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You Shall Not Pass! Georgia Court of Appeals Narrows the Admissibility of Prior Acts Character Evidence Under Georgia Evidence Rule 404(b)

Hannah Farthing*

I. INTRODUCTION

The common law rules of evidence prohibited the use of a defendant's "bad character or prior, unrelated misconduct" to show in a criminal trial that the defendant was more likely to have committed the charged crime.¹ Today, however, the accused's prior crime or prior acts are admissible in trial so long as the evidence is relevant to some issue other than proving the accused acted in accordance with his character.² Although the rule manages to keep out entirely unrelated evidence of the accused's criminal character, many broad exceptions to the rule still lie in place allowing the prosecution to sneak evidence into the trial.³ This creates a danger that once the jury learns that a defendant has a criminal history, the likelihood of a conviction escalates tremendously.⁴

Mirroring the Federal Rules of Evidence, Georgia maintains the general prohibition making character evidence of "bad acts" inadmissible

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1. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 777 (2013).

2. *Id.* at 777–78.

3. *Id.* at 779.

4. *Id.* at 780.

to show a defendant acted in conformity with these negative characteristics on a certain occasion.⁵ Georgia adopted its own rendition to the general prohibition of character evidence through the enactment of the Official Code of Georgia Annotated section 24-4-404(b).⁶ Under the Georgia code, character evidence will surpass the general prohibition if the prosecution can show that the evidence is relevant to the accused's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁷

The Georgia Court of Appeals tightened the reins on prosecutors' ability to admit character evidence into criminal trials through the ruling in *Wright v. State*.⁸ The court held evidence of Wright's prior drug conviction, while relevant to the charged offense, was improperly admitted into evidence because of the danger of unfair prejudice the evidence presented. Hiding behind a veil of relevance and minimal prosecutorial need will no longer suffice when the admission of the evidence poses a danger that the jury will misuse the evidence for an improper purpose.⁹

II. FACTUAL BACKGROUND

In November 2015, Jamie Courtney Wright arrived at a home in Richmond County.¹⁰ Approximately one hour later, narcotics investigators and law enforcement officers arrived at the residence in search of an unnamed fugitive. Officers were given consent to enter the residence by the homeowner. Wright emerged from a bedroom and was asked by a law enforcement officer to wait on the porch with another officer while the residence was searched.¹¹ An investigator found a black bookbag containing around forty seven grams of a "leafy substance" in the room where Wright emerged from.¹² After finding the substance, believed to be marijuana, the investigator asked the occupants waiting on the porch who the bookbag belonged to. Without a description of the bag, Wright told the investigators the bookbag belonged to him. After Wright claimed to own the bag, the investigator retrieved the black

5. David N. Dreyer et al., *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2.

6. O.C.G.A § 24-4-404(b) (2023).

7. *Id.*

8. 362 Ga. App. 867, 870 S.E.2d 484 (2022).

9. *Id.* at 884, 870 S.E.2d at 500.

10. *Id.* at 868, 870 S.E.2d at 489.

11. *Id.*

12. *Id.*

bookbag containing the believed narcotics.¹³ Wright claimed possession of a bookbag stating, “[y]eah, that’s my bag.”¹⁴ With consent from Wright to search the bag, investigators found a handgun, a small scale, a dollar bill with oxycodone residue, and various smaller bags of drugs. A search incident to arrest later revealed a large quantity of small denominations of bills. No personal drug use paraphernalia was found on Wright’s person or in the black bookbag, indicating the items recovered were for distribution and not personal use.¹⁵

Wright later testified that when he arrived at the residence that morning, he only possessed a small red and black bag containing various items for his child; furthermore, he knew nothing about the black bookbag or its contents.¹⁶ Wright also testified that he was simply found in the room containing the bookbag at issue because he entered the room to look out the window when officers arrived. Contradicting the testimony of the investigators, Wright testified that he only claimed possession of the red and black bag he arrived with, never claiming ownership of the black bookbag at issue. At the conclusion of the first phase of a bifurcated trial, Wright was charged and found guilty of possession with intent to distribute of a Schedule One and Schedule Two controlled substance and possession of a firearm during the commission of a crime. During the second phase of the bifurcated trial, the State admitted evidence from Wright’s 2011 conviction for a possession with intent to distribute.¹⁷

Wright challenged his conviction on two grounds.¹⁸ First, Wright argued that the statements made pertaining to the ownership of the bookbag at issue are inadmissible as “products of custodial interrogation” because the statements were made before an investigator advised him of his Miranda rights.¹⁹ After assessing the facts, the court of appeals found

13. *Id.*

14. *Id.* at 868, 870 S.E.2d at 489–90.

