arbery one time in the center of the chest. Defendant T. McMichael's unsupported, self-serving statement to the police claimed that Mr. Arbery "squared up" with him, and he could see where it was going, so he shot Mr. Arbery. (See statement to the police at 3:25:44.) Defendant T. McMichael does not contend that Mr. Arbery lunged at him, swung at him, charged him or made any threatening motion toward him. Thus, the reasonableness of Defendant T. McMichael's actions are in dispute, not the actions of the victim.

In addition, regarding any assertion that the actions taken by the defendants were simply a citizen's arrest, which Mr. Arbery then resisted causing Defendant T. McMichael to kill him, the law states that the amount of force used to make any kind of arrest must be reasonable. *Prayor v. State*, 214 Ga. App. 132, 133 (1994) ("[T]he law in Georgia **forbids a person from using more force than is reasonable** under the circumstances to make a citizen's arrest and deadly force in making the arrest is limited to self-defense or to a situation where it is necessary to prevent a forcible felony. See OGCA § 17-4-20; 17-4-60.") (Emphasis added); See also *Prayor v. State*, 217 Ga. App. 56, 57 (1995). *Patel v. State*, 279 Ga. 750, 754 (2005) (Holding that although a private person may make a citizen's arrest under O.C.G.A. § 17-4-60, only force that is reasonable under the circumstances may be used to restrain the individual arrested and the use of unreasonable force is not a part of a legitimate citizen's arrest.); *State v. Thompson*, 288 Ga. 165 (2010) (Georgia Supreme Court

affirmed the trial court's denial of statutory criminal immunity to a police officer who shot and killed a man as the man ran from law enforcement.); *Mullis v. State*, 196 Ga. 569, 577-578 (1943) (Holding that a police officer "can use no more force than is reasonably necessary under the circumstances, and cannot use unnecessary violence disproportionate to the resistance offered."); *Tennessee v. Garner*, 471 U.S. 1, 7-11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.")

Being the First Aggressors, The Defendants May Not Claim Self-Defense

Legally the defendants may not claim self-defense at trial.[8] They were the first aggressors, getting into their pick-up trucks, driving after Mr. Arbery and trying to hit him with their vehicles. **Mr. Arbery had no obligation to stop and talk to complete strangers who were armed and chasing him in two pick-up trucks.**

The defendants were committing felonies at the time they killed Mr. Arbery. Pointing a shotgun at Mr. Arbery, in order to make him stop and talk to them, was the crime of Aggravated Assault, which was perpetrated on Mr. Arbery by Defendant T. McMichael, after Defendant Bryan attempted to, and did strike Mr. Arbery, with his pick-up truck.

The State also contends that the pointing of the shotgun at Mr. Arbery, by Defendant T. McMichael, constituted Defendant T. McMichael's use of provocation, in order to get Mr. Arbery to react, so that defendant T. McMichael could kill him.

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[8] O.C.G.A. § 16-3-21 (b) states, "A person is not justified in using force under the circumstances specified in subsection (a) of this Code section if he:
(1) Initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant;
(2) Is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or
(3) Was the aggressor or was engaged in a combat by agreement unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other, notwithstanding, continues or threatens to continue the use of unlawful force.

What Issue at Trial Will be in Contention?

Thus, the State questions what issue at trial will be in contention that makes the other acts of the victim relevant. O.C.G.A. § 24-4-401, which defines "relevant evidence" as evidence that "ha[s] 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." The defendants have failed to specifically pinpoint the issue(s) or "facts that are of consequence," and it appears that the only purpose in having the jury hear about the ten prior acts is to smear the character of Mr. Arbery and suggest that his murder was deserved.

The defendants list as their proper purposes for the other act evidence:

- Identity and "modus operandi" – the identity of the parties not in dispute – it is not in dispute that Mr. Arbery went into 220 Satilla Drive on at least four different occasions.
    - *State v. Plaines*, 345 Ga. App. 205, 209 (2018) ("It is true that other act evidence offered under O.C.G.A. § 24-4-404 (b) to prove identity must satisfy a particularly stringent analysis, including that the other act is a 'signature' crime with the defendant using a modus operandi that is uniquely his. And a trial court must consider the dissimilarities as well as similarities in determining whether other acts evidence is admissible to show identity." (Citation and punctuation omitted.))

