

IN THE COURT OF APPEALS

STATE OF GEORGIA

CASE NO. A26A2155

BILLY GREG PRUITT,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

BRIEF OF APPELLANT

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

BILLY GREG PRUITT,	)	
Appellant,	)	
	)	
v.	)	CASE NO. A26A2155
	)	
STATE OF GEORGIA,	)	
Appellee.	)	

BRIEF OF APPELLANT

PART ONE

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia rather than the Supreme Court of Georgia has jurisdiction of this case because this is an appeal from the final judgment of a Superior Court in a non-capital felony case and does not come within any of the areas designated to be heard before the Supreme Court under Article VI, Section VI, Paragraph III of the Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Honorable Court under the provisions of Article VI, Section V, Paragraph III of the Georgia Constitution of 1983. See State v. Murray, 286 Ga. 258, 687 S.E.2d 790 (2009).

STATEMENT OF THE CASE

On or about April 29, 2024, Appellant was indicted by the Grand Jury of Jackson County for two (2) counts of Aggravated Assault. (See Record of the Case, hereinafter “R.,” pages 14-18, 20-24). Pursuant to a jury trial, on or about December 11, 2025, Appellant was convicted of both indicted counts. (R. 12-13). On or about December 11, 2025, Appellant was sentenced to twenty (20) years to serve fifteen (15) years in prison pursuant to O.C.G.A. § 17-10-7(a) on Count Two—Aggravated Assault and Count One merged into Count Two for purposes of sentencing. (R. 4-11).

It is from the sentence and convictions that this appeal is taken pursuant to the Notice of Appeal timely filed in the Superior Court of Jackson County on December 15, 2025 and docketed with the Honorable Court of Appeals of Georgia on June 2, 2026. (R. 1-3).

STATEMENT OF THE FACTS

The trial court confirmed with the State that the maximum sentence that Appellant faced was twenty (20) years to serve in confinement. (Trial Transcript, Volume 5, hereinafter “V5.,” page 5). The trial court determined that Appellant qualified for recidivist sentencing pursuant to O.C.G.A. § 17-10-7(a) and (c). (V5. 5-6). Appellant rejected the State’s final plea offer of twenty (20) years to serve the first eight (8) years confinement that would run concurrent with his probation revocation sentence. (V5. 6-7, 11). Appellant’s Motion to Exclude Impeachment pursuant to O.C.G.A. § 24-6-609 more than ten (10) years of age and Motion to admit prior sworn testimony of an unavailable witness were set to be argued later in the trial. (V5. 7-8).

Appellant invoked his right to be present at all critical stages of trial, including bench conferences. (V5. 9). The bailiffs were sworn and outside of Appellant’s presence, in the lower level of the Courthouse, the trial court asked the pool of potential jurors qualification questions as well as questions about any exemptions and hardships. (V5. 12). Appellant objected to this questioning occurring outside of his presence asserting that it was a critical stage of the process. (V5. 12). The trial court noted Appellant’s objection but continued to proceed without Appellant present based upon “security issues;” Appellant’s counsel and the State were present for this jury interaction. (V5. 12-13, 18). In the Courtroom and in Appellant’s presence, the venire

panel was sworn and voir dire commenced. (V5. 20-30). Following jury selection, the petit jury was sworn and the trial court gave preliminary jury instructions. (V5. 30-40). Before opening statements but after jeopardy attached, Appellant raised a general demurrer challenging Count One which was denied over a continuing objection. (V5. 40-52). The jury was seated and opening statements commenced. (V5. 52-57; 57-60).

Night Shift Patrol Deputy Samuel Roach of the Jackson County Sheriff's Office testified that he answered a call for service on March 30, 2024 and Deputy Roach encountered the alleged victim in the area of Jackson Trail Road and Doster Road, located in Jackson County. (V5. 60-61, 66). This area was dim-lit, had no streetlights or anything illuminating the street. (V5. 64-65). Deputy Roach was responding to a dispute between the alleged victim and an unidentified subject, who the alleged victim claimed had presented a firearm during the dispute. (V5. 61-62). The alleged victim provided the tag of the vehicle that the subject was driving and described the vehicle as a "white-in-color Chevrolet truck that was lifted." (V5. 62). The alleged victim also gave a description of the events that occurred, a description of the suspect and a description of the weapon. (V5. 62). Deputy Roach testified that the alleged victim seemed fearful and said multiple times about how he was afraid of possibly losing his life and getting shot. (V5. 62). The alleged victim identified pictures of Appellant and the alleged weapon and while on the scene, the alleged

victim wrote a witness statement. (V5. 63).

After the jury had been sent home for the day, the trial court told the State and defense counsel that “there’s an elephant in the room, maybe.” (V5. 67). Without any Motion from the State, the trial court, sua sponte, found that Appellant’s opening statement “opened the door” to O.C.G.A. § 24-4-404(b) evidence previously excluded for the purpose of intent. (V5. 67, 72). The trial court quoted portions of Appellant’s opening statement which it believed had “opened the door” to intent:

“Because they are within feet of each other, [Appellant] didn't know if [the alleged victim] was going to be a danger to him or [was] somebody who needed assistance. So [Appellant] had a BB gun. He had a BB gun and he held his BB gun and he showed his BB gun. He didn't do it in a threatening manner. He just wanted to make sure that nothing was going to happen to him or his property, which you're allowed to do.”

(V5. 74).

The trial court quoted additional language from the end of Appellant’s opening statement:

“You will learn that [Appellant] only held that BB— that pellet gun, the BB gun, because he did not know what he was about to encounter. He did not in any way intend to harm anyone. He just didn’t want anyone to harm him.”

(V5. 74).

Over Appellant’s continuing objection, the trial court ruled that Appellant’s 2015 other bad act evidence could be introduced by the State for the purpose of

showing intent. (V5. 72-84). Appellant stated that he required a preview of the testimony that would be introduced relating to Appellant's 2015 conviction. (V5. 85). The trial court noted that there was no objection to the proffer of admitting the evidence if intent became an issue at prior evidentiary hearing and suggested a limiting instruction. (V5. 86).

Appellant raised another General Demurrer on the grounds that if the charges were for a specific intent crime, the counts were defective. (V5. 86). Appellant objected to the witness testifying about Appellant's 2015 conviction in totality on the grounds that the trial court was denying a preview of the witness's testimony outside the presence of the jury. (V5. 87). In response to Appellant's Motion in Limine to exclude evidence of counterfeit money allegedly found in Appellant's vehicle, the State conceded that they would not discuss this evidence at trial. (V5. 70-71). The trial court denied the State's Motion to use Appellant's prior convictions that were more than ten (10) years old to impeach him. (V5. 71-72).

Mr. Almedin Ajanovic, the alleged victim, testified that he was a police officer with the Lilburn Police Department and that he had been involved in an incident on March 30, 2024, while off duty. (V5. 97). Mr. Ajanovic testified that he lived near Doster Road and Jackson Trail Road where the incident took place. (V5. 97-98). He was jogging at 8:30P.M. on the date at issue in a triangular route which included

Doster Road and Jackson Trail Road (V5. 98-99, 440); it was dark so he activated the flashlight on his cellular telephone as a precautionary measure (V5. 102-103); despite the dark conditions, he wore black shorts, a dark grey shirt and black jogging shoes (V5. 119, 148); and he did not wear any reflectors (V5. 157). Mr. Ajanovic encountered no other pedestrians, runners or cyclists during his exercise. (V5. 130). Since there were no sidewalks on this route, he ran close to the line which separates the roadway from the shoulder of the road and he noticed a vehicle driving in the middle of the street. (V5. 104, 133). Mr. Ajanovic testified that he was concerned that the driver was impaired, distracted or purposely trying to intimidate him. (V5. 105). Appellant did not drive towards the alleged victim or make him jump off the road while he was jogging. (V5. 137). Mr. Ajanovic could not affirmatively determine whether Appellant was speeding as he initially drove past him. (V5. 157). Mr. Ajanovic did not hear any music coming from the vehicle. (V5. 157).

