IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	**INDICTMENT NO. CR-2000433**
	:	
TRAVIS MCMICHAEL ,	:	
	:	
GREG MCMICHAEL,	:	
	:	
Defendants.	:	

1.14.2
DEFENDANT McMICHAELS' REPLY TO THE STATE'S SUPPLEMENTAL RESPONSE TO THE DEFENDANTS' NOTICE OF INTENT TO INTRODUCE 404(b) EVIDENCE

404(b) Is Not Character Evidence:

To be sure, under 404(a) and 405, the defense can call witnesses with knowledge about Mr. Arbery's character to testify that, in their opinion, Mr. Arbery is violent, aggressive, dangerous, confrontational, etc., or that Mr. Arbery has a reputation for those characteristics.

Properly constituted 404(b) evidence operates outside of the character evidence label, if the evidence demonstrates the actor's intent and motive, among other things. Relevant evidence is "inherently prejudicial." US v. Mills, 704 F.2d 1553, 1560 (11th Cir. 1983). It is error to continually assert that 404(b) evidence is in fact just "disguised" character evidence or "propensity"

evidence, even though the evidence of a prior act may incidentally lend itself to the improper label.

Relevance does not require that an issue be "in dispute."

In an effort to redefine 401 relevance, the State asks "What 'fact that is of consequence to the determination of the action' is in dispute?" and then answers by asserting that the four issues identified in the defense Notice "are not factually in dispute," which, so the State thinks, makes "the other act evidence of the victim irrelevant." (State's Response at 6). We disagree about whether the evidence is in dispute, but being "in dispute" is not required. *See* Walker v. State, 306 Ga. 637, 646, 832 S.E.2d 783, 791 (2019) (*citing* Federal Rule of Evidence 401, Advisory Committee Note: "The fact to which the evidence is directed need not be in dispute.")

OCGA § 24-4-401 defines "relevant evidence" as follows: "As used in this chapter, the term 'relevant evidence' means 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."

Thus, when the State asserts that the defendants failed to identify a "genuine issue that is *in dispute*" in our 404(b) Notice, it is not only inaccurate but also has created conditions for relevance that simply are not required. Neither being "genuine" nor being "in dispute" are parts of what make an item of evidence relevant. In every trial, many, if not most, items of evidence and testimony are admitted that are not even remotely "in dispute." That Travis McMichael fired a shotgun at Ahmaud Arbery, for example, is *beyond dispute*. The Court would not sustain a relevance objection to any evidence offered to prove this issue which is not "in dispute."

What makes evidence relevant is its "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." Thus, if the State offers evidence that Travis's shotgun is a pump action firearm, the relevance of this evidence will turn on whatever fact of consequence it tends to make more or less probable, not on whether the issue is "in dispute." It may be in dispute, it may not be, but whether it is or isn't offers nothing in answer to the question of its relevance to the case. *Walker*, *supra.*

What makes evidence relevant is whether it is probative and material. Probative value simply means that the evidence carries some weight,

however slight, between it and the fact of consequence for which it is offered as proof. Materiality simply means that the evidence relates to a fact that is of consequence to the determination of the action. Evidence of the distance a particular gun will eject potassium nitrate, sulfur, and carbon (gunpowder), if offered to prove muzzle-to-target distance, for example, could become relevant, but only if muzzle-to-target distance is material to the case, as it might be, say, in a self-defense case where the assailant was within inches of the defendant when the defendant fired his weapon. If the case was about whether the defendant stole a particular gun out of an unlocked truck, then muzzle-to-target distance would be immaterial and, thus, evidence of ejection distances of gunpowder would be irrelevant. Whether any of this would be "in dispute" is not a part of the analysis of admissibility.

Since the State improperly limits relevance evidence to only that evidence which is "genuinely in dispute," it further garbles its analysis of the other act evidence by mistakenly asserting that the only issues that count for relevance to the case are the charges in the indictment and the defenses to them. (State's Response at 7) The State conflates the various types of facts in the case into ultimate facts only – false imprisonment or citizen's arrest,

murder or self-defense – and then states, falsely, that only these ultimate facts are "facts of consequence."

Instead, any fact that is "of consequence to the determination of the action" may be an ultimate fact, an intermediary fact, or an evidentiary fact. It may be proved by direct or circumstantial evidence. Its "consequence to the determination of the action" may be slight or huge. In short, if the fact holds any amount of probative value for the fact finder to use to making a determination about a material issue in the case, any material issue, not just the ultimate issue, then it is relevant and should be admitted into evidence. This is the case here with respect to the 404(b) evidence that the defense has proffered at the hearing on their Notice.

July 9, 2021.

s/Franklin J. Hogue
FRANKLIN J. HOGUE
Attorney for Defendant
State Bar Number 360030
Hogue Hogue Fitzgerald & Griffin, LLP
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
frank@hogueandhogue.com

s/Laura D. Hogue
LAURA D. HOGUE
Attorney for Defendant
State Bar Number 786090
Hogue Hogue Fitzgerald & Griffin, LLP
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
laura@hogueandhogue.com

s/Robert G. Rubin
ROBERT G. RUBIN
Attorney for Defendant
State Bar Number 618635
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300
robertrubin@justiceingeorgia.com

s/Jason B. Sheffield
JASON B. SHEFFIELD
Attorney for Defendant
State Bar Number 639719
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300
jasonsheffieldattorney@gmail.com

Certificate of Service

I hereby certify by my signature that I have served a copy of **1.14.2 DEFENDANT McMICHAELS' REPLY TO THE STATE'S SUPPLEMENTAL RESPONSE TO THE DEFENDANTS' NOTICE OF INTENT TO INTRODUCE 404(b) EVIDENCE** on the Office of Flynn D. Broady, District Attorney, Cobb Judicial Circuit, by emailing it to:

Linda Dunikoski
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090
Linda.dunikoski@cobbcounty.org

July 9, 2021.

s/Franklin J. Hogue
FRANKLIN J. HOGUE