- Motive – Generic motives for theft or "casing" a location to commit a burglary are classic improper propensity arguments.
    - Motive is "the reason that nudges the will and prods the mind to indulge the criminal intent." (Citation and punctuation omitted.) *Bradshaw v. State*, 296 Ga. 650, 657 (2015).
    - An example of permissible use of motive evidence comes from the case of *Whaley v. State*, 343 Ga. App. 701, 707 (2017). The Georgia

Court of Appeals noted that the other act of stealing computer equipment from an employer can be relevant when it is what motivated the defendant to commit the RICO crimes with which he was charged, since he committed the new crimes in order to pay his restitution obligation from the prior crimes. In Whaley, the trial court determined that the prior plea and resulting restitution obligation was relevant to the issue of whether Whaley may have been motivated to engage with his co-defendant in the racketeering activity for which he was later tried and convicted.

- *Rouzan v. State*, 308 Ga. 894, 899 (2020) ("See *Kirby v. State*, 304 Ga. 472, 487 (2018) (holding that the State's argument that an armed robbery showed the defendant's "inclination" to use violence to obtain money as he did in the crimes charged was a "classic improper propensity argument … identifying his motive to act in far too generic a fashion"); *Thompson v. State*, 302 Ga. 533, 540 (2017) (holding that where the only similarities between an attempted armed robbery and the charged armed robberies and murders were the "all-too-common elements of guns and an assortment of co-conspirators," other acts evidence of the attempted armed robbery was not admissible to prove the defendant's motive for committing the charged crimes)."

- Preparation and Plan – There is no issue in dispute. While the defense may try to intimate that entering 220 Satilla Drive was preparation and part of a plan, the fact that Mr. Arbery had been entering 220 Satilla Drive since October of 2019, and had never taken anything, belies any contention that he had a Machiavellian plan to eventually get around to stealing from the property. Compare: A proper example of a common plan is when there are repeated armed robberies of lone female victims along a particular bus route over a short period of time. In such a case, each instance of armed

robbery may be introduced as other act evidence. *Sloan v. State*, 351 Ga. App. 199, 204-205 (2019).

- Intent – the intent of Mr. Arbery, as to any of his actions that day, is not relevant to the guilt of the defendants. Mr. Arbery's "intent" when he entered 220 Satilla Drive is not relevant to the actual issues in dispute, the defenses of "citizen's arrest" or self-defense, as the Defendants did not know Mr. Arbery had gone into 220 Satilla Drive that day nor were the defendants aware of any felony criminal activity by Mr. Arbery that day or any other day, per their own statements. (See Appendix C)

- Absence of mistake – not an issue in this case. The State is not contending that Mr. Arbery's entrance into 220 Satilla Shores was a mistake (he went into the vacant and open structure) nor that his jogging in the Satilla Shores neighborhood was a mistake (he was out jogging and purposefully took a route that went into Satilla Shores, a neighborhood adjacent to his own).[9]
    - Absence of mistake - to use running or jogging as a cover to commit crimes against persons – Mr. Arbery did not commit a crime against any person by using running or jogging as his "cover" on February 23, 2020.

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[9] The State assumes that the defense will attempt to contend, without any evidence to support the contention, that Mr. Arbery was motivated to go inside 220 Satilla Drive in order to steal items. But there is no evidence that he ever took anything on any of the four occasions he was inside the open location. The State also assumes that the defense will attempt to contend, without any evidence to support the contention, that Mr. Arbery was jogging in Satilla Shores, not simply to run, but to commit crimes of opportunity. But there is no evidence that he ever stole anything from anyone in the Satilla Shores neighborhood. The conjecture by Defendants McMichael, that Mr. Arbery must have stolen Defendant T. McMichael's handgun from his truck on January 1, 2020, because Mr. Arbery entered 220 Satillia Drive on three occasions is not based on any evidence and is mere unfounded speculation on their part. Rule 404(b) evidence cannot be used to establish something completely missing in the case in chief. In order for Rule 404(b) evidence to be used, there has to be a similarity between the crime and the other act, such that the other act tends to make the fact of consequence in the case in chief more probable. Otherwise, it is simply propensity evidence. Without an initial "crime" by the victim, the Court is unable to evaluate "similarity."

