

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

Ronald M Adams
CLERK SUPERIOR COURT

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

1.14.1
DEFENDANT McMICHAELS' BRIEF IN SUPPORT OF THEIR
NOTICE OF INTENT TO INTRODUCE 404(b) EVIDENCE

INTRODUCTION: THE QUESTION PRESENTED

The State's Response (State's 1.14) to the Defendants' 404(b) Notice (McMichael 1.14) provides an accurate and useful summary of basic extrinsic evidence law and, thus, it need not be reproduced here. At page 11 of its Response, the State asks the central question of most importance to the matter at hand: **"What issue at trial will be in contention that makes the other acts of [Ahmaud Arbery] relevant?"**¹ The Court has asked for a

¹ While not the subject of this brief, we note here that, based upon the state's pretrial motions, briefs, and arguments, the State is likely to "open the door" to the admissibility of these 404(b) incidents as rebuttal evidence to the testimony they present and the inferences that they seek to draw from that evidence.

brief answer to that question following the presentation of evidence in support of the Defendants' Notice on May 12-13, 2021. Here it is.

THE ISSUES AT TRIAL THAT MAKE EXTRINSIC ACT EVIDENCE

RELEVANT:

- a. Why was Ahmaud Arbery in Satilla Shores, specifically in 220 Satilla Drive, a vacant house under construction?**
- b. Why did Ahmaud Arbery run after having been spotted inside 220 Satilla Drive?**
- c. Why did Ahmaud Arbery continue to run when the McMichaels caught up to him to tell him to stop running and talk to them?**
- d. Why did Ahmaud Arbery turn toward Travis McMichael to attack him instead of continuing to run away from him and out of the neighborhood?**

II. O.C.G.A. § 24-4-401

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.

A "fact of consequence to the determination of the action" is whether the McMichaels were "unlawfully chasing" Ahmaud Arbery, as charged in the Indictment. The defense to this charge will necessarily focus upon:

- (1) the McMichaels' belief about Ahmaud Arbery's intent and motive behind entering the vacant house;
- (2) the McMichaels' intent and motive behind chasing Ahmaud Arbery; and
- (3) Travis McMichael's use of deadly force after Ahmaud Arbery turned toward him at the front of Travis McMichael's truck.

In part, the McMichaels' defense will rely upon Georgia's then-applicable citizen's arrest statute, which says:

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.

O.C.G.A. § 17-4-60.

Chasing may occur for a lawful purpose under this statute. Whether the chaser has a lawful purpose turns, in part, on what was in his "immediate knowledge" (first sentence) or whether he possessed "reasonable and probable grounds" to suspect that the one being chased was "escaping or attempting to escape" from having committed a felony

(second sentence).² Under either sentence of the statute--the “immediate knowledge” or the “reasonable and probable grounds” sentence – these mental states are “facts of consequence to the determination of the action,” and alleged mental states require evidence that may tend to make their existence more probable than they would be without the evidence. Either fact – “immediate knowledge” or “reasonable and probable grounds” – become “more probable” if evidence that probes the intent and motives behind Arbery’s entering the vacant house and running that day are admitted into evidence. How so?

(1) the McMichaels’ belief about Ahmaud Arbery’s intent and motive behind entering the vacant house;

It is the prior entering of 220 Satilla Drive and the “hauling ass” away from the vicinity of 220 Satilla Drive with another neighbor standing outside in front of 220 Satilla Drive waving in the direction of the fleeing Arbery on February 23, 2020 that sets the stage for the McMichaels’ acts. If Arbery entered the house for some non-criminal purpose previously and

² As the defendants will show later in a brief in support of a jury charge on citizen’s arrest, the second sentence of the statute, as case law shows, does not require that the felony suspected has occurred contemporaneous with the chasing. This renders inapposite the State’s argument that Ahmaud Arbery committed no felony on February 23, 2020. Other case law will render inapposite the State’s argument that no direct evidence exists that Arbery committed a felony on any other day, either. The focus of the statute is upon the “reasonable and probable grounds of suspicion,” which may be circumstantial, not the irrefutable proof of the fact suspected.

on February 23, 2020, as the state has contended, then he was never committing misdemeanor or felony offenses. Evidence of Arbery's intent and motive for entering 220 Satilla Drive previously and on February 23, 2020, can only be circumstantial, since no direct evidence to answer the "why" question exists. Showing that on other similar occasions Arbery entered or attempted to enter into commercial or residential structures, specifically to commit theft crimes (see 404(b) Notice incidents 7³, 8, and 9), makes it more probable that the McMichaels' assessment of Arbery's conduct and their belief that Arbery's intent and motive for being in the neighborhood and fleeing the area of the vacant house on February 23, 2020, was a nefarious one, was correct.

