IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

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

1.14.1

STATE'S SUPPLEMENTAL 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

The State is asking this Court to exercise its discretion, based on the appropriate analysis of Rule 404, Rule 401 and Rule 403, and exclude the proffered evidence of the other acts of the victim, Mr. Ahmaud Arbery. The defendants' contention, that the other acts of the victim, unknown to them, have a tendency to make their February 23, 2020, suspicions about the victim, more correct in hindsight, does not meet the standard for admission under these rules.

Summary

The defendants have failed to identify a genuine issue that is in dispute in this case that would make the other act evidence of Mr. Arbery relevant.

The defendants mischaracterize their questions of "why" as genuine "issues" in the case. Rule 401 pertains to the "existence of any fact," not the existence of any speculation. This includes the defendants' speculation about the victim or speculation as to "why" the deceased victim took certain actions. The victim's actions are not in dispute and "why" Mr. Arbery took those actions can never be

known. Why Ahmaud Arbery did anything on February 23, 2020, does not make it "more probable or less probable" that the defendants committed aggravated assault or murder, nor does it make it "more probable or less probable" that they were making a "citizen's arrest" or acting in self-defense (which are the genuine issues in dispute in this case).

The defendants and the State may make reasonable inferences from the undisputed facts. Other act evidence may not be used to bolster a party's inference drawn from the undisputed facts, especially when the other act evidence is only being used to allege that Mr. Arbery's actions were in conformity with his prior acts, which is impermissible propensity evidence.[1] The defendants have failed to provide this Court with a proper, non-character purpose for the victim's other acts.

The purported need, according to the defendants, for the other acts evidence (for the Rule 403 analysis) is to bolster the defendants' speculation about Mr. Arbery. The defendants' beliefs, intentions and motivations, along with the reasonableness of their actions on February 23, 2020, cannot be proven through the prior acts of a third party which were unknown to the defendants.

It is illogical to contend that the victim's other acts, unknown to the defendants, make it more probable that the defendants unfounded suspicions (that Mr. Arbery's February 23, 2020, act of running down the street was nefarious because he must have done something wrong) were correct. It is also illogical to contend that the victim's other acts, unknown to Travis McMichael, make it more probable that his suspicion (that Mr. Arbery was going to offer him violence) was correct.

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[1] The defendants, in Footnote 1 of their 1.14.1 Brief contend that the State will "open the door" to the admissibility of these other acts since the defendants will want to use the other act evidence to rebut the State's inferences. See Appendix B below for an overview of why this would be inappropriate.

Thus, the defendants' contention, that the other acts of the victim, unknown to them, have a tendency to make their February 23, 2020, suspicions about the victim, more correct in hindsight, does not meet the standard for admission under these rules.

The Law

In order for the victim's other acts to be admissible, per *Strong v. State*, 309 Ga. 295, 300-301 (2020), this 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;

The Court must look to OCGA § 24-4-401 ("Rule 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." This is a binary question — evidence is either relevant or it is not.

(2A) What is the issue that is in dispute? What "fact that is of consequence to the determination of the action" is in dispute?

(2B) How is this evidence relevant as to that issue? In other words, "more probable or less probable."

(3) the probative value of the other acts evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading

the jury or by considerations of undue delay or waste of time, and thus, the evidence must satisfy the four part analysis and requirements of O.C.G.A. § 24-4-403, *Bradshaw v. State*, 296 Ga. 650, 656-657 (2015) and *Jones v. State*, 301 Ga. 544, 546-547 (2017).

Probative value depends significantly on the quality of the evidence and its logical connection to the fact for which it is offered. *State v. Stephens*, 310 Ga. 56, 60 (2020) (holding that a trial court does not abuse its discretion when it determines that the connection between the evidence and the purpose for which it is being offered is too tenuous to establish relevance or that the chain of inferences a jury would be required to make was too attenuated to cause the evidence to be relevant.)

Rule 403 "is designed to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *McKinney v. State*, 307 Ga. 129, 137 (2019).

(1) The Other Acts

It appears from Defendant's Supplemental Brief 1.14.1, and the presentation of evidence at the Motions Hearing on May 12 and 13, 2021, that the defendants have abandoned the following other acts:

Other Act #1 – March 14, 2013 – Mutual combat. A fight between two groups of men at the South Georgia Technical School in Americus, Georgia.

Other Act #4 – June 17, 2018 – Mom's car keys.

Other Act #10 – Mutual Combat. A cellphone video shows a "fist fight" between two men.

The State does not dispute Mr. Arbery being the subject of the "other acts" listed in the defendants' initial brief and presented at the motions hearing (Other acts 2, 3, 5, 6, 7 and 8).[2]

The State takes exception with other act #9 (shoplifting at Love's gas station) as there is insufficient evidence to prove Mr. Arbery committed these acts because the credibility and believability of the witness identifying him is highly doubtful.

(2) Is the Other Act evidence relevant to an issue other that the victim's character? [3]

In order for other act evidence to be admitted, it must be relevant to a genuine issue in dispute in the case, meaning the evidence must make a fact, that goes toward the genuine issue in dispute, more probable or less probable.

In *Heard v. State*, 309 Ga. 76, 86 (2020) the Georgia Supreme Court found that the trial court abused its discretion when it admitted other acts to show "intent" when, in fact, the State had not charged the defendant with any crimes related to theft, and whatever intent the defendant may have had with regard to stealing a vehicle was not a fact that the State had to establish to prove his guilt and thus was not a fact "of consequence to the determination of the action" under OCGA § 24-4-401.

Here, the defendants wish to prove their affirmative defense of "citizen's arrest." Defendant's 1.14.1 pages 2-3. This centers around "the McMichael's belief

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[2] Please also see Appendix A of the State's 1.14 Brief for an overview of the "other acts" including dates and descriptions.

[3] O.C.G.A. § 24-4-404(b) states, "[e]vidence of other crimes, wrongs, or **acts shall not be admissible to prove the character of a person in order to show action in conformity therewith**. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *United States v. Gulley*, 526 F3d 809, 819 (5th Cir. 2008) points out that "a self defense claim may be proven regardless of whether the victim has a violent or passive character," and provides a collection of federal cases on this issue.

about Ahmaud Arbery's intent and motive behind entering the vacant house," "the McMichael's intent and motive behind chasing Arbery," and "Travis McMichael's use of deadly force after Ahmaud Arbery turned toward him at the front of Travis McMichael's truck." Defendant's 1.14.1 pages 5-7. The defendants state at page 4: "Either facts – "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."