- Absence of mistake - to use running or jogging as a cover to commit crimes against the community – Mr. Arbery did not commit a "crime against the community" on February 23, 2020.
- Absence of mistake - to steal – not an issue – Mr. Arbery stole nothing on February 23, 2020.
- Absence of mistake - to commit burglary – not an issue – Mr. Arbery did not commit a burglary on February 23, 2020 as there is video showing Mr. Arbery looking around inside the open, vacant property and voluntarily leaving without having committed a felony or theft therein.[10]
- Absence of mistake - to commit forcible felonies – not an issue – Mr. Arbery did not commit any forcible felonies on February 23, 2020.
- Absence of mistake - to flee when challenged, confronted or questioned by citizens about his conduct – not at issue in this case – Mr. Arbery had no obligation to stop for the defendants, and was trying desperately to get away from the defendants, after they assaulted him by trying to hit him with their pick-up trucks. Mr. Arbery was legally entitled to try to save his own life by running away from the strange men, with guns, in the two pick-up trucks.
- Absence of mistake - to flee when challenged, confronted or questioned by law enforcement about his conduct – not at issue in this case – none of the defendants were law enforcement officers at the time of the murder.

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[10] O.C.G.A. § 16-7-1 (b) states, "A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another.

- Absence of mistake - to commit forcible felonies against citizens who challenge, confront or question his conduct (State assumes this relates to other act #10) – not at issue in this case.
    - Mr. Arbery, who had no obligation to stop for these unknown men, was forced to run around the passenger side of the pickup truck, away from Defendant T. McMichael who was still pointing his shotgun at Arbery. When Arbery got to the front of the truck, Defendant T. McMichael shot him one time in the center of the chest. Defendant T. McMichael's unsupported, self-serving statement to the police claimed that Arbery "squared up" with him, and he could see where it was going, so he shot Arbery. (See statement to the police at 3:25:44.) T. McMichael does not contend that Arbery lunged at him, swung at him, charged him or made any threatening motion toward him. There is certainly no indication from the man who pulled the trigger on the shotgun that Mr. Arbery committed a forcible felony.
- Absence of mistake - to commit forcible felonies against law enforcement who challenge, confront or question his conduct – not at issue in this case – none of the defendants were law enforcement officers at the time of the murder. (In addition, Mr. Arbery never committed a forcible felony against any law enforcement officer. He was charged with misdemeanor obstruction, for running away from the police, on two occasions.)

403 Analysis

As demonstrated, the defense is unable to satisfy the first two requirements under *State v. Atkins*, 304 Ga. 413, 416 (2018). Pretermitting this fact, the trial court would perform a O.C.G.A. § 24-4-403 analysis and determine if the probative value of the evidence is not substantially outweighed by undue prejudice.

O.C.G.A. § 24-4-401 defines "relevant evidence" as "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." However, relevant evidence may be excluded under O.C.G.A. § 24-4-403 "if its probative value is substantially outweighed by the 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."

The Court must exercise caution when determining how much the other act adds to the other proof available, because **when the fact, issue or proof in the case-in-chief is undisputed or not reasonably susceptible to dispute, the other act evidence has less probative value**. An example would be in a car-jacking case where the defense is identity, causing the defendant's prior car-jacking conviction to have little probative value on the issue of intent, since it is obvious that whoever committed the car-jacking, intended to steal the car. The actual issue in dispute in such a case is who committed the car-jacking.

The Court in *Bradshaw v. State*, 296 Ga. 650, 656-657 (2015) and *Jones v. State*, 301 Ga. 544, 546-547 (2017) set out the parameters for analysis. In weighing the probative value of other-acts evidence, a court may consider a number of factors, including (1) prosecutorial need, (2) overall similarity of the other acts and the acts charged, and (3) the temporal remoteness of the other acts.

(1) What is the Defendants need for this evidence? To prove what? This has not been stated by the Defendants.

(2) What is the overall similarity of the other acts and the acts charged? In this case, the first question is what is the relevant act by the victim that the defendants are trying to prove? And then, what is the similarity between the proffered "other acts" and the relevant act by the victim?

As mentioned above, in footnote 10, in order for Rule 404(b) evidence to be used, there has to be a similarity between the crime (or in this case a relevant act by the victim on February 23, 2020 that is in dispute) and the other act, such that the

other act tends to make the fact of consequence in the case in chief more probable. However, what Mr. Arbery did on February 23, 2020 is not in dispute. Why Arbery did what he did is irrelevant to the fact of consequence of justification in this case, as the Defendants did not know of any felony committed by Mr. Arbery that day or any other day. (See Appendix C.)