Thus, permissible non-character purposes, namely, to prove Arbery's intent and motive for entering 220 Satilla Drive, may tend to make a fact of consequence to the determination of the action – that Arbery was reentering a house he'd entered in at least three previous times, at night, to

³ Also, and outside the purview of this brief, the fact that Arbery was convicted of this felony shoplifting offense and was on probation for it aids the jury in answering why Arbery would run away from the McMichaels and eventually attack Travis McMichael. At a minimum, Arbery had unlawfully entered the house at 220 Satilla Road, and thus, was in violation of his probation. Had he turned right, he would have turned towards the rapidly approaching Glynn County police car and face possible detention by the police officer and a warrant for violating his probation. Thus, evidence that Arbery was on felony probation also answers the question of why he ran after being spotted, continued to run after the McMichaels tried to speak to him, and attacked Travis rather than try to head out of the neighborhood.

commit theft crimes – more probable than it would be without the evidence. Thus, this evidence is relevant and admissible under O.C.G.A. § 24-4-404(b).

(2) the McMichaels' intent and motive behind chasing Ahmaud Arbery;

If Arbery was running for pleasure and health, initially, and then when chased ran in fear from “strange men in pickup trucks,” then he was not “escaping or attempting to escape” capture for having committed a felony at some prior time in the neighborhood, nor was he running to evade capture after being seen trespassing or loitering in the vacant house. Evidence of Arbery’s intent and motive for the running he engaged in on February 23, 2020, can only be circumstantial, since no direct evidence to answer the “why” question exists. Some of those circumstances are intrinsic to the case, but others are extrinsic. Showing that on other similar occasions when seen engaging in suspicious behavior (*see* 404(b) Notice, incidents 2, 5, 6, 8, 9), Arbery’s intent and motive was to flee on foot to evade capture tends to make more probable than not that on February 23, 2020, his running was *not* for pleasure and health, or fear of unknown men with unknown motives, but was exactly what the McMichaels suspected it

was – running to evade capture, involvement with police, and possible criminal legal troubles.

Thus, permissible non-character purposes, namely, to prove Arbery's intent and motive for running away when spotted and continuing to run when confronted, may tend to make a fact of consequence to the determination of the action – that Arbery was fleeing capture for having been spotted in a house he'd unlawfully entered at night on at least three previous times, more probable than it would be without the evidence. Thus, this evidence is relevant and admissible under O.C.G.A. § 24-4-404(b).

(3) Travis McMichael's use of deadly force after Ahmaud Arbery turned toward him at the front of Travis McMichael's truck.

It is unlawful to resist a lawful citizen's arrest. The jury will have to determine Ahmaud Arbery's intent and motive when, in the final moments of the encounter between Travis McMichael and Ahmaud Arbery, Arbery attacked Travis McMichael, who was holding a shotgun. Evidence of Arbery's intent and motive for turning on McMichael and not continuing to run away can only be circumstantial, since no direct evidence to answer

the “why” question exists. Showing that on other similar occasions when seen engaging in suspicious behavior or caught in the act of committing crimes (*see* 404(b) Notice incidents 2, 3, 5, and 6), Arbery’s intent and motive was to turn on his confronter with aggression, tends to make more probable than not that on February 23, 2020, his attacking of Travis McMichael was *not* in his own defense but was exactly what McMichael suspected it was – an assault to kill or seriously injury McMichael.

Thus, permissible non-character purposes, namely, to prove Arbery’s intent and motive for attacking after feeling caught, may tend to make a fact of consequence to the determination of the action more probable than it would be without the evidence. Thus, this evidence is relevant and admissible under O.C.G.A. § 24-4-404(b).

June 1, 2021.



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



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

Robert G. Rubin ^{by FJA}
WEP

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

Jason B. Sheffield ^{by FJA}
WEP

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 **DEFENDANT McMICHAELS' BRIEF IN SUPPORT OF THEIR NOTICE OF INTENT TO INTRODUCE 404(b) EVIDENCE** on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it by email to:

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

June 1, 2021.


FRANKLIN J. HOGUE