

Ronald M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

V.

GREG MCMICHAEL
TRAVIS MCMICHAEL
WILLIAM R. BRYAN

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* Indictment:
* CR 2000433
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4.68 STATE'S MOTION IN LIMINE TO EXCLUDE DEFENDANT'S
"USE OF FORCE" EXPERTS

COMES NOW, the State of Georgia, by and through the undersigned District Attorney Pro Tempore, and files this motion in limine to prohibit the Defense from offering any expert testimony about law enforcement "Use of Force."

1.

The defense has provided notice of its intent to call at least one law enforcement "Use of Force" expert, despite the fact that there were no law enforcement officers involved in the shooting death of Ahmaud Arbery, and there was no use of police force at any time during the above named defendants' attempts to falsely imprison and assault Ahmaud Arbery.

2.

Because there was no law enforcement officer involved in the events that led up to the charges in this indictment, and therefore no exercise of police authority, any testimony about law enforcement "Use of Force" standards, by any police department or state agency, would be entirely irrelevant. There is no fact at issue in this case that is made more or less likely by evidence of what amount of force a

police officer, had there been one on-scene, would or would not have been permitted to use (after identifying himself as a law enforcement officer). O.C.G.A. § 24-4-401.

3.

Moreover, the defendant's proposed "Use of Force" expert testimony would be extraordinarily confusing and highly prejudicial. O.C.G.A. § 24-4-403.¹ The evidence would be confusing for precisely the same reason it is irrelevant. Testimony from an expert in law enforcement's "Use of Force," would incorrectly and inappropriately suggest to the jury that there was a law enforcement officer involved in this incident, and/or that the jury should for some reason treat the non-officer defendants as if they were acting in that capacity, and had somehow taken on the cloak of authority, as law enforcement officers.

The testimony would also be highly prejudicial. The only reason the defense in this case would want to offer a law enforcement "Use of Force" expert would be to plant in the mind of the jurors that the defendants were somehow cloaked in official authority. Because the defendants were in fact private individuals acting with absolutely no police authority, this evidence would be entirely misleading.

4.

This of course begs the questions of which agency's policy on "Use of Force" is being referenced as the standard for the defendants. Most "Use of Force" experts compare a law enforcement agency's Standard Operating Procedures and their "Use of Force" policy against the actions taken by their employee, in the course of their employment, who was required to know the policy, had training on the policy and understood the consequences of not following the policy. We have none of these elements in this case.

¹ "Relevant evidence may be excluded 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."

5.

The defense in this case is “Citizen’s Arrest.” Testimony from a law enforcement expert, on law enforcement “Use of Force,” would inappropriately (and inaccurately) bolster this defense claim. If jurors hear about the rules of law enforcement “Use of Force,” they will naturally assume that the incident must have involved an actual and legitimate arrest. This will be true regardless of what evidence that expert actually provides. Even if the expert admits that a police officer would not be allowed to use lethal force in this situation, the defense will still have connected, in the jurors’ minds, the defendant’s actions and the concept of a legitimate arrest. Thus, the State’s position is that the evidence would be submitted to the jury, not because it makes any fact relevant to a citizen’s arrest more or less likely, but rather simply to improperly suggest that there must have been an actual arrest involved.

6.

The defendants have suggested that the expert testimony is relevant because the defendants were both trained in the use of force, at some time, years prior to this homicide, and therefore the information is relevant to explain their state of mind in their self-defense claim.

First, if they choose to take the stand, they can explain what was going through their minds and why, and the state can cross-examine them regarding those claims. But a defendant cannot call an expert to serve as a proxy for himself, to offer testimony about what was in his own mind. To allow expert testimony on this basis would undercut the search for justice by allowing the defendant to testify through a proxy witness and thereby avoid altogether the truth-seeking function of cross-examination.

Second, the reasonableness of self-defense is not outside the ken of the average lay person. State v. Copeland, 310 Ga. 345, 356 (2020) (Holding that law enforcement officers who are seeking immunity under OCGA § 16-3-24.2, are subject to the same self-defense standard as private citizens under OCGA § 16-3-21

(a), in that the force used must have been based on the defendants reasonable belief that such threat or force was necessary to defend himself); Kilpatrick v. State, 308 Ga. 194, 196-197 (2020) (Not an abuse of discretion when the trial court refused to allow the expert to testify because it did not believe the expert's testimony about use of force, fight-flight-freeze responses, and human physiology during high stress and life threatening situations would be helpful to the jury).

The proposed expert testimony would be irrelevant under Rule 401, confusing, misleading, and highly prejudicial under Rule 403; accordingly, it should be excluded.

Respectfully requested, this the 25th day of August, 2021.

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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 4.68 STATE’S MOTION IN LIMINE TO EXCLUDE DEFENDANT’S “USE OF FORCE” EXPERTS via the Odyssey E-File System to:

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This the 25th day of August, 2021.

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