This is not true under the test in *Heard*. Mr. Arbery's intent in entering the vacant house and running that day are not necessary to establish whether the defendants were engaged in a lawful citizen's arrest, and thus are not facts "of consequence to the determination of the action" under OCGA § 24-4-401.

Here the defendants have listed four "issues" that are not genuinely in dispute in the case; they are just unknowns, that can never be known. They are questions that cannot be answered because the answers are only known to the deceased victim.

All the defendants or the State can do is draw reasonable inferences from the evidence. However, Rule 404 does not provide for propping up one sides "inferences" with propensity evidence, which is what the defendants seek to do here, despite their attempt to call it "intent and motive."[4]

(2A) What "fact that is of consequence to the determination of the action" is in dispute? The defendants' list of four "issues" are not factually in dispute making the other act evidence of the victim irrelevant.

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[4] Propensity evidence will always survive a relevancy test, as it does tend to make it more likely, that if someone committed crime "A" last year, he probably committed crime "A" again this year. That is why propensity evidence is specifically not allowed under Rule 404.

i. None of the four "issues," listed by the defendants on page 2 of their brief, are genuine factual issues in dispute in this case. The charges in the indictment are in dispute:

- Aggravated assault and false imprisonment vs. the affirmative defense of "citizen's arrest."

- Murder, felony murder and aggravated assault vs. the affirmative defense of self-defense.

The State agrees that the facts of consequence to the determination of this action are whether the defendants were committing the crimes of aggravated assault, criminal attempt to commit false imprisonment and false imprisonment, as charged in the indictment, or whether the defendants were engaged in a lawful citizen's arrest, an affirmative defense to the charges in the indictment. Defendant's 1.14.1 pages 2-3.

As the defendants appear to concede, if they were not engaged in a lawful citizen's arrest, then they were committing the felonies of aggravated assault, criminal attempt to commit false imprisonment and false imprisonment, and thus murder. In addition, if they were not engaged in a lawful citizen's arrest, then they were the first aggressors and may not claim self-defense to the charge of murder. See OCGA § 16-3-21 (b) (3). They also may not claim self-defense if they were engaged in committing felonies that resulted in the death of Mr. Arbery. See OCGA § 16-3-21 (b) (2). This leads to Mr. Arbery having a lawful right to defend himself against their unlawful use of force via their unlawful "arrest." *Glenn v. State*, 310

Ga. 11, 27 (2020) (holding that "the common-law right to resist an unlawful arrest or detention remains in effect in Georgia").

Failure to prove by a preponderance of the evidence that the defendants were engaged in a lawful citizen's arrest, under O.C.G.A. § 17-4-60, cuts off the defendants' ability to then assert self-defense to the murder charges. Thus, it is obvious that their desire here is to elevate their unfounded suspicions to the levels of knowledge that are required for this affirmative defense.

None of other act evidence proffered by the defendants has "any tendency to make the existence of any fact that is of consequence to the determination for the action more probable or less probable that it would be without the evidence." OCGA 24-4-401. WHY Mr. Arbery did anything on February 23, 2020, (as opposed to WHAT he did, which is not in dispute) does not make it "more probable or less probable" that the defendants committed aggravated assault or murder, nor does it make it "more probable or less probable" that they were making a "citizen's arrest" or acting in self-defense.

ii. Regarding "proper purposes," there must be an issue genuinely in dispute, such as when a defendant claims, in the face of the State's evidence, he had no intent to commit the crime, he had no motive to commit the crime, he wouldn't even know how to commit the crime, or he just made a mistake. Such contrary assertions to the State's evidence make a defendant's assertion (i.e. "I wouldn't even know how to commit the crime") a genuine issue. Leading to the proper purpose for other act evidence being the defendant's knowledge of how to commit that crime. As applied here, there are no disputes as to what took place, as for the most part, it can be seen on video.

What motivated[5] the victim on February 23, 2020, or what his intentions[6] were that day, are irrelevant to the defendants' affirmative defenses.[7] See *Jones v. State*, 358 Ga. App. 584, 587 (2021) (holding that the trial court did not abuse its discretion in a robbery case in excluding evidence that the source of the victims money came from selling drugs, as it was of limited probative value, which "was substantially outweighed by its danger of creating prejudice").

The defendants listed numerous "proper purposes" for the admission of this evidence in their original 1.14 brief. They appear to have abandoned them (offering no argument, citation or legal support for those contentions), and now do not list any proper purpose for their proffered other act evidence, nor any citation or legal support for their contentions, except to repeatedly use the words "Arbery's intent and motive."[8]

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[5] It appears that the defendants misuse the word motive in the context of Rule 404. To properly show motive, the extrinsic evidence must be logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged. *Heard v. State*, 309 Ga. 76, 85 (2020); see also *Whaley v. State*, 343 Ga. App. 701, 707 (2017); *Rouzan v. State*, 308 Ga. 894, 899 (2020). Generic motives of theft, running away or being aggressive are not allowed. *Thompson v. State*, 302 Ga. 533, 540 (2017). An example of proper motive is when the other crime committed specifically led to committing the crime in question (i.e. the defendant was previously robbed while selling methamphetamines, which led him a week later to murdering the robber and stealing back the drugs, as listed in the indictment).

[6] Intent may be "inferred when it is the natural and necessary consequence of the act." 2 Ga. Jury Instructions - Criminal § 1.41.10. Here, Mr. Arbery never committed a crime of theft from 220 Satilla Drive. However, the defendants wish to posit that his intent in going inside the house under construction, looking around and then leaving was done with the intent to eventually commit theft, solely based on his prior acts at Loves and Walmart, neither of which were burglaries. Defendant's 1.14.1 page 5.

[7] *Kilpatrick v. State*, 308 Ga. 194, 197-198 (2020) determined that "the victim's alleged membership in a motorcycle gang, unknown to Appellant at the time of the shooting, was not relevant or admissible as to Appellant's justification defense and so the trial court did not err in that respect. See OCGA §§ 24-4-402, 24-4-404 (a)." Followed by *Smith v. State*, 854 S.E.2d 721 (2021), where the defendant failed to cite to any authority for his contention that evidence that the victim was a gang member would have been relevant to his claim of self-defense.

[8] The State is concerned that the defendants have conflated the concepts of facts in dispute (genuine issues at trial) and drawing reasonable inferences from those facts. The State believes that when trial comes, the defendants will claim that they are entitled to introduce the other act evidence under the guise of "relevancy" to support their inferences, since each party is drawing

But the defendants are offering "Arbery's intent and motive" in the context of "the McMichael's belief about Ahmaud Arbery's intent and motive behind entering the vacant house," "the McMichael's intent and motive behind chasing Arbery," and "Travis McMichael's use of deadly force after Ahmaud Arbery turned toward him at the front of Travis McMichael's truck." The defendants state at page 4: "Either facts – "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." Here they blatantly state that their intended use of the victim's other acts is to engage in speculation as to "why" did acted as he did, in order to elevate their unfounded suspicions to the levels of knowledge that are required for the affirmative defense of citizen's arrest.