15. *Id.* at 868, 870 S.E.2d at 490.

16. *Id.*

17. *Id.* at 869, 870 S.E.2d at 490. Wright’s trial was bifurcated because he was also charged with being a convicted felon in possession of a firearm in addition to the drug charge at issue here. The State first presented its case for the drug charge and the jury returned a verdict on that issue. Then Wright was tried for the felon in possession of a firearm charge. The trial was split so the jury did not take Wright’s prior felony conviction into account when returning a verdict for the drug charge.

18. *Id.*

19. *Id.* When examining if a detainee was in custody pursuant to Miranda, it must be determined if a reasonable person in the position of the detainee would have believed that he was not free to leave. The court rested its decision on three main points to explain why Wright’s statement did not meet the threshold for Miranda. First, Wright presented no evidence that investigators told the occupants that they were under arrest or forbidden to

no error in the denial of Wright's motion to suppress.²⁰ Compared to a reasonable person not guilty of a crime in a similar situation, Wright was found not to be within the confines of a custodial interrogation under *Miranda*.²¹

Wright's second justification for appeal rested on wrongfully admitted evidence of his 2011 conviction for possession with intent to distribute marijuana and possession of a firearm during the commission of a crime.²² The superior court admitted the evidence from Wright's prior conviction for the sole purpose of establishing Wright's knowledge, intent, and lack of mistake of the commission of the current charged crime.²³ Although the jury was given a limiting instruction on how to view the evidence, the Georgia Court of Appeals concluded that the evidence was improperly admitted.²⁴

III. LEGAL BACKGROUND

A. *The Georgia Rules of Evidence*

Under Official Code of Georgia Annotated § 24-4-401 (Rule 401)²⁵, for evidence to be considered admissible in trial the evidence must be relevant.²⁶ Relevant evidence tends to make the existence of a particular fact of consequence more or less probable than the fact would be without the admission of the evidence.²⁷ Specifically, in order for evidence to be found relevant under O.C.G.A § 24-4-404(b) (Rule 404(b)), the evidence must be relevant for the non-propensity purpose for which the evidence is being offered.²⁸ For instance, evidence of a prior driving under the

leave the premises. Second, the question investigators asked about the ownership of the black bookbag was directed at all three men awaiting on the porch, rather than Wright directly. Lastly, when the investigator asked the three men a second time about the ownership of the bookbag, the nature of Wright's detention had not changed.

20. *Id.* at 876, 870 S.E.2d at 494–95.

21. *Id.* While Wright may have believed that he was not free to leave from his detention on the porch, his freedom was not infringed to the level associated with a formal arrest requiring Wright to be informed of his *Miranda* rights. For *Miranda* rights to be necessary the line of questioning must be to implicate a crime. Here, the questions asked by the investigator to Wright and the other men present at the scene lacked an accusatory nature” and did not explicitly refer to the contraband contained within the bookbag.

22. *Id.* at 876, 870 S.E.2d at 495.

23. *Id.*

24. *Id.*

25. O.C.G.A § 24-4-401 (2023).

26. *Id.*

27. *Id.*

28. O.C.G.A § 24-4-404(b).

influence of alcohol charge would be relevant evidence in a current trial for the same charge.²⁹ Allowing this evidence in at trial would make the existence of the fact that the driver was voluntarily driving under the influence more probable than the fact would be without the admission of that evidence.³⁰

After concluding that evidence is relevant under Rule 401, the trial court must come to an independent conclusion as to whether the probative value of the evidence offered is “substantially outweighed” by any of the enumerated factors in Official Code of Georgia Annotated § 24-4-403 (Rule 403).³¹ Even if evidence is considered relevant to the case at hand, evidence is inadmissible if the evidence presents a danger of unfair prejudice to the defendant, would confuse the jury on the issues at bar, or would cause undue delay in the proceedings.³²