Mr. Ajanovic waved his phone with the flashlight activated at the vehicle which was approaching him, and said “hey, you’re driving in the middle of the road.” (V5. 106). Mr. Ajanovic made this statement even though vehicles approaching him from behind would often drive on the other side of the road (the “wrong” lane) to avoid him for safety. (V5. 103-104, 135-136). Mr. Ajanovic had no identification that he was a law enforcement officer and accepted that Appellant would have had to take

his word that he was. (V5. 130-131). He was also aware that people can identify themselves as police officers even when they are not, and that it is a crime to do so. (V5. 131).

The vehicle initially drove past Mr. Ajanovic and then stopped and reversed to where Mr. Ajanovic was standing. (V5. 107). When Appellant stopped to speak with Mr. Ajanovic, they were within arm's distance from one another. (V5. 137). In fact, Mr. Ajanovic could have reached and touched Appellant's vehicle which had its window rolled all the way down. (V5. 137).

Mr. Ajanovic perceived a long-barrel, chrome gun leaning on the windowsill of the vehicle as it approached him. (V5. 107). Appellant, the driver of this vehicle, asked Mr. Ajanovic "what did you holler?" (V5. 107). Mr. Ajanovic responded that Appellant was driving in the middle of the road and that Appellant needed to put the gun away. (V5. 107-108). Mr. Ajanovic testified that Appellant told him "you need to watch what you holler around here" and drove away. (V5. 109). Appellant did not ask whether Mr. Ajanovic needed help nor did Appellant check on his condition. (V5. 161- 162).

Although Mr. Ajanovic had his phone in his hand and still had the flashlight illuminated throughout this encounter, he did not record the audio or video of the encounter and he did not take any photographs although he was well aware of these

capabilities of his phone. (V5. 121, 145). Mr. Ajanovic memorized Appellant's vehicle's tag and called 911 to report this incident. (V5. 108-110).

Mr. Ajanovic testified that he felt "a feeling associated with like, hey, I'm about to die" and then recounted the events that occurred in a matter-of-fact manner to the 911 operator without being out of breath. (V5. 108, 148-149). Mr. Ajanovic was so impacted by this event that he stated that he has been crying for the last two years. (V5. 140). During the 911 call that was made immediately after the incident, Mr. Ajanovic characterized the events as "ridiculous". (V5. 149). Following the event that has impacted him "[e]very single day and forever," Mr. Ajanovic, incredibly, was able to provide the 911 operator with the vehicle tag, a description of Appellant who he has never met including details such as his build, type and color of shirt worn by Appellant, color of Appellant's hair, facial hair of Appellant, rough age estimate of Appellant, and a description of the barrel of the gun that he perceived. (V5. 140, 150-152). These details were provided while Mr. Ajanovic was walking back to his house. (V5. 150). Mr. Ajanovic did not run back to his house after this traumatic event had just occurred. (V5. 119, 150). The vehicle was a white pickup truck that was lifted. (V5. 110). The defense stipulated that Mr. Ajanovic could identify Appellant in the Courtroom. (V5. 112-113). Mr. Ajanovic intended to file a civil lawsuit against

Appellant. (V5. 146).¹

Mr. Ajanovic has not been known by any other names besides “A.J.” and his true, correct, given name is Almedin Ajanovic. (V5. 97, 153). Mr. Ajanovic agreed that his last name was not spelled correctly in either Count One or Count Two of the Indictment. (V5. 154). Mr. Ajanovic has never been known as a person with the last name as written in the Indictment. (V5. 154).

Following a limiting instruction that the upcoming testimony was to be considered solely for the issue of intent, Ms. Samantha Jones testified that in January, 2015, she lived in Jackson County with her then-husband and daughter in a trailer on a hill. (V5. 163-166). At 5:00P.M. on January 15, 2015, while Ms. Jones, her husband and daughter were home, Appellant drove his truck to the front of their house, stopped and honked his horn. (V5. 167-168). In response to the honking, Ms. Jones’ then-husband went into the front yard while Ms. Jones and her five-year-old daughter remained nearby on the porch. (V5. 168). Appellant, while seated in his truck, argued with her ex-husband and then, without any justification, fired bullets at him causing her then-husband to run into the house. (V5. 169). Appellant blasted three shots with his pistol at Ms. Jones’ ex-husband, all while Ms. Jones and her daughter were nearby

¹ Officer William Parks testified that he previously knew Appellant from other criminal investigations, Appellant moved to exclude these other criminal investigations, which was granted by the trial court. (V5. 143).

on the porch, approximately thirty (30) feet away from Appellant. (V5. 168-169). Ms. Jones and her young child then ran inside of their house, Ms. Jones hid her daughter under the kitchen table while she hid on the couch and called 911. (V5. 170). Appellant stipulated that Ms. Jones had identified him in the Courtroom. (V5. 170-171, 271). Over objection, Appellant's guilty plea to one count of Aggravated Assault relating to this incident was admitted into evidence. (V5. 171-172).

Officer William Parks testified that he was assigned to the Uniform Patrol Division with the Jackson County Sheriff's Office on March 30, 2024 and responded to the incident between Appellant and Mr. Ajanovic. (V5. 172-173). Officer Parks canvassed the area looking for Appellant's vehicle when a vehicle matching the description drove past Officer Parks while he was parked and he followed it into the parking lot of Appellant's business. (V5. 174, 178). Deputy Parks spoke with Appellant about a purported silver firearm that he was interested in finding as part of this investigation and located same in the front passenger seat of Appellant's vehicle. (V5. 175). Appellant was compliant and cooperative with Deputy Parks during this interaction and even offered that he was just involved in a dispute. (V5. 178). Deputy Parks noted that Appellant did not appear to be under the influence of any drugs or alcohol. (V5. 178-179). Deputy Parks identified Appellant in the Courtroom. (V5.

174).²

The State called Mr. Patrick Najjar to read Appellant's testimony from a prior probation revocation hearing relating to the Indictment on trial. (V5. 190, 228). Outside of the presence of the jury, the trial court determined that the probation revocation hearing was to be referred to as a prior evidentiary hearing when discussed at trial. (V5. 190). This prior testimony included the fact that Appellant worked at a family business owning rental houses and was in the process of opening FastLane Motorsports and Accessories. (V5. 229). On the night of the Indictment on trial, Appellant swore that he left his home at around 9:00P.M. and headed to Chick-fil-A to arrive before it closed. (V5. 230). Appellant was driving on Jackson Trail Road and turned onto Doster Road. (V5. 230). While on Doster Road, Appellant drove past a man who yelled and waved his flashlight. (V5. 230). Appellant just heard the alleged victim yell and Appellant thought that the alleged victim may have been hurt. (V5. 230-231). Appellant was previously a trained EMT and had spent eight (8) years on the volunteer fire department and rescue—and concerning this incident, his first response was to think of the Good Samaritan Law when encountering the alleged victim. (V5. 231, 238). Appellant reasoned that if the alleged victim was hurt,

² Following a colloquy between the trial court and Appellant informing him of his right to testify, Appellant elected not to testify at his trial. (V5. 188-190). The jury charge conference occurred. (V5. 193-227).