There is no logical connection for the proffered Rule 404 other act evidence, since "Arbery's intent and motive" to do anything on February 23, 2020, is irrelevant to the defendants' affirmative defenses and their beliefs, their intent and motive, or Travis McMichael's use of deadly force. The defendants' contention, that the other acts of the victim, unknown to them, have a tendency to make their February 23, 2020, suspicions about the victim, more correct in hindsight, does not meet the standard for admission under these rules.

(3) Defendants failed to adequately address the Rule 403 analysis.

Pretermitting whether Mr. Arbery's other acts are relevant for a proper purpose, not all relevant evidence is admissible. O.C.G.A. § 24-4-403 grants the trial court discretion to exclude relevant evidence "if its probative value is substantially

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different inferences from the undisputed facts. Thus, we provide this Court with an analysis in Appendix A of this brief.

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."

In this case, Mr. Arbery's other acts are being "dragged in by the heels for the sake of its prejudicial effect." *Flowers v. State*, 307 Ga. 618, 622-623 (2020). The State requests that this Court exercise its discretion and utilize the major function of Rule 403, which is to exclude matter of scant probative force.

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) need for the evidence, (2) overall similarity of the other acts and the acts charged, and (3) the temporal remoteness of the other acts.

This Court may then also exclude the other act evidence in this case if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time.

This Court may also determine that the other act evidence lacks sufficient probative value. This may be due to the quality of the evidence. See *DiPietro v. State*, 356 Ga. App. 539, 549 (2020) (holding that the trial court did not err in excluding the expert's conclusions since they lacked sufficient probative value, having been based upon a "raggedy patchwork of sources" leading to guesswork and speculation). Or this may be due to the fact that the jury would have to make a number of inferences, that are simply too long, dubious, or attenuated, in order to link the other act evidence to a legally relevant point. *State v. Stephens*, 310 Ga. 56, 60 (2020) (Holding that a trial court does not abuse its discretion when it determines that the connection between the evidence and the purpose for which it is being

offered is too tenuous to establish relevance or that the chain of inferences a jury would be required to make was too attenuated to cause the evidence to be relevant).

(A) What is the Defendants' need for this evidence? To prove what?

Overview – Need for this Evidence

Evidence of the defendants' beliefs, intentions, motivations, along with the reasonableness of their actions on February 23, 2020, (1) cannot be proven through the prior acts of a third party, which were unknown to the defendants and (2) do not make it more probable that their February 23, 2020, thoughts were correct.

The defendants would like this Court to believe that they need this evidence in order to prove they were lawfully making a citizen's arrest under O.C.G.A. § 17-4-60. As the defendants assert, "[e]ither facts – "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." Defendant's 1.14.1 page 4.

However, as can be seen by their three subsequent arguments, the defendants' admitted purpose for this evidence is to attempt to turn the defendants' (admitted as unfounded) speculation, assumptions and hunches into "immediate knowledge" or "reasonable and probable grounds," in order to conform to the statutory requirements of O.C.G.A. § 17-4-60. In other words, they claim they need this evidence because somehow, the other acts of Mr. Arbery, unknown to them, make their assumptions or thoughts more "correct."[9]

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[9] *State v. Jones*, 297 Ga. 156, 163 (2015) ("We caution that the potential for prejudice caused by the introduction of other acts evidence is great and the often subtle distinctions between the permissible purposes of intent and knowledge and the impermissible purpose of proving character may sometimes be difficult to discern. The danger of the subtlety of this distinction is that a jury could consider prior acts evidence for an impermissible purpose, thus elevating the importance of

Analysis– Need for this Evidence

The basic flaw of the defendant's argument is their contention that their "immediate knowledge" or their "reasonable and probable grounds" are "mental states." Defendants' 1.14.1 page 4. They are not "mental states," they are facts. The defendants either had "immediate knowledge" that Mr. Arbery had just committed a felony or they did not. The defendants either had "reasonable and probable grounds of suspicion" that Mr. Arbery committed a felony and was escaping (from a felony committed in their presence or within their immediate knowledge), or they did not. Asking "why" Mr. Arbery did anything sheds no light on the defendants' actual knowledge on February 23, 2020.

The defendants state in their brief that they will present evidence of **their** "**belief** about Ahmaud Arbery's intent and motive behind entering the vacant house;" **their "intent and motive** behind chasing Ahmaud Arbery;" and the **reasonableness of Travis McMichael's** use of deadly force when he shot the unarmed Mr. Arbery in the chest.[10] Defendants 1.14.1 page 3.

Evidence of the defendants' beliefs, intentions, motivations, along with the reasonableness of their actions on February 23, 2020, cannot be proven through the prior acts of a third party which were unknown to the defendants. Nor do the victim's other acts make it more probable that the defendants' February 23, 2020 beliefs were correct.

The State agrees that what was in the immediate knowledge of the defendants, which can be shown by the evidence, is relevant to this case. Whether the defendants

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Rule 403's **balancing of the need for other acts evidence against the dangers of its introduction**.")

[10] When the person claiming immunity uses force intended or likely to cause death or great bodily harm, that person must also prove by a preponderance of the evidence that such potentially lethal force was based on a reasonable belief that the force was necessary to prevent death or great bodily injury at the hands of the alleged victim or to prevent the commission of a forcible felony. See OCGA § 16-3-21 (a).

had "reasonable and probable grounds of suspicion" that Mr. Arbery was the one who had committed the felony and was escaping (from a felony committed in their presence or within their immediate knowledge – which are synonymous[11]) on February 23, 2020, is also relevant to this case.[12]

This leads us to the defendants' assertion that the other acts evidence of Mr. Arbery, unknown to the defendants, make it more probable that they had "immediate knowledge" that he committed a felony on February 23, 2020 (or any other date). Defendants 1.14.1 page 4. The State is unclear on how something unknown to someone would make it more probable that they knew something else.

For example, how does evidence that Mr. Arbery attempted to shoplift a television at Walmart with his friends on December 1, 2017, unknown to the defendants, make it more probable that Mr. Arbery committed an unnamed and unproven felony on February 23, 2020, in the presence of the defendants, especially when the defendants tell the police that they do not know if Mr. Arbery committed any crime?