Generally, evidence of a defendant’s character trait is not allowed during trial to show that the defendant acted in conformity with that specific character trait on the date in question.³³ In contrast, evidence of a defendant’s character is permissible during trial if the evidence is being offered to show proof of motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake.³⁴ The Rule 403 analysis of evidence of prior acts requires a case by case common sense assessment of the surrounding circumstances of both the prior act and the charged crime.³⁵

29. *State v. Jones*, 297 Ga. 156, 163, 773 S.E.2d 170, 175 (2015). The ruling of *State v. Jones* occurred at a very interesting time, ultimately resulting in the reversal of Jones’ conviction grounded in the new evidence code. *State v. Jones* was in the court system a month prior to the passage of the updated Georgia Evidence Code. Anticipating the passage of the new code, the State filed a notice with the court outlining its purpose for including Jones prior conviction in trial was for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

30. *Id.* Michael Jones was stopped by a deputy sheriff in Cherokee County after being observed driving above the speed limit. During the stop, the officer detected the smell of alcohol and requested Jones exited his vehicle. After failing two field sobriety tests, Jones was arrested for driving with a blood alcohol content of 0.08 grams or more. Jones was found guilty of all charges at the trial court level. Jones’ conviction was reversed due to the improper admission of evidence of his prior acts. The court held the prior act was not relevant to or probative of the current charged crime.

31. *Wright v. State*, 362 Ga. App. 867, 877, 870 S.E.2d 484, 495 (2022); *Jones*, 297 Ga. at 163, 773 S.E.2d at 175.

32. O.C.G.A § 24-4-403 (2023).

33. O.C.G.A § 24-4-404(a).

34. O.C.G.A § 24-4-404(b).

35. *Wright*, 362 Ga. App. at 877, 870 S.E.2d at 495 (citing *Green v. State*, 352 Ga. App. 284, 290, 834 S.E.2d 378, 384 (2019)). *Green v. State* is like the case here because defendant Anthony Green was also charged with possession of a firearm by a convicted felon in addition to the charged crime. During Green’s trial, a police investigator read from a

B. The Jones Test

When reviewing the admission of evidence, courts view the decision and circumstances around the admission of the evidence for abuse of discretion on the part of the judge.³⁶ The error of improperly admitting evidence into the trial court requires reversal of the appellant's conviction unless the error is concluded to be harmless.³⁷ In determining if the evidence was offered for a "proper purpose" the Georgia Court of Appeals applies the evidence to the test outlined in *State v. Jones*.³⁸

State v. Jones is a similar case that deals with the admissibility of prior convictions under the Georgia Evidence Code.³⁹ The Supreme Court of Georgia held that the evidence of Jones' prior conviction for driving under the influence was admissible for subsequent prosecution of driving under the influence to show his intent and knowledge.⁴⁰ While the court held that the evidence was admissible under Rule 404 (b), the court reserved the Rule 403 analysis of the evidence on remand for the court of appeals.⁴¹ A thin line lies between the permissible purposes of proving intent and knowledge and the impermissible purpose of proving the character of the defendant.⁴² The *Jones* opinion concluded with caution that admission of prior acts evidence leaves significant room for prejudice to the defendant.⁴³

Jones lays out a three-prong test to determine the admissibility of evidence: (1) the proposed evidence must be relevant to an issue other than the defendant's character; (2) the probative value of the prior acts must not be substantially outweighed by unfair prejudice to the defendant; and (3) there must be sufficient proof that the defendant committed the current act in question.⁴⁴

transcript of a guilty plea hearing from 1982. The court held that the evidence from the 1982 guilty plea was improperly admitted into evidence during Green's 2012 trial. Furthermore, the court noted the jury was improperly instructed it could use the evidence in establishing identity in the charge offense, which was a central issue in the case.

36. *Wright*, 362 Ga. App. at 876, 870 S.E.2d at 495. (citing *Jones*, 297 Ga. at 159, 773 S.E.2d at 172).

37. *Finney v. State*, 311 Ga. 1, 13, 855 S.E.2d 578, 588 (2021).

38. *Wright*, 362 Ga. App. at 876, 870 S.E.2d at 495.