(3) The temporal remoteness of the other acts. Two of the other acts took place in 2013, while some others took place in 2017, such as the Shoplifting at Walmart.

(4) And a fourth factor must be considered. Is there 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 (1997). In this case, "as to the [victim,] it speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring [not guilty] on a ground different from proof specific to the offense charged."

Thus, the trial court must determine if the other act evidence, if relevant to an issue in the case, has the capacity to push the jury into a "not guilty" verdict based mostly on the other act evidence and not on the evidence specifically pertaining to the charges in the indictment. It is obvious that the ten "other acts" are simply impermissible and improper propensity evidence and are intended to lure the jury into jury nullification by making it seem that Mr. Arbery deserved to be killed because he was probably, sometime in the future, going to burglarize 220 Satilla Drive, or that he probably stole Defendant T. McMichael's handgun from his truck on January 1, 2020, even though there is no evidence to support either contention.

Conclusion

The "other act" evidence of the victim has been "dragged in by the heels for the sake of its prejudicial effect." *Castillo-Velasquez v. State*, 305 Ga. 644, 649 (2019). The defendants did not know Ahmaud Arbery. Every "other act" by

Ahmaud Arbery that they seek to admit were unknown to them at the time of the murder. This makes the "other acts" of scant probative value to the main issue of justification in this case.

The "other acts" are merely impermissible and improper propensity evidence, some not even capable of being related back to any actions Mr. Arbery took on February 23, 2020. The Defendants seek solely to smear the victim and ask the jury to excuse the defendant's behavior by saying: "See Arbery was a bad guy, it's okay that they murdered him."

Therefore, the State requests that the Court DENY the defendant's 404(b) Motion.

This the 29th day of January, 2021.

/S/ *Jesse Evans*
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District Attorney Pro Tempore
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/S/ Linda J. Dunikoski
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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 RESPONSE TO DEFENDANTS NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO O.C.G.A. § 24-4-404 AND UNIFORM SUPERIOR COURT RULE 31.1 via the Odyssey E-File System to:

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This the 29th day of January, 2021.

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APPENDIX A

Other Act #1 – March 14, 2013 – Mutual combat. A fight between two groups of men at the South Georgia Technical School in Americus, Georgia. Arbery, a student on campus, was with seven others outside Martin Hall, when two cars pulled up, the men inside the cars exited and then began the fight. Arbery was bleeding from being hit in the head with a baseball bat by the men who arrived at the campus to engage in the fight. Arbery admitted to retrieving pliers for himself and another man to use in the fight.

Other Act #2 – December 3, 2013 – Handgun on school property. Arbery brought a .380 caliber handgun to a Brunswick High School basketball game. When an officer approached him inside the gym, Arbery ran outside, threw away the handgun and ran from three officers. Officer Smith was scratched on his arm when he tried to grab Arbery as he first ran from the gym, and Officer Harris tripped over a speed bump chasing after Arbery. When Officer Schultz pulled his handgun on Arbery and told him that he would shoot him, Arbery stopped and laid down with his hands out to his sides, per instructions. All officers were in full uniform. Arbery pled guilty under First Offender and received five years of probation.

Other Act #3 – November 7, 2017 – Minding his own business at the park. At 9:00 a.m. in the morning Arbery was near his 2001 Toyota Camry, parked on the grass, at Townsend Park, when Officer M. Kanago, in full uniform and a marked patrol car, made contact with Arbery, asked for his identification and when Arbery questioned the officer, albeit in a loud and angry manner, Arbery was searched for weapons. Officer Haney arrived and attempted to use his taser on Arbery, while Arbery stood still with his hands in the air. The taser malfunctioned and Arbery was directed to get on the ground which he did. The officers told him he was free to leave but could not drive the car away since his license was suspended. Arbery left on foot.

Other Act #4 – June 17, 2018 – Mom's car keys. Ms. Wanda Jones calmly called 911 to report that Ahmaud had her car keys and would not give them back. Ms. Jones informed the 911 operator that Ahmaud has some mental issues. The 911 operator reassured her that, now that it was noted he had mental issues, the police will make sure that he got the help he needed, as they know how to respond appropriately to persons with mental health issues.