This logic holds true for the defendant's other assertions. How does evidence that Mr. Arbery was given a criminal trespass warning on August 18, 2018, in Waynesboro, unknown to the defendants, make it more probable that the defendants had "reasonable and probable grounds of suspicion" that Mr. Arbery was the one who had committed (the unnamed) felony and was escaping (from that unnamed

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[11] *State v. Greene*, 178 Ga. App. 875, 875 (1986) ("It has been held that "[t]o justify the arrest without warrant, the officer need not see the act which constitutes the crime take place, if by any of his senses he has personal knowledge of its commission." (citing to *Lynn v. State*, 130 Ga. App. 646 (1974) ("We think that the words, 'in his presence' as used in the Penal Code (1910), § 917 [Code 1933, § 27-207], and the words 'within his immediate knowledge,' as used in § 921 [Code 1933, § 27-211] are synonymous)). Please see Appendix C on this issue.

[12] The State requests that the Court refer to Appendix C of the State's original 1.14 brief, which lays out the statements of Greg McMichael showing he had no knowledge of any felony committed by Mr. Arbery at any time. Please also see page 7 of the State's original 1.14 brief where Greg McMichael asserts to Officer Rash, on February 11, 2020, that Mr. Arbery was criminally trespassing, a misdemeanor.

felony committed in their presence) on February 23, 2020? Defendants 1.14.1 page 4.

Defendant's assertion #1 - Defendants 1.14.1 page 4 - 6.

Defendants assert that Mr. Arbery's other acts #7, 8 and 9 (Shoplifting at Walmart, Blount property and Love's) make it more probable that the defendants' uninformed assessment of Mr. Arbery as a nefarious[13] character was correct.[14] The defendants themselves assert that they made an assessment of Mr. Arbery's conduct, of quickly running down the street on February 23, 2020, and concluded that his conduct was "nefarious." Defendant's 1.14.1 page 5. This is improper character evidence, which is exactly what Rule 404 prohibits: "acts shall not be admissible to prove the character of a person."

The defendants also assert that they made an assessment that Mr. Arbery's intent and motive for being in Satilla Shores, and then fleeing from the strange men assaulting him, was "nefarious." Defendant's 1.14.1 page 5. The State notes that this does not come anywhere close to the standard needed for "reasonable and probable grounds of suspicion" that Mr. Arbery was the one who had committed the felony and was escaping (from that unnamed felony committed in their presence) such that it would justify his warrantless arrest.[15] Regardless, this is improper character and propensity evidence.

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[13] Per Merriam-Webster the definition of nefarious is: flagrantly wicked or impious: evil; the Synonyms are: bad, black, dark, evil, immoral, iniquitous, rotten, sinful, unethical, unlawful, unrighteous, unsavory, vicious, vile, villainous, wicked, wrong.

[14] Should this be allowed, the State will want to rebut this assertion with its own 404(b) evidence about the true nature and source of the defendants' thoughts in their uninformed, knee-jerk assessment of Mr. Arbery as a nefarious character.

[15] The term "reasonable suspicion" is now associated with the police making a second-tier investigatory detention, which is not provided for under O.C.G.A. 17-4-60. See *Dougherty v. State*, 341 Ga. App. 120, 125-126 (2017). However, in *Davidson v. State*, 125 Ga. App. 502, 506-507 (1972) the Court of Appeals equated these terms to probable cause: "Our Code on the other hand only allows such arrest if the offense is being committed in the presence of an officer (§ 27-207),

Defendant's assertion #2 - Defendants 1.14.1 page 6-7.

Defendants assert that Mr. Arbery's other acts #2, 5, 6, 7, 8 and 9 (Handgun on school property, two interactions with the police in Waynesboro, Blount property and Love's) make it more probable that the defendants' assumption, that Mr. Arbery was running on February 23, 2020, because he had just done something wrong, was correct.[16]

The defendants themselves claim that they made a speculative assessment, that Mr. Arbery's conduct of quickly running down the street on February 23, 2020, and then fleeing from the strange men assaulting him, was because he was "running to evade capture, involvement with the police, and possible criminal legal troubles." Defendants 1.14.1 page 6-7. Once again, this does not come anywhere close to the standard needed for "reasonable and probable grounds of suspicion" that Mr. Arbery committed a felony and was escaping (from that unnamed felony committed in their presence) such that it would justify his warrantless arrest.[17] This is improper character evidence, which is exactly what Rule 404 prohibits: "acts shall not be

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or by either an officer or private person "upon reasonable and probable grounds of suspicion" -- that is, on probable cause -- if (1) the offense is a felony and (2) the offender is attempting to escape").

[16] Should this be allowed, the State will want to re-butt this assertion with its own 404(b) evidence about the true source and nature of the defendants' assessment in their knee-jerk assessment of Mr. Arbery as someone who must have just committed a crime.

[17] For an explanation of the common law for a citizen's arrest ("when a felony actually had been committed, a private person was authorized to arrest the person whom he reasonably believed committed the felony") see *Adams v. Carlisle*, 278 Ga. App. 777, 786-787 (2006) (reversing a grant of summary judgement, holding that it was for the jury to decide whether the security guards had committed the crime of false imprisonment). While common law may support the "Old West" wanted poster theory – seeing a wanted poster for a person, who is wanted for a specific felony (thus, "when a felony actually had been committed" part of the common law), a person could arrest the wanted person when they reasonably believed he was the person from the poster. Here the defendants have absolutely failed to inform this Court as to what felony Mr. Arbery committed, for which they were making their warrantless arrest. The State contends that they are unable to do so, since at no time did any defendant indicate that they knew Mr. Arbery had committed any crime on February 23, 2020.

admissible to prove the character of a person in order to show action in conformity therewith."

Defendant's assertion #3 - Defendants 1.14.1 page 7-8.

On page 7 of their brief, the defendants state that is unlawful to resist a lawful citizen's arrest. However, the common-law right to resist an unlawful arrest or detention remains in effect in Georgia, per *Glenn v. State*, 310 Ga. 11, 27 (2020). This means that the only issue in dispute is whether the defendants were making a lawful citizen's arrest, which, as they have asserted, is their affirmative defense in this case.

The other acts #2, 3, 5 and 6 (all involving police interaction: Handgun on school property, minding his own business in the park, and the two interactions with the police in Waynesboro) do not make it more or less probable that the private-citizen defendants were making a lawful citizen's arrest. The other acts also do not make it more or less probable that Travis McMichael's suspicion ("what McMichael suspected it was" - Defendant 1.14.1 page 8) that Mr. Arbery meant to kill or seriously injure him, was correct. See *Beck v. State*, 310 Ga. 491, 498 (2020) (Holding that 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). Once again, the State is unclear on how something unknown to someone (other acts by Mr. Arbery unknown to Travis McMichael) would make it more probable that someone's (Travis McMichael's) "suspicions" were correct.