Appellant should stay with him until somebody even more trained arrived. (V5. 231). Thus, Appellant put his vehicle into reverse and checked on the alleged victim. (V5. 231). As Appellant was driving his vehicle in reverse, he thought that the person yelling at him and pointing the flashlight while he was driving could be a “crazy person,” so Appellant placed a plastic, toy BB gun on the dashboard of his vehicle for his own safety. (V5. 230). Appellant has never fired this BB gun and it was left in his car by someone who works with Appellant. (V5. 238-239). Appellant testified that he could not see how a plastic BB gun could be dangerous. (V5. 239). The State stipulated that there were no BBs in the BB gun at the time of this incident. (V5. 246-247, 271).

Appellant asked the alleged victim if he was okay, and what he was hollering. (V5. 231). Appellant tried to get the alleged victim to speak, but he was unable to hear all of what the alleged victim said. (V5. 231). The alleged victim told Appellant that he was a police officer, which caused Appellant to question why he was dressed in dark clothes. (V5. 231). Appellant could not see whether there was somebody hurt on the side of the ditch, because it was dark. (V5. 231). During the encounter, the BB gun was laying on the dashboard and only happened to be pointing at the alleged victim due to the positioning of Appellant’s truck; if Appellant had backed up another foot, it would have pointed toward the woods. (V5. 231). Appellant asked for the

alleged victim's name and looked for a badge, which the alleged victim did not provide. (V5. 231-232). Appellant only asked what the alleged victim's name was, and what he hollered. (V5. 233). Appellant did not express any anger and wished no harm on the alleged victim. (V5. 233-234). Appellant shone a light on the alleged victim to identify whether the alleged victim had on any police uniform. (V5. 233). Appellant then drove to the Chick-fil-A before the restaurant closed. (V5. 232). The State stipulated that there was an empty Chick-fil-A bag in the truck. (V5. 269-270).

The State then rested its case and Appellant's Motion for a Directed Verdict was denied. (V5. 240-246). The evidence was closed and the final charge conference occurred. (V5. 247-270). The prosecution presented its initial closing argument. (V5. 272-280). Appellant gave his closing argument. (V5. 280-307). The prosecution then gave its final summation. (V5. 307-320).

At the time of filing Brief of Appellant, Appellant rots in the State of Georgia prison system. (R. 4-11).

PRESERVATION OF ERRORS

1. The trial court committed reversible error when it wrongly permitted the introduction of overly prejudicial and inadmissible other act evidence.

(Enumeration of Error No. I).

This Enumeration of Error is preserved for appellate review as Appellant properly and timely objected to the introduction of this other act evidence. (R. 48-49, 50-57, 69-74, 92-93; V5.67-96, 163-172). See Calhoun v. State, __ Ga. __ (1), __ S.E.2d __ (Case Number S26A0145, decided June 16, 2026).

2. The trial court's jury charge that a BB gun is a deadly weapon per se was harmful error.

(Enumeration of Error No. II).

This Enumeration of Error is preserved for appellate review as Appellant objected to this instruction in timely manner. (V5. 258-262, 340, 371-374). See O.C.G.A. § 17-8-58(a); Booze v. State, __ Ga. __ (3), __ S.E.2d __ (Case Number S26A0154, decided June 16, 2026).

3. Over objection, the trial court conducted a critical stage of the proceedings outside of Appellant's presence.

(Enumeration of Error No. III).

This Enumeration of Error is preserved for appeal since Appellant timely

objected to the trial court speaking with potential jurors outside of Appellant's presence. (V5. 12-19). Champ v. State, 310 Ga. 832, 854 S.E.2d 706 (2021).

PART TWO

ENUMERATION OF ERRORS

- I. THE TRIAL COURT ERRED WHEN IT, SUA SPONTE, PERMITTED PREVIOUSLY EXCLUDED OTHER CRIME EVIDENCE INTO TRIAL BASED UPON APPELLANT’S OPENING STATEMENT. THIS WAS A GROSS ABUSE OF DISCRETION AND VIOLATION OF LAW. THE ADMISSION OF THIS OTHER ACT EVIDENCE GREATLY DAMAGED AND PREJUDICED APPELLANT’S RIGHT TO A FAIR TRIAL. HENCE, APPELLANT’S CONVICTIONS AND SENTENCE MUST BE REVERSED.**
- II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CHARGED THE JURY THAT A BB GUN, UNDER CERTAIN CIRCUMSTANCES, IS A DEADLY WEAPON PER SE. THIS ERRONEOUS INSTRUCTION WRONGLY AFFECTED BOTH COUNTS OF CONVICTION. HENCE, APPELLANT’S CONVICTIONS AND SENTENCE MUST BE REVERSED.**
- III. OVER TIMELY OBJECTION, THE TRIAL COURT CONDUCTED A CRITICAL STAGE OF THE PROCEEDINGS OUTSIDE OF APPELLANT’S PRESENCE. THIS CONSTITUTIONAL ERROR IS A**

**PRESUMPTION OF HARM AND HENCE, APPELLANT'S
CONVICTIONS AND SENTENCE MUST BE REVERSED.**

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT ERRED WHEN IT, SUA SPONTE, PERMITTED PREVIOUSLY EXCLUDED OTHER CRIME EVIDENCE INTO TRIAL BASED UPON APPELLANT’S OPENING STATEMENT. THIS WAS A GROSS ABUSE OF DISCRETION AND VIOLATION OF LAW. THE ADMISSION OF THIS OTHER ACT EVIDENCE GREATLY PREJUDICED APPELLANT’S RIGHT TO A FAIR TRIAL. HENCE, APPELLANT’S CONVICTIONS AND SENTENCE MUST BE REVERSED.

Standard of Review: Whether the trial court abused its discretion when it admitted the introduction of other act evidence into Appellant’s trial. Calhoun v. State, __ Ga. __ (1), __ S.E.2d __ (Case Number S26A0145, decided June 16, 2026).

Prior to trial, the prosecution filed a Notice to introduce two (2) prior Aggravated Assault convictions pursuant to O.C.G.A. § 24-4-404(b). (R. 48-49, 50-57; Immunity Motion Transcript dated January 8, 2025, hereinafter “V4.,” pages 62-74). Prior to trial, a hearing was held and the trial court eventually excluded both of these prior crimes. (R. 69-74, 92-93). After opening statements, the trial court, sua

sponte, uttered “let’s discuss the elephant in the room” and admitted evidence that in year 2015, Appellant drove his vehicle in front of another victims’ home, one (1) victim and her young daughter were located on the porch while her former husband walked to his vehicle and Appellant, without any justification, blasted bullets from a firearm, a deadly weapon, per se, at the former husband and onto their property. (V5. 67-96, 163-172). The testifying victim, daughter and former husband ran for safety, called 911 and Appellant pled guilty (but mentally ill) to the crime of Aggravated Assault.³ (V5.163-172, 441-461). There was no cross-examination of this other crime victim as Appellant was stuck with the evidence that Appellant is a violent perpetrator, who is not to be trusted on the streets of Jackson County. (V5. 67-96, 163-172, 441-461). This other bad act evidence was so disconnected to the Indictment on trial but was so prejudicial that in closing argument, Appellant could only claim that there was no reason to introduce this prior act evidence and same was simply to prove Appellant’s propensity to commit crime in order to cause the jurors to be scared of Appellant. (V5. 291-292, 303). The prosecutor argued this other crime evidence but when met with an objection, confidently stated that the jurors will recall Appellant’s conduct concerning the 2015 crimes. (V5. 307, 316-317). The trial

³ Over Appellant’s objection, the State introduced the 2015 other bad act Indictment and Sentencing Sheet but same did not go out with the deliberating jurors. (V5. 67-96, 441-461).

instructed the jury that the 2015 crimes could be used only for intent. (V5. 163, 356-357, 361-362).