Other Act #5 – August 21, 2018 1:15pm – Criminal Trespass Notice – 2847 Seven Oaks Road, Waynesboro, Georgia. Supposedly, a deputy sheriff's wife saw Arbery in someone's yard, may have been hers, looking into cars. However, Arbry stated to the police that he was running in the street. Thus, it is the word of an anonymous woman (hearsay conveyed via the police in the video) against the word of Arbery, since the woman did not come to the scene to identify him. Arbery's grandmother told the police that Arbery was visiting her at her home at 158 Persimmon (which is one block over from the supposed criminal trespass location). The police told Arbery that the people in the neighborhood take it very seriously and the last thing they need is one of the neighbors shooting Ahmaud for being in their yard. They then told him that they are going to give him a written warning and that if he was seen back over on the property that he would go to jail.

Other Act #6 – October 23, 2018 5:30pm – Arrest for Obstruction. Anquinta Jackson at 125 Persimmon Road told Dep. Yarbrough that she saw three people inside of a vacant trailer in the lot north of hers (which is directly across the street and two lots down from 158 Persimmon where Arbery was staying with his grandmother). The windows of the vacant trailer were broken out and the doors were wide open. Upon entry into the trailer, with his gun drawn and pointing at the two juveniles and Mr. Arbery, the Deputy yelled "Stop Police." The two juveniles and Mr. Arbery ran from the trailer. One juvenile lived at 200 Persimmon Road, across the street from Mr. Arbery, with his grandmother. The other juvenile, found with

Mr. Arbery, was the son of the original complainant, Anquinta Jackson. Mr. Arbery was arrested for obstruction for running from Dep. Yarbrough.

Other Act #7 – December 1, 2017 - Theft by Shoplifting at Walmart. Walmart employee Dendol Kelly reported that one of four black males, later located in the parking lot by the police, attempted to shoplift a VIZIO 65" Television valued at $798.00 by trying to walk out of the store with it. There was video of the incident. Mr. Arbery was arrested for Theft by Shoplifting and subsequently pled guilty.

Other Act #8 – January 2020 on Blount Property - Arbery on Blount Property. (Note: Julia Bolin, who lives across the street from 140 Boykin Ridge Road and has known Ahmaud Arbery all her life, is the cousin of Drew Blount. Drew Blount, and his wife Ashley, live at 221 Andy Tostensen Road. Drew's mother, Sandy Blount, and his father, Andrew Tostensen, own the houses at 201 and 191 Andy Tostensen Road. The Tostensen property backs up to the Boykin Ridge cul-de-sac.)

Sometime in January of 2020 Sandy Blount saw Mr. Arbery attempting to open a window at one of their vacant houses along Andy Tostensen Road. She called out to him and asked if he needed help. Another time, Sandy Blount and Andrew Tostensen saw Mr. Arbery trying to open a door to one of the homes. The police were not called. Mr. Arbery was known to Drew and Ashley Blount, who had seen him running in the neighborhood, and when over at Julia Bolin's home, had seen him working out in his front yard.

Other Act #9 – Love's on I-95. On May 19, 2020, GBI Special Agent Strickland was approached by John Hart who lives at 151 Royal Drive (the subdivision across Hwy 17 from Andy Tostensen Road and Mr. Arbery's neighborhood). Hart stated that a black man, whose name he did not know, but who worked at Circle K and Love's told Hart that Mr. Arbery was banned from Love's for stealing, that Mr. Arbery would stretch outside before going into the store, steal items and run away. Hart had Randy Sullivan and Heather Sullivan on speaker phone. Heather Sullivan stated that she is a manager at the Love's truck stop on

Interstate 95. Hart reported that both Sullivan's told him that Mr. Arbery was known for stealing from stores by the interstate. Exhibit 346, 352.

On May 20, 2020, GBI Special Agent Terry Howard interviewed Heather Sullivan at Love's. It does not appear to have been recorded.

> SULLIVAN advised that she did not know who AHMAUD ARBERY was until after the incident. SULLIVAN recalled a black male subject who would come into the store before the incident and would run inside the store. SULLIVAN suspected ARBERY of taking items; specifically, Little Debbie Cakes. However, SULLIVAN would make eye contact with ARBERY and he would put the item back. Law Enforcement authorities were never called regarding ARBERY'S actions in the store. ARBERY was not officially given a Trespass Warning by law enforcement officials for that location. Exhibit 484.