39. *Jones*, 297 Ga. at 156, 773 S.E.2d at 171.

40. *Id.*

41. *Id.* at 163, 773 S.E.2d at 175.

42. *Id.*

43. *Id.*

44. *Wright*, 362 Ga. App. at 877, 870 S.E.2d at 495.

1. Prong One: Relevance to Some Issue Other Than Defendant's Character

For evidence to be admissible in trial, the proposed evidence must be relevant to a fact of consequence at issue in the trial.⁴⁵ Relevant evidence is any “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁴⁶

2. Prong Two: Probative Value Not Substantially Outweighed by Unfair Prejudice

The second prong of the *Jones* test requires the facts of the issue at hand to be applied to the exclusionary factors found in Rule 403.⁴⁷ Evidence will be considered inadmissible if the need for the evidence is not stronger than the danger of unfair prejudice to the defendant.⁴⁸ The court may consider prosecutorial need for the evidence, overall similarity to the charged acts, and the “temporal remoteness” of the other acts when analyzing the probative value of evidence of other acts.⁴⁹

a. Knowledge

Knowledge under Rule 404(b) refers to a special skill needed to execute a crime or specific knowledge based on past experience.⁵⁰ Evidence of a book about bombmaking would be a proper admission under Rule 404(b) to show that the defendant had the knowledge to construct the destructive device used in the current crime.⁵¹ Moreover, evidence may be admitted if the defendant's knowledge is an element of the charged crime.⁵² Finally, evidence pertaining to a defendant's knowledge is properly admitted when the defendant claims they were unaware that a criminal act was being carried out.⁵³ On the other hand, if a crime does not require special knowledge on the defendant's part, prior acts evidence

45. O.C.G.A § 24-4-401.

46. *Jones*, 297 Ga. at 877, 870 S.E.2d at 495 (citing O.C.G.A. § 24-4-401).

47. *Id.*; O.C.G.A § 24-4-403.

48. O.C.G.A § 24-4-403.

49. *Jones*, 297 Ga. at 877, 870 S.E.2d at 495 (citing *Thompson v. State*, 308 Ga. 854, 859, 843 S.E.2d 794, 799 (2020)).

50. *Id.* at 879, 870 S.E.2d at 496.

51. *United States v. Walters*, 351 F.3d 159, 164–165 (5th Cir. 2003).

52. *Jones*, 297 Ga. at 879, 870 S.E.2d at 497 (citing *Green v. State*, 352 Ga. App. 284, 289, 834 S.E.2d 378, 383 (2019)).

53. *Id.* at 879, 870 S.E.2d at 497.

should not be admitted to show that the defendant is capable of committing the crime.⁵⁴

b. Intent

Evidence of a defendant's prior acts is admissible under Rule 404(b) where intent is a material issue which the State must prove in its case against the defendant and "the same state of mind was required for committing the prior act and the charged crimes."⁵⁵ The intent of a defendant becomes an issue when the defendant pleads not guilty, unless the defendant takes affirmative steps to remove intent as an element to be proven by the State.⁵⁶ When a defendant's intent of the charged offense is at issue, the prior acts evidence becomes relevant by the defendant placing himself in the same mental state for both the prior conviction and the charged crime.⁵⁷ Prior acts evidence would be relevant and admissible if a defendant was to admit to criminal involvement but testifies they were forced or coerced into participating in the crime, thus lacking the necessary criminal intent.⁵⁸

When deciding the probative value of prior acts evidence used to prove intent, the court reviews the prosecutorial need for the extrinsic evidence, the similarities between the prior act and the charged offense, and the temporal remoteness of the prior act.⁵⁹ Admission to prior acts evidence presents a danger that the jury will convict the defendant based on the prior offense and not the charged offense.⁶⁰ Prosecutorial need for prior acts evidence to show intent is minimal when it is unlikely that a rational jury could conclude, given the facts and circumstances of the case, that the defendant lacked intent.⁶¹ The probative value of evidence is considered to be minimal when prior evidence is offered to prove a fact that is undisputed or "not reasonably suspectable of dispute."⁶²

54. *Id.*; *Green*, 352 Ga. App. at 289–90, 834 S.E.2d at 384.