If other act evidence has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without that evidence, it is relevant under O.C.G.A. § 24-4-401. Relevant evidence is always admissible at trial unless it is limited by Constitutional requirements or other laws or rules. O.C.G.A. § 24-4-402. O.C.G.A. § 24-4-403 is a law that requires exclusion of otherwise relevant evidence. Roberts v. State, 315 Ga. 229(2a), 880 S.E.2d 501 (2022). Evidence of the criminally accused's past crimes is treated with extreme caution because of the great danger that the jury will view this prior crime evidence as general bad character and then convict the accused because this criminal nature makes it more likely that he committed the crime on trial instead of determining whether the evidence proves beyond a reasonable doubt that the accused is guilty of the indicted offenses. Michelson v. United States, 335 U.S. 469, 475-476, 69 S. Ct. 213, 93 L.Ed. 168 (1948)(evidence that the criminally accused committed prior crimes used to establish probability of his or her guilt in the crime charged is not rejected because it is irrelevant but because the prior crime evidence weighs too much with the jury so as to over persuade them as to prejudice the jury with bad general character and deny the accused a fair opportunity to defend against the current charge). When the jury is

informed that the accused committed other crimes, the jury, like every human being, is naturally more inclined to believe that the accused is guilty of the Indictment on trial. White v. State, 319 Ga. 367, 398-399, 903 S.E.2d 891 (2024)(then Presiding Justice Petersen, Concurring Opinion). To guard against the improper, overly powerful use of prior crime evidence, the law prevents the introduction of same in order to prove the bad character of a person to show action in conformity therewith. O.C.G.A. § 24-4-404(b). On the other hand, other bad act evidence is admissible for other purposes if the prosecution can show that it is relevant to an issue in the case other than the accused's evil character. Hood v. State, 309 Ga. 493(2), 847 S.E.2d 172 (2020). If the bad act evidence is too prejudicial, then even if it is deemed admissible under O.C.G.A. § 24-4-404(b), it is still subject to exclusion under O.C.G.A. § 24-4-403 if its probative value is substantially outweighed by the danger of unfair prejudice. Harris v. State, 321 Ga. 87(2), 913 S.E.2d 570 (2025). As noted above, in the case at bar, after opening statements, the trial court, sua sponte, deemed that Appellant "opened the door" to previously excluded other act evidence. (R. 48-49, 50-57, 69-74, 92-93; V5. 67-96, 163-172). That decision was wrong and prejudiced the outcome of the case as discussed below.

First, in Georgia, an opening statement does not and cannot "open the door" to present evidence of character. Holt v. State, 352 Ga. 504(1a)(fn. 2), 835 S.E.2d 336

(2019); Carlton v. State, 356 Ga. App. 1(3ai), 846 S.E.2d 175 (2020). Appellant informed the trial court of this law but the trial court was not persuaded. (V5. 67-96). The trial court erroneously determined that Appellant made intent a “central issue” in the case during his opening statement. (V5. 67-96, specifically pages 73-74). The trial court based this finding on statements made by Appellant’s counsel that Appellant did not know if the alleged victim was going to be a danger to him or somebody who needed assistance, and that “[Appellant] just wanted to make sure that nothing was going to happen to him or his property, which you’re allowed to do.” (V5. 74). The trial court quoted additional statements made during Appellant’s opening that Appellant only held the BB gun because “he did not know what he was about to encounter,” and “[h]e did not in any way intend to harm anyone.” (V5. 74). “[Appellant] just didn’t want anyone to harm him.” (V5. 74).

Based on this erroneous ruling, the trial court admitted evidence relating to Appellant’s 2015 conviction for Aggravated Assault at trial for the purpose of intent.(V5. 67-96). The evidence admitted and shown to the jury comprised of testimony from Ms. Samantha Jones, who testified that in year 2015, Appellant had honked his vehicle’s horn and then parked his truck in front of her house (V5. 167-168), got into a verbal argument with her then husband (V5. 169), and shot at her husband in the front yard from his truck while she, and her five-year-old daughter,

were sitting nearby on the front porch of her house. (V5. 163-172). Ms. Jones also testified that Appellant was roughly thirty (30) feet away from her and her child when he unlawfully fired his weapon, and that she had to run inside, hide her daughter under the kitchen table, hide on the couch, and call 911. (V5. 170). Over continuing objection, the trial court admitted a copy of Appellant's guilty plea to the crime of Aggravated Assault.⁴ (V5. 67-96, 163-172, 441-461).

Second, even if assertions made by Appellant's counsel during opening statement can "open the door" to previously inadmissible evidence, which is not the law as described above and Appellant does concede, the trial court erroneously concluded that the defense contested intent during opening statements and made it a "central issue" in the case. (V5. 73-74). Assault with the aggravating factor of use of a deadly weapon is a general intent crime. Strong v. State, 309 Ga. 295(2), 845 S.E.2d 653 (2020). General criminal intent is simply the intent to do the act which results in the violation of the law, and not the intent to commit the crime itself. Wright v. State, 365 Ga. App. 288, 290, 878 S.E.2d 137 (2022). Thus, the criminal intent at issue for Counts One and Two of the instant case is the intent to commit the acts which caused the victim to be reasonably apprehensive of receiving a violent injury, not any underlying intent of the accused in assaulting the victim. Ganaway v. State, 282 Ga.

⁴ See Footnote 3, supra.

297(2), 647 S.E.2d 590 (2007).

Appellant's opening statement did not contest whether Appellant had the intent to "brandish" or point an unloaded BB gun at the supposed victim, the act which would cause the alleged victim to be reasonably apprehensive of receiving a violent injury. (R. 14-18; V5. 67-96). In the statements that the trial court quoted to find that Appellant had "opened the door" to intent evidence, Appellant actually conceded that "[h]e had a BB gun and he held his BB gun and he showed his BB gun." (V5. 74). Appellant's trial counsel's statement that "[Appellant] only held that BB [gun] because he did not know what he was about to encounter" again concedes the fact that Appellant intentionally displayed the BB gun and merely offers his reason for doing so. (V5. 74). Appellant's trial counsel's statement that "[h]e did not in any way intend to harm anyone" does not contest the intent to commit the act of pointing or showing the BB gun, but rather his intention to inflict injury, which was objectively obvious since the BB gun was not loaded. (V5. 246-247, 271, 357). Appellant's sole defense was defense of self and/or defense of vehicle. (See Entire Trial Transcript). Thus, Appellant conceded intent to use the weapon to stop the possible attack of the alleged victim. (V5. 229-239).