Other Act #10 – Mutual Combat. A cellphone video shows a "fist fight" between two men. (The just swing at each other and jump around a bit.) The State has been provided with no witness information about this incident, no dates, times nor locations, and thus is unable to address the assertions in Defendants' motion.

APPENDIX B

OVERVIEW OF O.C.G.A. § 24-4-404(a) and O.C.G.A. § 24-4-405

Character evidence is controlled by O.C.G.A. § 24-4-404(a) and O.C.G.A. § 24-4-405. Evidence of a person's character is not admissible for the purpose of propensity. In other words, "they did this back then, so they must be doing it again now" is not allowed. If the defense wants to tender evidence as to the victim's character, the evidence must be a pertinent character trait, meaning it must be relevant to the issues in the case. If the Court determines that the defense may put the victim's character before the jury, then that evidence may only come in the form of reputation or opinion testimony.

Ahmaud Arbery's criminal records and encounters with the police should be excluded because they would only be offered to establish that Mr. Arbery has a propensity for theft (the shoplifting conviction), propensity for violence in mutual combat situations (the school fight), and anger and foul language in interactions with law enforcement (Waynesboro interactions and the park interaction). The rules on character evidence bar evidence of specific instances of conduct offered to show propensity unless propensity is an essential element of a charge, claim, or defense, which it isn't in this case. O.C.G.A. § 24-4-404 (a) provides, in pertinent part, that "[e]vidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a)(2)(B) makes an exception by allowing a defendant in a criminal case to introduce evidence of "a pertinent trait of character of the alleged victim of the crime offered by an accused" but O.C.G.A. § 24-4-405 (Rule 405) makes clear that such evidence must take the form of "opinion" or "reputation" testimony only unless the victim's pertinent trait is "an essential element of a charge, claim, or defense."

An example of synthesizing those rules was in *United States v. Gulley*, 526 F.3d 809, 819 (5th Cir. 2008), where the Fifth Circuit held that evidence of an inmate-victim's prior acts of violence was inadmissible and properly excluded because it was offered to show the inmate-victim's propensity for violence, which

was not an essential element of the charge or defense of willfully using excessive force against an inmate by defendant-prison guard.

It is important to note that in a murder case where the defense is self-defense, character or a trait of character of a person is NOT an essential element of murder, felony murder, false imprisonment or aggravated assault, nor is it an essential element of self-defense. See *Beck v. State*, 2020 Ga. LEXIS 914, *13, 2020 WL 7133063 (Decided December 7, 2020). This was the same holding in *Strong v. State*, 309 Ga. 295, 314 (2020), which cited to *Gulley*, where defendant claimed self-defense when he stabbed his stepson to death and seriously injured his step-grandson, both of whom were living in the same household with defendant.

> In this case, Rule 404 (a) (2) allowed Appellant to offer evidence of Maurice's violent character, as that trait was pertinent to Appellant's claim of self-defense. Under Rule 405, however, Maurice's character trait could be proved only with reputation and opinion testimony, because a victim's violent character is not an essential element of a self-defense claim. See *United States v. Gulley*, 526 F3d 809, 819 (5th Cir. 2008) (pointing out that "a self defense claim may be proven regardless of whether the victim has a violent or passive character," and collecting federal cases on this issue). See also *Mohamud v. State*, 297 Ga. 532, 536 (773 SE2d 755) (2015)." *Strong* at 314.

Therefore, the State motions this Court to disallow the defense from offering specific instances of the character of the victim in this case, and only allow evidence, if any, of the victim's violent character, through reputation and opinion testimony.

The Specific Statutes are listed below for the Court reference:

O.C.G.A. § 24-4-404

(a) Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for:

(1) Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under paragraph (2) of this subsection, evidence of the same trait of character of the accused offered by the prosecution;

(2) Subject to the limitations imposed by Code Section 24-4-412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

O.C.G.A. § 24-4-405

(a) In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.

APPENDIX C

The Statements of Defendant G. McMichael:

Defendant G. McMichael made a voluntary statement to the Glynn County Police Department at 3:15 p.m. on February 23, 2020, approximately 2 hours and 45 minutes after the murder. The following are his statements regarding his intent and what he knew about Arbery committing a crime in his presence or within his immediate knowledge.[11]

3:21:29 – 3:21:32 But the whole thing started when I saw this guy running down the street.