55. *Wright*, 362 Ga. App. at 880, 870 S.E.2d at 497 (citing *Jones*, 297 Ga. at 160–61, 773 S.E.2d at 173–74).

56. *Id.*

57. *Kirby v. State*, 304 Ga. 472, 480, 819 S.E.2d 468, 477 (2018).

58. *Sloan v. State*, 351 Ga. App. 199, 209, 830 S.E.2d 571, 581 (2019).

59. *Green*, 352 Ga. App. at 291, 834 S.E.2d at 384.

60. *Brown v. State*, 303 Ga. 158, 162, 810 S.E.2d 145, 150 (2018).

61. *Wright*, 362 Ga. App. at 881, 870 S.E.2d at 497; *Sloan*, 351 Ga. App. at 210, 830 S.E.2d at 581.

62. *Wright*, 362 Ga. App. at 881, 870 S.E.2d at 497 (citing *Brown*, 303 Ga. at 162, 810 S.E.2d at 150).

c. Lack of Mistake

Lack of mistake is only at issue in a case when the defendant attempts to use justification as a defense in claiming the crime was committed by accident or mistake.⁶³

3. Prong Three: Sufficient Proof Defendant Committed the Act

When a defendant challenges the evidence supporting a conviction, the court must answer the question, if after viewing the evidence in a light most favorable to the prosecution, that a rational jury could have found the elements of the crime were met beyond a reasonable doubt.⁶⁴ Generally, questions about conflicting pieces of evidence, credibility of witnesses, and the weight given to each piece of evidence is left to the discretion of the trier of fact, most often the jury.⁶⁵ The trier of fact is also not required to accept the defense presented by the defendant.⁶⁶ The court first views the evidence presented at trial in a light most favorable to the verdict.⁶⁷ Then the court determines if the evidence is sufficient for a rational jury to find the defendant guilty of the charged crime beyond a reasonable doubt.⁶⁸ As long as there is some amount of competent evidence, even if contradictory, to support each element of the state's case, the verdict will stand.⁶⁹

IV. COURT'S RATIONALE

A. Judge Phipps's Opinion

Judge Herbert Phipps's analysis of the character evidence issue in *Wright v. State* can be traced through three major points: (1) the facts at hand weigh against admissibility of the evidence under the *Jones* test; (2) an analysis of the potential harm that admission of the evidence would pose on the defendant; and (3) commentary of the dissent's jaded rationale of the complex issue.

63. *Parks v. State*, 300 Ga. 303, 306, 794 S.E.2d 623, 628 (2016).

64. *Galvan v. State*, 330 Ga. App. 589, 592, 768 S.E.2d 773, 777 (2015).

65. *Heard v. State*, 309 Ga. 76, 82, 844 S.E.2d 791, 797 (2020).

66. *Wright*, 362 Ga. App. at 890, 870 S.E.2d at 505.

67. *Heard*, 309 Ga. at 82, 844 S.E.2d at 797.

68. *Id.* at 82–83, 844 S.E.2d at 798.

69. *Galvan*, 330 Ga. App. at 592, 768 S.E.2d at 777.

1. The Jones Test Analysis

a. Relevance to Some Issue Other Than Wright's Character

Under the first prong of the *Jones* test, evidence of prior acts will be admissible in trial if the evidence of the other acts is relevant to some issue other than the character of the defendant.⁷⁰ Evidence is either relevant to the issue at hand or it is not. Here, the evidence of Wright's 2011 conviction would only be admissible if that evidence was being proffered for a purpose other than to impeach Wright's character.⁷¹

b. Probative Value Not Substantially Outweighed by Unfair Prejudice

Justice Phipps conducted an in-depth analysis of prong two by assessing if the probative value of the evidence was not outweighed by unfair prejudice to Wright. The trial judge gave the jury a limiting instruction to only consider the evidence of Wright's prior conviction as it pertained to his knowledge, intent, and lack of mistake of the current crime.⁷² The limiting instruction was provided to the jury before the evidence was admitted and again during the jury charge.⁷³ As discussed below, the Georgia Court of Appeals found error in the admission of the evidence as it pertained to all three considerations provided in the limiting instruction.⁷⁴

i. Knowledge

The crime Wright was charged with does not require any special skill or knowledge to execute the offense.⁷⁵ Moreover, Wright did not claim to have knowledge, or lack of knowledge of the items contained in the black bookbag. Wright outright claimed that the black bookbag was not his. The trial court erred in admission of evidence on the basis of the defendant's knowledge because Wright's knowledge was not an issue in this case.⁷⁶

70. *Wright*, 362 Ga. at 877, 870 S.E.2d at 495.