Pretermitting this assertion by the defendants, suspicion that someone means to kill or seriously injure you is NOT the standard in a self-defense claim, since "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." O.C.G.A. § 16-3-21(a) (emphasis added). Suspecting that someone means to hurt you does not rise to the statutory standard of reasonably believing you have to use lethal force to prevent your own death.

Conclusion– Need for this Evidence

The defendants, through their own assertions, wish to tender the other act evidence as impermissible character and propensity evidence: (1) Mr. Arbery was a nefarious character, just look at his past; (2) Mr. Arbery must have been "running to evade capture, involvement with the police, and possible criminal legal troubles," since he had done that before; and (3) Mr. Arbery must have offered Travis McMichael unlawful force since Mr. Arbery used swear words and attitude with police officers in the past. This character and propensity evidence, unknown to the defendants on February 23, 2020, does NOT make it more likely that the defendants were lawfully making a citizen's arrest under O.C.G.A. § 17-4-60.

The defendants have failed to show a permissible need for this evidence, have failed show any relevancy for the evidence and have actually demonstrated that its true purpose is to simply smear the character of the victim and assert that he was probably going to act in a certain fashion since he acted that way in the past.

(B) What is the overall similarity of the other acts and the acts charged?

The State previously asked, in its original 1.14 brief, what February 23, 2020 relevant acts by the victim, that are in dispute, were the defendants trying to prove. The defendants have still not answered that question, and therefore, are obviously unable to provide a similarity analysis. See *Strong v. State,* 309 Ga. 295, 310 (2020)

(noting that Rule 404(b) analysis requires consideration of both the similarities and the dissimilarities between the other acts evidence and the charged crime).

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 by the victim, such that the other act by the victim tends to make a fact of consequence (not their suspicions) in the defendants' case in chief more probable.

However, what Mr. Arbery did on February 23, 2020, is not in dispute. Why Mr. Arbery did what he did (per the defendants four "issues") 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, nor did they have knowledge of his other acts.

An example would be other act # 7. How is attempting to shoplift a television at Walmart similar to anything Mr. Arbery did on February 23, 2020? For other act #2, how is foolishly taking a handgun to a school basketball game in 2013, getting caught with it by the police and then running from them, similar to his actions on February 23, 2020? The defendants have failed to demonstrate how all of the other act evidence, with the exception of one, is similar to Mr. Arbery's undisputed actions on February 23, 2020.[18] Please see the State's original brief 1.14 at pages 11-15.

The defendants failed to provide this Court with specifics of how the other acts and the specific actions of Mr. Arbery on February 23, 2020, were similar. This is because (1) there are no "disputed" actions by Mr. Arbery (there are only disputed

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[18] The State concedes that trespassing at the Blount property, which is between Mr. Arbery's home and the Satilla Shores neighborhood, and then running away from the owner, is similar to his actions on February 23, 2020, but the defendants have failed to meet the other Rule 404, Rule 401 and Rule 403 criteria for this other act to be relevant, since it is not in dispute that Mr. Arbery trespassed at 220 Satilla Drive on February 23, 2020.

inferences as to why he did what he did), and (2) almost all of the other act evidence is dissimilar to the undisputed actions of Mr. Arbery on February 23, 2020.

(C) The temporal remoteness of the other acts.

The defendants failed to address the temporal remoteness of the other acts. It is for this Court to weight whether the temporal remoteness is of any real concern, given that all the acts, with the exception of other act #2 which took place in 2013, allegedly took place within the five years prior to the murder.

(D) Is the other act evidence's probative value (if any) substantially outweighed by other factors?

i. Is there unfair prejudice?

The trial court must determine if the other act evidence (if relevant to a genuine 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. *Old Chief v. United States*, 519 U. S. 172, 180 (1997).

While the other act evidence is not of an egregious nature, such that it would shock the sensibilities of the jurors, it is of the nature that it would tend to devalue the life of Mr. Arbery. The State fully expects the defendants to present evidence of their lack of criminal history, their prior employment history, their military service and to assert that the actions they took are those that "any red-blooded American citizen" would take to protect their neighborhood. The defendants will then make sure to contrast this against the seven proffered other acts of Mr. Arbery, casting him

as a criminal with no respect for law enforcement, in order to achieve jury nullification.

The other act evidence does have the capacity to push the jury into a "not guilty" verdict. The State askes that this Court use its discretion to find that the other acts evidence has no probative value in this case and that any probative value it may have is substantially outweighed by the danger of unfair prejudice.

ii. Is there confusion of the issues?

There is confusion of the issues. The main issue is whether the defendants were committing the crimes of aggravated assault, criminal attempt to commit false imprisonment and false imprisonment, as charged in the indictment, or whether the defendants were engaged in a lawful citizen's arrest, their affirmative defense to these charges. The second potential issue is whether Travis McMichael acted in self-defense when he shot Mr. Arbery. The introduction of the victim's other acts would create confusion as to whether it is the defendants' actions on February 23, 2020, or the victim's actions in 2013, 2017 and 2018, that are the relevant acts to be considered by the jury.

In addition, the defendant's entire argument is confusing: that the other acts of the victim, unknown to them, have a tendency to make their February 23, 2020, suspicions about the victim, more correct in hindsight. Defendants 1.14.1 pages 5, 6-7, 8.

iii. Is there danger of misleading the jury?

There is substantial danger of misleading the jury. The other act evidence may lead the jury to believe that they may consider the character of the victim in their analysis of the defendants' affirmative defenses. The other act evidence may lead the jury to believe that the defendants were authorized to make a citizen's arrest for

actions they knew nothing about, such as trespassing at the Blount property or stealing form Love's. The other act evidence may lead the jury to believe that it is not illegal to murder a "bad" person or someone who had previously been convicted of a crime. The other act evidence may lead the jury to believe, that while Mr. Arbery did not commit any felony that day, that there was a future dangerousness, that he would eventually commit crimes, and therefore, the defendants' actions were somehow justified on this basis. And finally, the defendants may get their wish: the other act evidence may lead the jury to erroneously believe that hindsight confirmation of their suspicions mean that the defendants did have probable cause to arrest Mr. Arbery for a felony that day.

iv. Considerations of undue delay and waste of time in the trial.

The seven other acts proffered by the defendants will take at least two days to present to the jury. Several of the other acts have lengthy videos associated with them. The cumulative effect of presenting the worst seven days in the life of the twenty-five-year-old victim is that the jury will believe, as the defense argued to this Court, that all his days, for the last seven years, were just like these days. This in turn will lead to the jury devaluing his life. The creation of a mini-trial about each instance will cause undue delay and be a waste of time.