Further, the 2015 drive-by shooting does not pass the O.C.G.A. § 24-4-404(b) test or O.C.G.A. § 24-4-403. Appellant put forth a very cohesive, consistent defense

at trial, as follows: (i) Appellant was driving in the middle of the street on a dark, quiet road in Jackson County on March 30, 2024 (V5. 64-65, 102-103); (ii) the supposed victim was dressed in dark clothing, to wit: a black shirt, dark gray pants and black shoes (V5. 119, 148, 157); (iii) the alleged victim was jogging on the wrong side of the road next to the white line in the roadway (V5. 104, 133; see O.C.G.A. § 40-6-96); (iv) as Appellant's driver's side passed the alleged victim, the alleged victim called/yelled at Appellant (V5. 106-109); (v) Appellant drove a short distance and then thought to himself whether that pedestrian was in danger and needed help or possibly a third party needed help or whether Appellant was putting himself in danger by returning and speaking with the alleged victim who was in the roadway and would be close to Appellant's driver's door (V5. 107, 137, 230-231); (vi) Appellant decided to stop his vehicle and ensure that no one was injured or in need of help and drove his vehicle in reverse stopping once he was even with the alleged victim (V5. 230-234, 238-239); (vii) Appellant did not know the alleged victim and the alleged victim did not know Appellant. (V5. 140, 149-152, 231-232); (viii) the alleged victim watched Appellant stop his vehicle and put same in reverse and thought that he may be in danger, the same thought that Appellant was under (V5. 107-109, 137, 140, 148-149, 230-239); (ix) Appellant had an unloaded plastic BB gun in his vehicle and placed same on his dashboard with the muzzle pointed at

the alleged victim according to Appellant while the alleged victim testified that Appellant placed the muzzle of the BB gun, which looked like a hand gun, onto the window seal and pointed same at the alleged victim. (V5. 107-109, 230-232, 238-239, 246-247, 271); (x) the alleged victim feared that a true firearm was pointed at him and that he would die (V5. 107-109); (xi) Appellant was only asking whether the alleged victim needed help and Appellant wanted the alleged victim to realize not to attack Appellant or his vehicle as Appellant had a “gun,” although it was an unloaded, plastic toy BB gun, for protection (V5. 230-239); and (xii) Appellant never intended to harm the alleged victim. (V5. 230-239).

Under law, the above facts do not come close to permitting for purposes of “intent” under O.C.G.A. § 24-4-404(b) and O.C.G.A. § 24-4-403, the fact that in 2015, Appellant drove to a stranger’s home, honked his horn and in the presence of a child, her mother and the former husband, unjustifiably discharged a firearm at the former husband and the property, including the victims’ truck. (V5. 163-172). How could intent be at issue based upon Appellant’s defense at trial that Appellant intentionally placed a BB gun that had the appearance of a handgun on his dashboard or pointed same at the victim in order to protect himself and his vehicle from possible attack by the supposed victim? (V5. 107-109, 230-239). Intent was not a contested

issue nor was mistake of fact.⁵ (See Entire Trial Transcript, specifically V5. 107-109, 230-239). These were the circumstances of Appellant’s state of mind at the time of intentionally displaying the gun in plain view for the supposed victim to see from the vehicle’s window seal or from the dashboard. (V5. 107-109, 230-239). There was no legal reason for the trial court to violate Appellant’s right to a fair trial by the introduction of this 2015 unjustified act of violence/attempted murder. (V5. 163-172, 441-461).

Where the intent required for the charged offenses and other acts is the same, and intent is at issue, the first prong of the Rule 404 (b) test is satisfied. Booth v. State, 301 Ga. 678, 683, 804 S.E.2d 104 (2017). This is true “regardless of whether the charged offense is one requiring general or specific intent.” Id.; Castillo-Velasquez v. State, 305 Ga. 644, 647, 827 S.E.2d 257 (2019). The relevance of other act evidence offered to show intent is established when the other act was committed with the same state of mind as a charged crime. Strong v. State, 309 Ga. 295, 309, 845 S.E.2d 653 (2020). The determination of relevance is a binary question— evidence is either relevant or it is not. Heard v. State, 309 Ga. 76, 84-85, 844 S.E.2d 791 (2020). Other act evidence may be relevant to proving the general intent element of

⁵ Appellant relied upon the law of mistake of fact to support his justification defense concerning his thought that the supposed victim may attack Appellant or his vehicle. (R. 158; V5. 230-239).

a charged crime, when applied to the many violent crimes that require only general intent, it should not be viewed by prosecutors or trial courts as an open invitation to admit evidence of marginally similar violent acts that involve the same general intent. Moody v. State, 361 Ga. App. 737, 742, 865 S.E.2d 544 (2021) (cleaned up).

Assuming arguendo, without conceding anything, this Honorable Court finds that Appellant's opening statement and/or the rigors of O.C.G.A. § 24-4-404(b) for purposes of intent were passed, this other bad act evidence must still be excluded by O.C.G.A. § 24-4-403. The second prong of our Rule 404(b) analysis requires the weighing of the probative value of the other act evidence against the substantial danger of unfair prejudice. Olds v. State, 299 Ga. 65, 70, 786 S.E.2d 633 (2016) ("for evidence of other acts to be admitted under Rule 404 (b), the evidence must pass the test of O.C.G.A. § 24-4-403"). 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." Strong v. State, 309 Ga. 295, 301, 845 S.E.2d 653 (2020). Factors to be considered in determining the probative value of other act evidence offered to prove intent include its overall similarity to the charged crime, its temporal remoteness and the prosecutorial need for the prior bad act. Hood v. State, 309 Ga. 493, 501, 847 S.E.2d 172 (2020). The probative value of Appellant's 2015 conviction was extremely low for the issue of intent and its prejudicial effect was overwhelming.

The State's need for "intent" evidence was minimal. Appellant's only defense at trial was justification. (See Entire Trial Transcript; V5. 230-239, 365-367). Strong v. State, supra (State's need for evidence to prove intent was "extremely low" because his sole defense at trial was self-defense); Brown v. State, 303 Ga. 158, 162-163, 810 S.E.2d 145 (2018); State v. Flowers, 320 Ga. 882, 888-889, 912 S.E.2d 527 (2025); Crawford v. State, __ Ga. __ (2), 929 S.E.2d 225 (2026). By asserting a justification defense, Appellant did not deny the general intent required as an essential element for Aggravated Assault, but rather argued that the threat of force was legally justified because: (1) Appellant reasonably believed that the threat of force was necessary as he approached a stranger at night who wore dark clothing and was in the roadway shining a light into Appellant's vehicle as it drove by while yelling at Appellant; (2) to possibly defend himself or his vehicle; (3) against the other person's possible imminent use of unlawful force. (V5. 230-239, 366). As such, "the only factual issue in the case was whether [a legally justified purpose] was the reason for the admitted act." Brown v. State, 303 Ga. at 163. The fact that Appellant had committed a brutal drive by shooting at an unsuspecting family nine (9) years earlier had nothing to do with his reason for his charged conduct in the instant case, and "really has no purpose other than to show appellant's propensity toward violence." See id. In fact, propensity was the reason the prosecutor argued the 2015

attempted murder/Aggravated Assault was admissible. (V4. 63-65). Specifically, the prosecutor urged for the admission of this 2015 violent act because Appellant “. . . is willing to engage with strangers through an act of violence.” (V4. 64-65; R. 71-73). The trial court agreed with this argument in its original written Order. (R. 71-73; but see R. 92-93).