71. *Heard*, 309 Ga. at 84–85, 844 S.E.2d at 799.

72. *Wright*, 362 Ga. App. at 876, 870 S.E.2d at 495.

73. *Id.* at 878, 870 S.E.2d at 496.

74. *Id.*

75. *Id.* at 880, 870 S.E.2d at 497.

76. *Id.*

ii. Intent

Wright's prior convictions were relevant because the same intent was needed for both crimes, and Wright did not affirmatively take steps to withdraw intent as an element of the State's case.⁷⁷ The jury was tasked with choosing between believing the testimony of the sole witness for the State or believing the testimony of Wright.⁷⁸ To believe the State's account of events, the jury would need to believe that Wright claimed ownership of the black bookbag and all of its contents.⁷⁹ Alternatively, to believe Wright, the jury would have to believe he claimed ownership to only one bookbag—the black and red bag; that he did not know the contents of the black bookbag; and that he never claimed ownership of the black bookbag.⁸⁰

The court held that the prosecutorial need for evidence of prior acts is minimal, no matter which version is believed, because there is no reasonable jury that could find that Wright possessed the bookbag and its contents but did not intend to use the items within the bag.⁸¹ A reasonable jury could have concluded that Wright only intended to claim ownership of the red and black bag.⁸² Moreover, the court held that the short time frame between the June 2011 offense and the November 2015 offense did not add to the probative value of the prior acts evidence.⁸³

The danger of unfair prejudice against Wright was significant in this case because the only direct incriminating evidence was from the testimony of a single witness.⁸⁴ Following Wright's testimony about never claiming ownership to the black bookbag and his reasoning behind being in the room where the black bookbag was recovered, a reasonable jury could have concluded that Wright intended only to claim ownership of the red and black bag.⁸⁵ If the evidence of Wright's prior conviction was admitted it could have encouraged the jury to find—because he was convicted of a drug and gun possession offense in the past—that Wright was more likely to have committed the charged offense here.⁸⁶

77. *Id.* at 881, 870 S.E.2d at 497–98.

78. *Id.* at 881, 870 S.E.2d at 498.

79. *Id.*

80. *Id.* at 881–82, 870 S.E.2d at 497.

81. *Id.* at 882, 870 S.E.2d at 497.

82. *Id.*

83. *Id.* at 883, 870 S.E.2d at 499.

84. *Id.*

85. *Id.*

86. *Id.*

iii. Lack of Mistake

The court spent little analysis on whether the evidence could be considered to show Wright's lack of mistake.⁸⁷ There was no evidence that Wright accidentally possessed the drugs and gun in this case. So, whether the charges resulted from accident or lack of knowledge is irrelevant.⁸⁸

c. Sufficient Proof Wright Committed the Charged Act

The only factor that weighed in favor of admitting the evidence was prong three: finding enough evidence in the case to prove Wright committed the crime notwithstanding the evidence of his prior 2011 conviction.⁸⁹ Wright argued that the evidence against him presented at trial was insufficient to support his conviction, and the court disagreed.⁹⁰ Wright's appeal challenged the evidence connecting him to the black bookbag.⁹¹ Wright contends the evidence presented to the jury on the issue of ownership of the bag was contradictory.⁹² The court found no issue with the conclusion the jury reached from the evidence at trial.⁹³ Even though the court concluded the evidence against Wright was sufficient to uphold the conviction, the court reversed his conviction.⁹⁴

2. Potential Harm of Wrongfully Admitted Evidence

Determining that the evidence of Wright's prior conviction was erroneously admitted, the Georgia Court of Appeals reviewed the record de novo to conclude if the error was harmless.⁹⁵ To test if a given error had a harmful impact, the court must determine whether it was highly probable that the error contributed to the verdict of the jury.⁹⁶ The evidence is weighed in the same fashion a reasonable jury would be expected to weigh the evidence, assuming the jury refrained from the "most pro-guilt possible view" of each piece of evidence.⁹⁷

87. *Id.* at 889, 870 S.E.2d at 503.