(4) Conclusion

The defendants' contention, that the other acts of the victim, unknown to them, have a tendency to make their February 23, 2020, suspicions about the victim, more correct in hindsight, does not meet the standard for admission under the Georgia rules of evidence.

The State accordingly requests an order excluding the proffered other acts of Mr. Arbery, as they violate the rules against character and propensity evidence, have no relevance to the reasonableness of the defendants' use of force against Mr. Arbery, nor relevance as to whether the defendants were engaged in lawful citizen's arrest. In addition, the State askes this Court to find that the other act evidence's probative value (if any) is substantially outweighed by the danger of unfair prejudice, as it presents a serious risk of jury nullification, confusion of the issues, and misleading the jury as to the real issues in this case.

The State also requests that this order preclude any attempt to place this other act evidence before the jury via cross-examination, or by any other method, unless and until permission of this Court allows such questions or method.

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

This the 17th day of June, 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 1.14.1 STATE'S RESPONSE TO DEFENDANTS NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO O.C.G.A. § 24-4-404 via the Odyssey E-File System to:

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This the 17th day of June, 2021.

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APPENDIX A

Review of Defendant's list of four issues.

The State feels it prudent to address the difference between "facts in dispute" (genuine issues at trial) and when attorneys draw a reasonable inference from the facts as part of their argument.

Making an inference from undisputed evidence is for the jury and is not the standard for the admission of other acts under Rule 404(b).[19] The defendants, just like the State, cannot take undisputed facts, draw an inference from them, and then prop up that inference with Rule 404 other acts evidence to show propensity or conformity with that other act.[20]

The State is concerned that the defendants have conflated the concepts of facts in dispute (genuine issues at trial) and drawing reasonable inferences from those facts. The State believes that when trial comes, the defendants will claim that they are entitled to introduce the other act evidence under the guise of "relevancy" to support their inferences. Thus, we provide this Court with the following analysis.

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[19] O.C.G.A. § 24-14-9 states, "In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved."

[20] The only instance where this is allowed is with the defense of "some other dude did it" where the other person's prior acts provide a reasonable inference that someone other than the defendant committed the crime. See *Gilreath v. State*, 298 Ga. 670, 673-674 (2016) (holding, in a child homicide case, that it was reversible error to exclude evidence that the other adult in the household had a history of inappropriate behavior toward her own infant child, since it raised the inference that the defendant was innocent, and the other adult committed the crime). But see *Pittmon v. State*, 342 Ga. App. 874, 877-878 (2017) (holding that the trial court did not abuse its discretion by excluding other act evidence that supported the defendant's inference that someone else burned the child because it was propensity evidence offered to show "that the mother's bad parenting of other children made it more likely that she burned [the victim] in this case").

"Why was Ahmaud Arbery in Satilla Shores, specifically in 220 Satilla Drive, a vacant house under construction?"

The facts are not in dispute. This question is not relevant to whether the defendants were engaged in a lawful citizen's arrest under O.C.G.A. § 17-4-60.

1) None of the three defendants knew that Mr. Arbery had entered 220 Satilla Drive on February 23, 2020, per their own statements to the police.

2) The only person who knows "why" Mr. Arbery went inside 220 Satilla Drive, looked around and then left, is Mr. Arbery. His actions are not in dispute and can be seen on video.

3) The defendants, like the State, may make reasonable inferences based on the undisputed facts (the video). The State fully expects the defendants to assert that Mr. Arbery was planning on eventually burglarizing 220 Satilla Drive ("commit theft crimes" per Defendants 1.14.1 page 5-6), or something similar. But utilizing other act evidence of his prior "theft crimes" to prove that Mr. Arbery must have been planning on acting in conformity with the prior behavior, sometime in the future, is simply speculative propensity evidence, which is not allowed by the law.

"Why did Ahmaud Arbery run after having been spotted inside Satilla Drive?"

The facts are not in dispute. This question is not relevant to whether the defendants were engaged in a lawful citizen's arrest under O.C.G.A. § 17-4-60.

1) None of the three defendants knew that Mr. Arbery had entered 220 Satilla Drive on February 23, 2020, per their own statements to the police.

2) The only person who knows "why" Mr. Arbery went inside 220 Satilla Drive on February 23, 2020, looked around, took nothing and then ran off very quickly is Mr. Arbery. His actions are not in dispute and can be seen on video.

3) The defendants, like the State, may make reasonable inferences based on the undisputed facts. The State fully expects the defendants to assert that Mr. Arbery ran off so quickly because he felt "guilty" that he was inside the open house under construction or that he was "running to evade capture, involvement with the police,

and possible criminal legal troubles." Defendants 1.14.1 page 6-7. An inference is not a fact in dispute. And utilizing other act evidence of his prior acts of running from the police, to prove that Mr. Arbery must have been acting in conformity with the prior behavior on February 23, 2020, is propensity evidence, which is not allowed by the law.

"Why did Ahmaud Arbery continue to run when the McMichaels caught up to him to tell him to stop running and talk to them?"

The facts are not in dispute. This question is not relevant to whether the defendants were engaged in a lawful citizen's arrest under O.C.G.A. § 17-4-60.

1) Mr. Arbery was under no obligation to stop running and talk to the McMichaels. This is commonly known as freedom. Mr. Arbery was free to choose to respond to the McMichaels in any way he wanted. Mr. Arbery was free to ignore them and their demands.

2) The only person who knows "why" Mr. Arbery chose to ignore the McMichaels and keep running is Mr. Arbery. His actions are not in dispute.

3) The defendants, like the State, may make reasonable inferences based on the undisputed facts. The State fully expects the defendants to assert that Mr. Arbery refused to obey the commands of the strangers chasing him down in their pick-up trucks because he was "running to evade capture, involvement with the police, and possible criminal legal troubles." Defendants 1.14.1 page 6-7. An inference is not a fact in dispute.

The real issues in dispute are the actions of the McMichaels, whether they were committing the crimes of aggravated assault and false imprisonment or whether they were engaged in a lawful "citizen's arrest." Utilizing other act evidence of Mr. Arbery running from the police, to prove that Mr. Arbery must have been acting in conformity with the prior behavior on February 23, 2020, is propensity evidence, which is not allowed by the law.

"Why did Ahmaud Arbery turn toward Travis McMichael to attack him instead of continuing to run away from him and out of the neighborhood?"