Furthermore, Appellant’s 2015 conviction for Aggravated Assault has minimal probative value for the charged act as there are few similarities and major differences from each other. Strong v. State, 309 Ga. at 310 (noting that both dissimilarities and similarities between the extrinsic and charged acts should be considered for Rule 404 (b) analysis). A glaring difference between Appellant’s 2015 conviction and the charged act is that in 2015, Appellant stalked the alleged victim to his home and actually discharged his handgun three times compared to the case at hand where Appellant pointed an unloaded, plastic BB gun at the alleged victim only after the indicted victim called for Appellant and shined a light at Appellant’s vehicle as Appellant drove past. (V5. 107-109, 169, 230-239, 357). The trial court grossly abused its discretion by finding that Appellant’s state of mind when firing three rounds at a man and his nearby family had any meaningful probative value for his state of mind when pointing an unloaded plastic BB gun at the alleged victim, the charged act in the instant case.

The fact that the extrinsic and charged acts involved completely different weapons and were used against different types of victims, under disparate circumstances diminishes the probative value of Appellant's 2015 conviction to prove intent. Strong v. State, 309 Ga. at 310-311 ("The incidents involved different weapons used against different types of victims under disparate circumstances"); Wright v. State, 362 Ga. App. 867, 885 (n.13), 870 S.E.2d 484 (2022). Appellant's 2015 conviction for Aggravated Assault involved the discharge of a live firearm, a handgun, (V5. 169, 455), while the charged act in the instant case involved an unloaded BB gun. (V5. 230-239, 357). A live firearm and an unloaded (or even loaded) BB gun are two distinct items, diminishing the probative value of Appellant's 2015 conviction for the issue of intent in the instant case. The extrinsic act and charged act also occurred under wholly different circumstances. Appellant's 2015 conviction was for an act which Appellant initiated by driving to the front of the victim's house, honking his horn to gain the attention of the unsuspecting family and unjustifiably opening fire upon them and their property. (V5. 163-172). For the charged act, Appellant responded to a jogger on the side of a quiet road who yelled something toward him while shining a flashlight at Appellant's windshield as Appellant drove by. (V5. 106-109, 230-239). Additionally, the type of victim in the two acts are distinct— Appellant's 2015 Aggravated Assault was against a man

standing in his front yard with his spouse and her daughter in close proximity, while the instant case involved an unknown person dressed in all black on a dimly lit road whom initiated the contact with Appellant on the road. (V5. 64-65, 102-103, 106-109, 119, 163-172, 230-239).

Additionally, the temporal remoteness of Appellant's 2015 conviction further diminishes the probative value of the extrinsic act for the purpose of intent, as it took place nine (9) years before the crimes charged here, with Appellant incarcerated for a portion of the intervening years. (R. 14-18; V5. 441-451). Jackson v. State, 309 Ga. 69, 78 (holding that the probative value of an extrinsic act was diminished because it took place a decade before the charged crimes, with defendant not incarcerated during any of the intervening years).

Based upon the above, any probative value of Appellant's 2015 conviction was wholly outweighed by its extreme and unfair prejudicial impact. The erroneous admission of Appellant's prior crime cannot be deemed harmless. Testimony about Appellant's 2015 conviction portrayed Appellant as a violent person who needs to be erased from free society. (V5. 163-172, 441-461). Appellant was shown to be a man of such bad, evil character that he would drive to a stranger's house, initiate an argument with them without any cause, and start shooting bullets after a mere exchange of words. (V5. 163-172). To further inflame the jury, Appellant discharged

his firearm at a man in the direction of his house, while his wife and her five-year-old daughter were on the nearby porch. (V5. 168-169). What reasonable individual could possibly give Appellant any presumption of innocence or cause the State to prove this evil purported murderer's guilt beyond a reasonable doubt on the indicted offenses? A juror could easily be swayed by imagining the fear felt by the O.C.G.A. § 24-4-404(b) witness as she described running into her house, hiding her daughter under the kitchen table for safety, hiding herself on the couch while calling 911 after Appellant fired several gun shots. (V5. 163-172). This other act evidence is the poster for a dangerous person who was hardly punished for his crime as he was out of custody on March 30, 2024. (R. 14-18; V5. 60-61, 66).

The testimony about Appellant's 2015 conviction paints him as someone who starts fights, resorts to firearms at a moment's notice and has no regard for the life of the man he fired at or his wife and young child. The prejudicial impact of this testimony is severe and exposes Appellant to the risk that the jury may convict him not for the offense charged but for the extrinsic offense. This is an outcome that Rule 403 and O.C.G.A. § 24-4-404(b) of our Evidence Code are designed to prohibit, and it was a great abuse of discretion for the trial court to admit evidence of Appellant's 2015 conviction for Aggravated Assault. Brown v. State, 303 Ga. 158, 162, 810 S.E.2d 145 (2018).

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). The trial court significantly interfered with Appellant's Sixth Amendment rights by erroneously admitting prior act evidence. The introduction of this other act evidence devastated Appellant and Appellant could not come back from same. (See Entire Trial Transcript). The unfair prejudice resulted when this supposed O.C.G.A. § 24-4-404(b) evidence lured the jury into declaring guilt on an improper basis rather than on proof of specific offenses charged. Harris v. State, supra.

The case itself was whether Appellant was justified in displaying an unloaded, plastic toy BB gun which had the appearance of a handgun to the alleged victim during the alleged victim's encounter with Appellant. (See Entire Trial Transcript; V5. 97-157, 230-239). The Indictment on trial was the alleged victim's word versus Appellant's word and whether the State disproved Appellant's sole defense of self defense and defense of vehicle beyond a reasonable doubt. (See Entire Trial Transcript; V5. 97-157, 230-239). As the trial court correctly found, the case was simply the alleged victim's word compared to Appellant's word. (R. 69-74, specifically R. 72). There was no other evidence to support guilt, to wit: (i) no video

surveillance; (ii) no admission or confession; (iii) no independent eye witness; or (iv) the like. (See Entire Trial Transcript). The admission of the fact that Appellant fired gunshots, unjustifiably, at strangers in the same County in the same area as the indicted offenses must cause this Honorable Court to step in and reverse the convictions and sentence. (V5. 163-172). Too much prejudice flows onto Appellant. Regardless of the O.C.G.A. § 24-4-404(b) analysis and regardless of the “opening the door” analysis, O.C.G.A. § 24-4-403 must bar this other act evidence and its admission was harmful error (beyond a reasonable doubt).⁶ When this Honorable Court reviews the Record de novo and weighs the evidence as it would expect reasonable jurors to have done, this error was harmful. Boone v. State, 321 Ga. 820, 827, 917 S.E.2d 78 (2025).