3:23:25 – 3:24:10 But I look up and see this guy hauling ass, I'm not talking about a jog, I'm talking about a haul ass, like somethings right on his ass, chasing him. Well, I had seen two or three prior videos that, oh god what's his name, the Hispanic guy, oh geez, Diego, had of this guy breaking into or being or wandering around into this house that's, it's under construction, the guy that owns it, I guess he's doing it himself because it's been that state with no doors, no windows on it for well over a year now.

3:24:26 – 3:24:35 But anyway, this guy had video cameras inside that shell of a home.

3:25:21 – 3:25:39 We were aware that there had been numerous entering autos and break-ins and such in the neighborhood going on for quite some time. And of course this guy, that was on video, was, I mean logic will tell you, this guy may be the one doing it.

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[11] O.C.G.A. § 17-4-60 ("A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.")

3:28:48 – 3:29:07 **So now we have a missing weapon and the possibility in my mind that the guy that's been breaking in down the road there, may have that weapon. That's just a hunch,** I've been a cop for thirty years. (*Note that he is talking about Defendant T. McMichael's handgun, which was stolen on January 1, 2020 (54 days earlier) from his truck while parked in front of their house.)

3:30:32 – 3:30:53 Well I'm thinking he's either done something, somebody is chasing him, or you know he's…I thought well maybe somebody drove up and found him in their house or drove up to that particular house that he likes to go into over and over again. For whatever reason he's running, he ain't running for a jog. He's got it hooked up.

3:40:06 – 3:40:32 (In reference to what he saw on the videos) Q: Is he picking up anything, going through anything? A: Not that I recall, **I don't think the guy has actually stolen anything out of there**, or if he did it was early on in the process but he keeps going back over and over and over again to this damn house. Plus we've had numerous entering autos and other burglaries and thefts out of yards and that sort of thing throughout the neighborhood, and so, he'd be a prime suspect.

3:42:01 – 3:42:20 I don't know what the reason is but damn if he don't fit the description. It was like bingo, here's a guy, short dreads, t-shirt, short pants, black male.

3:42:42 – 3:42:35 I run in the house I said Travis that guy that broke into the house, or I, you know, whatever I said, I don't remember how I came across, I said he's running down the street come on let's go.

3:55:40 – 3:55:44 We got involved because of the prior incidences.

3:56:52 – 3:57:41 The intent was to hold him for the police come and check him out. There was no doubt in my mind as to who this guy was. None. You know having seen the videos prior. The thing that was doubtful, not doubtful, **but was it certainly a driving factor in my mind, was that my son had a missing pistol**. And **I'm pretty certain this guy, well, I don't know for a fact, and I have no reason**

to think that he did it, other than the fact that this guy has been doing this crap over and over again.

3:58:18 – 3:58:38 Well anyway in my mind there's a good possibility this guy's armed, that was my thought process. My intention, and I know it was my son's as well, was to stop this guy so that he could be arrested or be identified at the very least.

4:14:34 – 4:15:04 When I came and got Travis, I saw the guy running down the street, he wasn't jogging, he was hauling ass. I mean he was getting it. And so I thought, well you know, he's running from somebody, he's just done something, you know he might have hurt somebody or whatever, because you know this guy's been in and out of that damn one house over and over and over again, got him on videos and everything. Well my intent was to see if we could detain him till you guys got there, you know.

4:21:20 – 4:22:22 **Q: Did this guy break into a house today? A: That's just it, I don't know.** That's what I told, what's her name out there, I said listen you might want to go knock on doors down there cuz this guy just done something because he was fleeing from. I don't know, he might have gone in somebody's house. Q: Were you the first one to see him? A: Yeah, well, I was the first I, I guess. I don't know if somebody saw him running, and didn't think anything of it, but **when he came past my house, he was, he met the description of the guy that Travis seen going in that empty house, you know, two weeks ago** or however long ago it was. I mean to a T. Plus he met the description of the video that I'd seen of this guy being in there, short dreads, black T-shirt, short pants, I mean it was… plus he was hauling ass, and he was running like people don't run normally, he wasn't out for no Sunday jog, he was getting the hell out of there.