1) While Mr. Arbery can be seen turning toward Tavis McMichael at the front of the pick-up truck, fractions of a second before he is shot in the chest, the pick-up truck obscures any view of what Mr. Arbery actually did, and we only have the word of Travis McMichael that Mr. Arbery turned toward him to attack him. The question of "why" Mr. Arbery did not continue to run away from Travis McMichael is not relevant to whether the defendants were engaged in a lawful citizen's arrest under O.C.G.A. § 17-4-60 nor relevant to whether Travis McMichael reasonably believed that his must use lethal force.

2) The only person who knows "why" Mr. Arbery turned in front of the pick-up truck is Mr. Arbery. His actions are not in dispute and this turning at the front of the pick-up truck can be seen on video.

3) The other act evidence is in no way relevant on this "issue" as Mr. Arbery did not "attack" anyone in any of the prior acts. Defendants mischaracterize other acts #2, 3, 5, and 6, when they try to assert that Mr. Arbery would "turn on his confronter with aggression." Defendants' 1.14.1 page 8. In acts 2, 5 and 6 he ran away. In act 3, he was angry for being "hassled" by the police in the park (Mr. Arbery's words), when he was minding his own business, and eventually, he simply walked away.

4) The defendants, like the State, may make reasonable inferences based on the undisputed facts. The State's reasonable inference from the undisputed facts is that the unarmed Mr. Arbery chose to defend himself out of fear of being shot. The State fully expects the defendants to assert that Mr. Arbery attacked Travis McMichael in order to take away Travis McMichael's shotgun and then use it to kill Travis McMichael, as this is the "suspicion" they list in their brief. Defendants 1.14.1 page 8. Either inference is not a fact in dispute.

The real issues in dispute are the actions of the McMichaels, whether they were committing the crimes of aggravated assault, false imprisonment and murder

or whether they were engaged in a lawful "citizen's arrest." Should the jury find that they were engaged in a lawful citizen's arrest, the next question would be whether Mr. Arbery had the right to resist the amount of force being used, and if he did not, then was the amount of force used by Travis McMichael reasonable or excessive.

Utilizing other act evidence of Mr. Arbery running from the police, being angry with the police or using swear words, to prove that Mr. Arbery must have been acting in conformity with the prior behavior on February 23, 2020, and "attacked" Travis McMichael, is propensity evidence, which is not allowed by the law. *Mohamud v. State*, 297 Ga. 532, 536 (2015) ("the evidentiary rule set forth in *Chandler* does not remain viable under the new Evidence Code").

Conclusion

The defendants four "issues" are not genuinely in dispute in this case, they are just unknowns, that can never be known. The defendants, just like the State, cannot take undisputed facts, draw an inference from them, and then prop up that inference with Rule 404 other acts evidence to show propensity or conformity with that other act. Simply using the words "Arbery's intent and motive" do not make them proper purposes in the context presented by the defendants. This is a classic use of other acts evidence to show propensity, and thus violates O.C.G.A. 24-4-404.

APPENDIX B

"Opening the Door"

Defendant's Footnote #1 on page 1 asserts that the State will inevitably "open the door" to this other act evidence with the presentation of the evidence in its case in chief (testimony) and the inferences the State will seek to draw from that evidence. An example would be the State's evidence that Ahmaud Arbery was an avid runner and the inference that he was running in Satilla Shores at 1:00 p.m. on Sunday, February 23, 2020.

To rebut this evidence, the defendants could present evidence that Mr. Arbery was NOT an avid runner, had never been seen out running in his neighborhood or the adjacent neighborhoods, or testimony from Mr. Arbery's friends or family that he disliked running, or that they had never seen him running. See O.C.G.A. § 24-6-621 ("A witness may be impeached by disproving the facts testified to by the witness.")

Instead, it appears that the defendants will attempt to "rebut" the evidence that Mr. Arbery was an avid runner, with assertions that he also did other things while running, like entering a convenience store and stealing chips (other act #9). However, such evidence does not in fact "rebut" the fact that Mr. Arbery was an avid runner.

The State assumes that the same rebuttal logic will be used in regard to the State's evidence, as seen on video, that Mr. Arbery entered into 220 Satilla Drive, looked around, and did not take anything from the property (on four different occasions). It appears that the defendants will attempt to "rebut" what can be seen on video, with assertions of future danderousness: that even though Mr. Arbery did not take anything this time, he eventually would have gotten around to it, based on his prior actions (his propensity) of shoplifting at Walmart (other act #7).

It also appears that the defendants will attempt to "rebut" the inference that Mr. Arbery was running in Satilla Shores on February 23, 2020, with assertions that he used running to cover up his criminal activities, like entering a convenience store and stealing chips (other act #9). However, the defendants may not use other act evidence to rebut the State's inferences, or bolster their own inferences, from the undisputed facts. See O.C.G.A. § 24-14-20 ("Presumptions of fact shall be exclusively questions for the jury, to be decided by the ordinary test of human experience") and O.C.G.A. § 24-14-9 ("In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved.")

In addition, the defendants may attempt to put the other act evidence in front of the jury through cross-examination: "Did you know that when he ran, he sometimes committed crimes, like running into Love's eight times and stealing chips?"

However, "it is within a trial court's discretion to determine if a party is improperly attempting to use extrinsic evidence to impeach a witness by contradiction under OCGA § 24-6-621 on a matter collateral to the relevant issues at trial." *Moore v. State*, 356 Ga. App. 752, 754-755 (2020) (holding that testimony that the wife was having an affair had nothing to do with whether the defendant assaulted her); see also *Corley v. State*, 308 Ga. 321, 324-326 (2020) (trial court properly concluded that the issue of a prior rent dispute was not "germane or material" to the relevant issues at trial which were whether Corley was justified in shooting Manuel during this rent dispute).

This "opening the door" assertion, and the associated attempts to cast the defendants other act evidence as "rebuttal," make it clear that the defense only wishes to use the prior acts of Mr. Arbery to impermissibly bring his character into the case and use propensity evidence to claim that Mr. Arbery was a criminal and was in Satilla Shores to commit crimes, since he had committed other crimes

(propensity), and therefore the defendants' actions, while not justified, are not really that bad, and they should be acquitted (nullification).

The defendants have attempted to disguise their purported purpose in tendering this propensity evidence by (1) claiming it rebuts the State's evidence; (2) claiming that it rebuts the State's inferences; (3) that "the jury is entitled to know;" or (4) that the jury will wonder about it. None of these claims are supported by legal principles (statutes nor case law) that allow inadmissible propensity evidence under our evidence code.

The State moves to have all mention of Mr. Arbery's other acts excluded, unless expressly permitted by pre-permission of this Court, since the State will be unable to "un-ring" the bell.

APPENDIX C

The definitions contained in O.C.G.A. § 17-4-60. Because the defendants are asking this Court to allow their Rule 404(b) evidence based upon an erroneous assertion of the law, the State provides the following overview.