As argued above, the case at bar created an issue of whether the State disproved that Appellant was justified to point an object that appeared to look like a hand gun at the alleged victim in order to protect himself and/or his vehicle while determining why the alleged victim attempted to gain the attention of Appellant. The introduction of Appellant’s unjustified attempted murder of a family distorted,

⁶ Obviously, the test is not for Appellant to prove harm beyond a reasonable doubt. Rather, the test applied to this situation is whether it is highly probable that the error did not contribute to the verdict. Jester v. State, 322 Ga. 554(2b), 920 S.E.2d 679 (2025).

unfairly, Appellants right to a fair trial. (V5. 232-239). Compare Ealey v. State, 322 Ga. 509(2a), 920 S.E.2d 581 (2025)(High Court determined no prejudice concerning admission of O.C.G.A. § 24-4-404(b) evidence because the prior act was unlikely to inflame the jury's passion against the accused). This error in Appellant's case must not be deemed to be harmless as it is not highly probable that any such error did not contribute to the guilty verdicts. Jester v. State, 322 Ga. 554(2), 920 S.E.2d 679 (2025).

Based upon the above, Appellant's convictions and sentence must be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CHARGED THE JURY THAT A BB GUN, UNDER CERTAIN CIRCUMSTANCES, IS A DEADLY WEAPON PER SE. THIS ERRONEOUS INSTRUCTION WRONGLY AFFECTED BOTH COUNTS OF CONVICTION. HENCE, APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED.

Standard of Review: Whether the trial court's jury instruction was reversible error is reviewed de novo when there is a proper objection. See O.C.G.A. § 17-8-58(a); Booze v. State, __ Ga. __ (3), __ S.E.2d __ (Case Number S26A0154, decided June 16, 2026).

In the case at bar, over timely objection, the trial court charged the jury as follows:

. . .In deciding whether a BB gun is a deadly weapon, you may consider all of the following factors: The nature and extent of an injury inflicted, the character or capabilities of the weapon, the manner in which it was used, any display of it to the jury, and any other circumstances of the case. If the BB gun reasonably appeared, under the circumstances, to be a deadly weapon, then you may find the BB gun was, per se, a deadly weapon. For Count 2 of the indictment, namely, aggravated assault/offensive weapon, the State must prove that the Defendant assaulted another person with an offensive weapon.

To prove assault, the State does not have to prove that the other person was actually injured. However, the State must prove that the Defendant committed an act that placed the person in reasonable apprehension or fear of immediately receiving a violent injury. An offensive weapon is any object that is likely to cause or actually does cause death or serious bodily injury if used against someone. In deciding whether a BB gun is an offensive weapon, you may consider all of the following factors: The nature and extent of any injury inflicted, the character or capabilities of the weapon, the manner in which it was used, any display of it to the jury, and any other circumstances of the case.

(V5. 363, line 7 through V5. 364, line 6; V5. 258-262, 340, 371-374).

An essential element of both counts of the Indictment was whether this BB gun was a deadly weapon (Count One) or an offensive weapon (Count Two). (R. 14-18). In State v. Nejad, 286 Ga. 695(2), 690 S.E.2d 846 (2010), the Honorable Supreme Court of Georgia explained that a pellet gun is a deadly weapon, per se, when the uncontradicted evidence proves that the pellet gun reasonably appeared to the victim against whom it was used to be deadly. The trial court's jury instruction in State v. Nejad, supra, was "A pellet gun in the shape of an automatic weapon is per se a deadly weapon." The Nejad Court reversed this Honorable Court's Opinion in Nejad v. State, 296 Ga. App. 163(2), 674 S.E.2d 60 (2009), by reasoning that because the uncontradicted evidence proved that each victim in Mr. Nejad's case perceived the weapon to be a gun that could be used to shoot them, the trial court did not err when

it charged the jury that the pellet gun was a deadly weapon, per se. See State v. Nejad, supra. Again, this was not a contested issue in State v. Nejad, supra.

In the case at bar, the prosecutor introduced Appellant's sworn testimony from a probation revocation hearing that occurred prior to trial. (V5. 228-240, 462-489). Unlike in State v. Nejad, supra, in the case sub judice, the evidence was not uncontraverted that the BB gun had the appearance of a real firearm because Appellant specifically testified at the prior hearing that was presented at trial that the BB gun was plastic, a toy that had a lot of writing on its side which is unlike a true firearm. (V5. 230-231, 236-237, 439). Thus, the evidence was not uncontraverted that this unloaded, plastic BB gun had the appearance of a deadly weapon and the trial court should not have instructed the jury as quoted above.

This instruction was wrong because it led the jurors to find, under a lesser standard than beyond a reasonable doubt, that if the BB gun reasonably appeared under the circumstances to be a deadly weapon, the jury may find that the gun was, per se, a deadly weapon. (V5. 363, lines 13-15). That instruction is permitted only when the evidence is uncontraverted. State v. Nejad, supra. Otherwise, this per se deadly weapon instruction should not be given. See Nejad v. State, 296 Ga. App. 163(2), 674 S.E.2d 60 (2009)(reversed in State v. Nejad, supra).

Also, who decides if the BB gun “reasonably appeared” under the circumstances to be a deadly weapon—the alleged victim? The jurors? Is this an objective person standard? The trial court did not so instruct. (V5. 363-364). Further, the prosecution must prove that the BB gun reasonably appeared under the circumstances to be a deadly weapon beyond a reasonable doubt. That instruction is not present. (V5. 363, lines 13-15). The law allows the trial court to charge that a BB gun, under certain circumstances, may be a deadly weapon per se only if that is the uncontroverted evidence. State v. Nejad, supra. In the case at bar, as shown above, the evidence was in controversy on whether the unloaded, plastic, toy BB gun was, per se, a deadly weapon. Hence, this instruction was clear error. See State v. Nejad, supra.

This instruction prejudiced the outcome of the case. Both counts of conviction required a deadly weapon or an offensive weapon to be proven by the State beyond a reasonable doubt. (R. 14-18). For the trial court to tell the jurors this erroneous instruction that an unknown person, under these circumstances, could reasonably believe that this pellet gun had the appearance of a firearm and thus, it was, per se, a deadly weapon prejudiced Appellant on both counts. The trial court should not have given this charge and instead, simply left whether the State proved, beyond a reasonable doubt, that the BB gun was a deadly or offensive weapon to the jury under

other circumstances and charges. The trial court should have never injected a per se finding that this unloaded, plastic, toy pellet gun was a deadly weapon under the facts discussed herein. This prejudiced both counts of the Indictment as the makeup of the BB gun was an essential element of both counts. (R. 14-18).

Based upon the above, Appellant's convictions and sentence must be reversed.

III. OVER TIMELY OBJECTION, THE TRIAL COURT CONDUCTED A CRITICAL STAGE OF THE PROCEEDINGS OUTSIDE OF APPELLANT'S PRESENCE. THIS CONSTITUTIONAL ERROR IS A PRESUMPTION OF HARM AND HENCE, APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED.

Standard of Review: Whether the trial court conducted a critical stage of the proceedings outside of Appellant's presence is reviewed under the presumption of harm test. See Sprayberry v. Morris, 322 Ga. 481(3a), 920 S.E.2d 611 (2025).

In Robertson v. State, 268 Ga. 772(4), 493 S.E.2d 697 (1997), our Highest Court held that it does not condone the exclusion or the absence of the criminally accused when the trial judge meets with the prospective members of the jury panel prior to voir dire and asks the following qualifying questions: (i) whether they are citizens of the county; (ii) whether they served on the Grand Jury; and (iii) whether they would suffer any hardship if selected for the jury. The Robertson Court explained that all voir dire should take place in the Courtroom and in the presence of all parties however, in viewing the limited scope of the trial court's question, the Robertson Court found no error.

