

Russell M. Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

*

V.

*

Indictment:

*

CR 2000433

*

TRAVIS MCMICHAEL

*

GREG MCMICHAEL

*

WILLIAM R BRYAN

*

**4.72 STATE'S BRIEF ON CHARACTER WITNESSES AND "OPENING
THE DOOR" TO CHARACTER EVIDENCE**

COMES NOW THE STATE OF GEORGIA and provides to this Court this Brief on the issue of character evidence and the concept of one party "opening the door" to evidence that has previously been ruled inadmissible. The State shows the following:

1.

This Court has ruled that Ahmaud Arbery's prior acts and his mental health status are not relevant to the issues in this case nor are they essential elements of any charge, claim, or defense.¹

¹ Please see this Court's Order on the Admission of the Victim's Mental Health Records - Filed on October 1, 2021 and Order on Defendants' Notice of Intent to Introduce 404(b) Evidence - Filed on August 30, 2021.

2.

The State anticipates that it will present several lay witnesses who knew Ahmaud Arbery personally or who saw him running or jogging in his neighborhood or in the surrounding neighborhoods in Brunswick, Georgia. The State's intention is NOT to offer these witnesses as character witnesses nor to offer any evidence of Mr. Arbery's general good character. Rather, these witnesses are being offered as fact witnesses about Ahmaud Arbery being an avid runner.

3.

Defendants have repeatedly stated, in their motions, that they believe the State will "open the door" to both Ahmaud Arbery's prior acts and his mental health by inadvertently providing the jury with character evidence despite the State's intention for them to be fact witnesses to Arbery's running. However, as the recent case of Montgomery v. State, 350 Ga. App. 244 (2019) noted, a party must affirmatively place character evidence before the jury before the opposing party may cross-examine the witness with specific instances of prior conduct (not via the presentation of extrinsic evidence). The bright line rules from Montgomery are instructive.

4.

The Court of Appeals in Montgomery, at 247-48, stated that "An inadvertent or nonresponsive answer by a witness that invokes the defendant's good character ... does not automatically put his character at issue so as to open the door to character

evidence.” This same principle would apply to the victim’s character. This is because, as the Court of Appeals noted (citing to Christopher B. Mueller et al., Federal Evidence § 4:43 (4th ed. updated July 2018)), a nonresponsive answer by a witness should not allow one side to exploit the situation by cross-examining on bad acts or offering other negative character evidence.

“Furthermore, the question whether the [State] has intentionally placed [the victim’s] character in issue through the direct examination of a witness is not assessed in a vacuum; rather, the trial court can consider the questioning of the witness in the context of the trial proceedings as they have unfolded and the trial strategy being pursued by [the State].” Montgomery v. State, 350 Ga. App. 244, 248 (2019).

5.

“Under Georgia's current Evidence Code, the admissibility of evidence of a defendant's character is governed by OCGA §§ 24-4-404 and 24-4-405.”² “As a general rule, evidence of a person's character is inadmissible.”³ There is no provision in O.C.G.A. § 24-4-404 for the State to offer good character evidence of a victim of a crime, except in rebuttal to the defendant’s evidence. Such evidence, tendered first by the State, would be inadmissible. The defense objection would generally be

² Montgomery at 246.

³ Id.

relevancy and bolstering. O.C.G.A. § 24-4-404 only has provisions for the accused to offer character evidence, and only provides for the State to offer character evidence of the victim to rebut other evidence already placed before the jury by the accused.⁴

6.

Should a witness for the State inadvertently or non-responsively testify to the good character of the victim, via their opinion or personal knowledge,⁵ the defense may purposefully fail to object, believing that this will somehow allow them to then put up witnesses to testify to negative extrinsic character evidence. See Strong v. State, 309 Ga. 295, 315 (2020) (Holding that a party must object to inadmissible evidence, as that party may not “consent” to the inadmissible evidence, simply to seek the introduction of its own inadmissible evidence as rebuttal).

However, inadvertent good character opinion testimony does not lead to the presentation of extrinsic character evidence via witness testimony. The only provision for proof of specific instances of a person’s character is when the Court

⁴ This is the same for other statutes as well. For instance, the State may not put up reputation or opinion evidence of a victim’s character for truthfulness until the victim’s truthfulness has been attacked. O.C.G.A. § 24-6-608(a)(2).

⁵ The defense may try to claim that the State tendered such evidence, even though inadmissible, under OCGA § 24-4-405(a) which states, “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.”

has determined that it is an “essential element of a charge, claim, or defense or when an accused testifies to his or her own character.” O.C.G.A. § 24-4-405(b).

7.

Thus, the State is mystified as to why the Defendant’s other act evidence witnesses and mental health witnesses have all been placed under subpoena by the defense, since even if the State purposefully wanted witnesses to testify to the good character of Ahmaud Arbery, via reputation or opinion testimony (which it does not), the defendant’s only recourse is to object and ask for the testimony to be stricken, as the evidence is non-rebuttal character evidence (inadmissible) under the evidence code.⁶

Rule 405(c)⁷ has no provision for the tendering of adverse, extrinsic character evidence. See Griffin v. State, 309 Ga. 860, 872-874 (2020) (No error in excluding extrinsic evidence of prior acts of the victim since Rule 405(c) only authorized the defendant to cross-examine the witness’ opinion testimony by inquiring into whether he was aware of relevant specific acts of the victim’s conduct).

⁶ There is no provision for (1) the State to put up non-rebuttal (inadmissible) good character evidence of the victim, (2) without objection from the defense, (3) leading to a claim of “opening the door” for the defense to cross-examine the character witness about their knowledge of Ahmaud Arbery’s prior acts or mental health. Cross-examination of a defendant’s good character witness is allowed since such cross-examination goes toward evaluating the credibility of the character witness.

⁷ Rule 405(c) states, “On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.”

8.

Regardless, inadvertent testimony by any witness as to the victim's good character will be objected to by the State and the State will ask to move to strike the testimony as non-responsive, per the direction of the Court of Appeals in Montgomery v. State, 350 Ga. App. 244, 252 (2019).

This the 18th day of October, 2021.

/S/ Linda J. Dunikoski

Linda J. Dunikoski

State Bar # 233887

Senior Assistant District Attorney

District Attorney Pro Tempore

Cobb Judicial Circuit

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 Brief via the Odyssey E-File System to:

Mr. Robert G. Rubin
Peters Rubin Sheffield & Hodges, PA
2786 North Decatur Road Suite 245
Decatur, GA 30033
robertrubin@justiceingeorgia.com
jasonsheffieldattorney@gmail.com
(404) 296-5300

Laura and Frank Hogue
Hogue & Hogue LLP
341 Third Street
PO Box 1795
Macon, GA 31202-1795
(478) 750-8040
laura@hogueandhogue.com
frank@hogueandhogue.com

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

This the 18th day of October, 2021.

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