The defendants attempt to brush off the crux of their problem in Footnote 2. Defendants 1.14.1 page 4. They assert that they will show, in a later brief, that O.C.G.A. § 17-4-60 does not require that "the felony suspected has occurred contemporaneous with the chasing."

However, that is not the law in Georgia. "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." *Raif v. State*, 109 Ga. App. 354, 358 (1964).

Suspicion that someone may have committed the crime is also insufficient for a citizen's arrest. See *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.")

The arrest for the crime must take place contemporaneously. 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."); *McPetrie v. State*, 263 Ga. App. 85, 87 (2003) (citing to *Johnson v. Jackson*, 140 Ga. App. 252, 257 (1976) ("A private [person] has quite as much power to arrest a fugitive felon, where the emergency calls for immediate action, as a public officer, and while so doing, is equally under the protection of the law").

The case of *Graham v. State*, 143 Ga. 440 (1915) explains that current O.C.G.A. § 17-4-60 is simply a codification of the common law. First, the Supreme Court of Georgia in *Graham* points out that the "authority of a private person to arrest is more limited than that of an officer." *Graham* at 444. A private person could only make an arrest for a felony committed in his presence, under the common law. Id. If the private person made an arrest for a felony otherwise, he did so at his peril. This was because if he was called upon to justify his act of making a warrantless arrest, some courts held that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty; while other courts went further, holding that the private person must show that the person arrested was actually guilty. Id.

The Supreme Court of Georgia went on in *Graham* to discuss misdemeanors, stating that a private person could make an arrest for an affray or other breach of the peace committed in his presence, or to prevent its immediate continuance. Id.

The Court noted that the common law rules had been codified (and were not the result of a statute creating a new rule) in Penal Code (1910), § 921: "A private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge; and 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." Id. As this Court will note, the original statute did

not have a period after "knowledge" and did not begin a new sentence, thus, the plain meaning of the statute, back in 1910, was that the felony from which someone was escaping had to have been committed in the presence of the private person. The update of the statute, into two sentences, has obviously given the defendants here an opportunity to misconstrue the law.

The Georgia Courts have gone on to clarify the terms in O.C.G.A. § 17-4-60, "the offense is committed in his presence or within his immediate knowledge." Presence and immediate knowledge are synonymous per the Georgia Court of Appeals.

In *Lynn v. State*, 130 Ga. App. 646, 646-647 (1974), the Court of Appeals held that "[w]e think that the words, 'in his presence' as used in the Penal Code (1910), § 917 [Code 1933, § 27-207], and the words 'within his immediate knowledge,' as used in § 921 [Code 1933, § 27-211] are synonymous."

The *Lynn* court went on to explain, that "[t]o justify the arrest without warrant, the officer need not see the act which constitutes the crime take place, if by any of his senses he has personal knowledge of its commission. Thus, if he hears shooting or other noises, and runs immediately to the place and finds the offender with evidence of the alleged crime on him, or finds the offender running away as if in apparent flight from the crime, and in similar cases, the crime is considered as having been committed in the officer's presence or immediate knowledge." Accord *King v. State*, 161 Ga. App. 382, 383 (1982). Thus, a felony must have taken place, before a person can escape from it, which is contrary to the defendants' assertion that a person only has to suspect a felony took place.

These principles have been applied to private citizens. The Court of Appeals reviewed them in *Dinnan v. State*, 173 Ga. App. 191, 194 (1984), where they determined that "[i]f an offense is a felony, and an offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion. The terms, in his presence and within his immediate knowledge are synonymous in a crime committed in one's presence, only if, by the

exercise of any of his senses, he has knowledge of its commission, or by the accused admitting that such a crime is being, or has been committed. A private person may not act on hearsay or information furnished him by other persons."

"While the actual shoplifting was not done in the sight of the manager, appellant's admission, together with other evidence of the shoplifting known by the manager at the store, were sufficient to bring the offense within the immediate knowledge of the manager and authorize him to arrest appellant without a warrant. The terms "in the presence of" and "within his immediate knowledge" have been held to be synonymous." *Young v. State*, 238 Ga. 548, 549 (1977).

Pretermitting the law above, the defendants' contention (that O.C.G.A. § 17-4-60 does not require that "the felony suspected has occurred contemporaneous with the chasing") leads us to the question of what felony, committed by Mr. Arbery, did they have immediate knowledge of? What felony committed by Mr. Arbery did they have "reasonable and probable grounds of suspicion" to believe he committed? When did he commit it? On what day? At what location? Based on what evidence?

If they are referring to Travis McMichael's stolen handgun, taken from his truck on January 1, 2020, 54 days prior to the murder, Greg McMichael tells the police that he has "no reason to think that he did it" other than Mr. Arbery has been going inside 220 Satilla Drive.[21]

If they are referring to Mr. Arbery being at 220 Satilla Drive on Feb. 11, 2020, twelve days prior to the murder, the bodycam of Glynn County Police Officer Rash reveals that he told Travis McMichael and Greg McMichael that Mr. Larry English, the owner of the property, had never seen Mr. Arbery take anything from the property. Greg McMichael then asserted that going inside the house was criminal trespass (a misdemeanor) and Officer Rash responded by stating that it is at least

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[21] Defendant G. McMichael made a voluntary statement to the Glynn County Police Department at 3:15 p.m. on February 23, 2020. 3:56:52 – 3:57:41 "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."

loitering and prowling. (See Axon Body 2 Video X81034268 2020-02-11 193436 at 14:37 minutes.) Thus, any assertion by defendants that Greg McMichael was conducting a felony citizen's arrest, of a fleeing felon, based on "reasonable and probable grounds of suspicion" that a felony was committed on February 11, 2020, is unsupported by any evidence and the defendants' own statements, on video.

Obviously, Mr. Arbery committed no felony on February 23, 2020, and none of the defendants had any knowledge that Mr. Arbery had entered into the property at 220 Satilla Drive earlier that day, thus, no crime was committed in their presence. In other words, O.C.G.A. § 17-4-60 DOES require that "If the offense is a felony [committed in his presence] and the offender is escaping or attempting to escape [at that time], a private person may arrest him upon reasonable and probable grounds of suspicion [that he is the offender]." *Adams v. Carlisle*, 278 Ga. App. 777, 786-787 (2006) (under common law "when a felony actually had been committed, a private person was authorized to arrest the person whom he reasonably believed committed the felony"). O.C.G.A. § 17-4-60 does require that if someone is going to make a warrantless arrest of a fleeing felon, the fleeing must be exigent, an emergency situation and contemporaneous with the felony that was committed in the presence of the private person.