In Neale v. State, 344 Ga. App. 448(4a), 810 S.E.2d 621 (2018), this Honorable Court held that when a trial judge addresses perspective jurors and dismiss some of them in the jury assembly room who appeared pursuant to the summons of jury service for multiple trials, same is not condoned if done outside of Appellant's presence. Neale v. State, supra. The Neale Court held that the right under the Georgia Constitution to be present pursuant to Article I, Section I, Paragraph XII does not extend to any and all communications between the trial court and potential jurors and thus, Mr. Neale was unsuccessful on direct appeal.

In the case at bar, the following occurred:

[TRIAL COURT]: All right. Let me—I'm going to administer the oath to the bailiffs, and then I think Mr. Harvey knows this, but Mr. Steel, again, we've never tried a case together. I'm going to go downstairs after I administer the oath to the bailiffs. I think there's over 100 potential jurors downstairs. My plan is to run through the basic qualification questions with them and also address any exemptions and hardships. You could certainly come on downstairs and watch that process if you would like. I'm going to go over the statutory qualification questions with them again when we get up here, but I'm always blown away by the fact that I'll lose some downstairs to statutory qualification questions, and then I'll lose some more up here to the exact same questions. So if you want to come down and watch that process, you're certainly invited to do that. It will be downstairs on the first floor in the jury assembly area.

[TRIAL COUNSEL]: We would like to, Your Honor.

[TRIAL COURT]: Okay.

[TRIAL COUNSEL]: Can [Appellant] also attend since it's a part of the critical stage of this process?

[TRIAL COURT]: They're shaking their heads no, that it's a security issue. And I think that's why we probably do it twice. So --

[TRIAL COUNSEL]: Well, I just want the Court to be aware, we are -- and I saw the sheriff saying no -- very politely say no. But we would like [Appellant]-- we don't want to waive this issue under Article I, Section I, Paragraph XII of the Georgia Constitution --

[TRIAL COURT]: All right.

[TRIAL COUNSEL]: -- and the corresponding section of the Federal Constitution his right to be present at a critical stage. We believe it's a critical stage whenever the Court is interacting with jurors and potentially discussing with jurors their qualifications before releasing them. So I understand the Court's ruling. I'm just --

[TRIAL COURT]: Yeah. The objection is noted for the record, but due to the security issues -- he will be present certainly when the 36 potential jurors are brought up and the statutory qualification questions are asked of them again. All right. With that, I'm going to go ahead and administer the oath to the bailiffs. If I can get you both to state your name for the court reporter.

[BAILIFF]: Lonnie Pressley.

[BAILIFF]: Jimmy Parham.

[TRIAL COURT]: All right. And then I'm going to impose on the State with my poor memory. We have another bailiff who is going to be coming in on Wednesday -- later today? We'll need to get him sworn too if I forget it.

So he has been sworn already as part of the term. I like to swear them again so that it's contained in the trial transcript somewhere. So if I can get you both to raise your right hand.

(...bailiffs sworn...)

[TRIAL COURT]: All right. I'm going downstairs and will see you down there. I'll see you when I come back.

[TRIAL COUNSEL]: Thank you, Your Honor.

(Whereupon, there was a break in the proceedings.)

(V5. 12, line 1 through V5. 14, line 11);

...

[TRIAL COUNSEL]: Thank you. And can I just put on the record, Your Honor, what happened in the jury assembly room, if you don't mind?

[TRIAL COURT]: Sure. Yeah, absolutely. So went down to the jury assembly room. I gave them the general -- what I guess I'm calling the general oath. And I took up any hardships that existed as well as any statutory exemptions. I think we lost two to statutory exemptions of being over the age of 70 and another juror because she was the primary custodial caregiver of children with no reasonable alternative available. I asked them the juror qualification questions. I'm going to ask them again those up here. We didn't lose anybody to those. And there was two hardships, one surgery planned this week, some kind of a heart -- I'm sorry -- surgery planned next week, but a heart issue that causes them to need two-hour blocks at a time to just lay down on the floor, which

probably wasn't going to work, and another lady whose daughter had given birth with complications earlier in the week that she is caring for post-cesarean, so... But that's what occurred downstairs. I guess I want to put y'all on notice also. Number one on the list, Mr. Vadim Andrian, he did approach and speak to me and wanted off because he travels for work and is supposed to go out of town tomorrow. He's supposed to drive up to South Carolina for work. I did not excuse him for that reason, but I told him that he could make y'all aware that he had that going on. And for -- so the record is clear, those hardships and exemptions were addressed downstairs in the jury assembly area. The Defendant was not present. The Defendant's counsel was present.

[TRIAL COUNSEL]: Thank you, Your Honor.

[TRIAL COURT]: No problem.

[TRIAL COUNSEL]: And the prosecutor, I believe, was present. And then -- I know he was present. And then it did not appear to me it was being recorded. Maybe it was being recorded.

[TRIAL COURT]: No, it was -- it was not. It was not.

[TRIAL COUNSEL]: Thank you, sir.

[TRIAL COURT]: No problem.

[TRIAL COUNSEL]: May I ask the court reporter a question off the record?

[TRIAL COURT]: Absolutely.

(...off the record...)

(V5. 17, line 16 through V5. 19, line 9).

Security reasons do not trump Appellant's Constitutional right pursuant to Article I, Section I, Paragraph XII of the Georgia Constitution to be present at every critical stage of the proceedings. See, by analogy, Reid v. State, 286 Ga. 484(3c), 690 S.E.2d 177 (2010)(upon timely objection, security reasons do not trump Defendant's right to a public trial). Appellant timely objected to having any of the proceedings, including the above quoted portion of trial, conducted outside of his presence. (V5. 12-19). Appellant never saw nor heard the potential jurors who were excused or the potential jurors who spoke with the trial court and there was no Court Reporter making an accurate record of same. (V5. 12-19). Appellant was not informed on exactly what occurred outside of his presence as he did not see the jurors, hear the jurors, hear the trial court's questions or the like. (V5. 12-19). It is not enough for Appellant to receive a generalization of what occurred outside of his presence during this critical stage of the proceedings after the fact as was done by the trial court at the request of Appellant's trial counsel. (V5. 12-19). Appellant timely objected to this

procedure occurring outside of his presence. (V5. 12-19). Appellant was in custody at the time of trial. (R. 105). The trial court prevented Appellant from participating in this critical stage of his proceeding, to wit: trial court speaking with potential jurors outside of Appellant's presence and deciding whether to excuse some of the potential jurors. This is reversible error per se. See Champ v. State, 310 Ga. 832, 854 S.E.2d 706 (2021).

Based upon the above, Appellant's convictions and sentence must be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse Appellant's convictions and sentence and remand this case to the Superior Court of Jackson County with directions to grant Appellant a new trial.

This submission does not exceed the word count limit imposed by Rule 24.

This 22nd day of June, 2026.

Respectfully submitted,

/s/ BRIAN STEEL

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Georgia Bar No. 677640

Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **BRIEF OF APPELLANT** via e-mail to the below individual. I certify that there is a prior agreement with Assistant District James Chafin, Esq. with the Jackson County District Attorney's Office to allow documents in a PDF format sent via email to suffice for service.

Jchafin@jacksoncountygov.com

**James Chafin, Esq.
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This 22nd day of June, 2026.

Respectfully submitted,

/s/ BRIAN STEEL

Brian Steel
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