88. *Id.*

89. *Id.* at 890, 870 S.E.2d at 504.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 889, 870 S.E.2d at 504.

96. *Brown v. State*, 303 Ga. 158, 164, 810 S.E.2d 145, 150 (2018).

97. *Id.*

Apart from the wrongfully admitted evidence of Wright's prior criminal acts, the evidence against him was scarce, resting on the testimony of a single witness.⁹⁸ It is reasonable the jury could have concluded from Wright's own testimony that he intended to claim ownership of the red and black bag, not the black bookbag containing the drugs.⁹⁹ Finally, the jury was given erroneous instructions on how it could consider and weigh the evidence of Wright's prior conviction.¹⁰⁰ The court concluded, because the evidence against Wright was scarce and the improperly admitted prior acts evidence was not insignificant, it was highly probable that the error resulted in the guilty verdict.¹⁰¹

3. The Majority's Opinion on the Dissent

The dissent, authored by Chief Justice Brian Rickman, argues that the verdict should have been upheld on two grounds: (1) the probative value of the prior acts evidence was high because of the similarity of the two offenses, and (2) the prosecutorial need for the evidence was significant to answer the question of whether Wright intended to possess the black bookbag.¹⁰² The majority took its own analysis of the dissent, pointing to three intertwined flaws within its reasoning.¹⁰³

a. The Balancing Test

The majority contends that the dissenting opinion misses the mark on the balancing test to determine the prosecutorial need and probative value of Wright's 2011 conviction evidence.¹⁰⁴ The test under Rule 403 asks whether a rational jury could conclude that the defendant committed the charged crimes without intent, not whether the evidence "generally is probative of the defendant's intent in the abstract."¹⁰⁵

Here, the court determined that no rational jury could conclude that Wright possessed the black bookbag and its contents while neither intending to possess nor intending to distribute the drugs inside the bookbag.¹⁰⁶ Potential similarities between the prior act and the charged offense only increased the danger of unfair prejudice and the possibility

98. *Wright*, 362 Ga. App at 890, 870 S.E.2d at 504.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 884, 870 S.E.2d at 500 (Rickman, C.J. dissenting).

103. *Id.*

104. *Id.*; O.C.G.A § 24-4-403.

105. *Wright*, 362 Ga. App. at 884, 870 S.E.2d at 500; O.C.G.A § 24-4-403.

106. *Wright*, 362 Ga. App. at 884–85, 870 S.E.2d at 500.

that the jury would infer Wright's guilt from improper propensity evidence.¹⁰⁷

b. Exception Swallowing the Rule

Because the charged offense is a controlled substance charge, the dissent viewed the prior acts evidence as evidence with a high prosecutorial need to prove intent due to Wright's "mere presence" defense.¹⁰⁸ The majority concluded, while there may be circumstances where the mere presence defense would increase prosecutorial need of the evidence, this case does not elicit such need.¹⁰⁹

On one hand, if the jury were to believe the testimony of the investigator, the prosecutorial need for the prior acts evidence would be nonexistent.¹¹⁰ On the other hand, if the jury were to believe the testimony of Wright, the presence of such evidence would present two relevant issues.¹¹¹ First, the jury could infer Wright's guilt based on propensity.¹¹² Because Wright committed the 2011 act, one could infer he likely intended to commit the crimes at issue here, and because he intended to commit the crimes, one could infer he subsequently possessed the drugs and gun at issue here.¹¹³ Alternatively, the jury could decide Wright was guilty of the charged crime to punish him for possessing a gun and drugs in the prior 2011 case.¹¹⁴ In both possible scenarios, the admission of prior acts evidence manufactures an improper purpose of evidence.¹¹⁵

c. Reliance on Inapplicable Case Law

Finally, the majority found the cases from which the dissent was founded upon differed substantially from the facts here, with only surface-level applicability to the case at hand.¹¹⁶ In each case relied upon by the dissent, the court did not engage in discussion about the prosecutorial need of prior acts evidence for the non-propensity purpose of intent under Rule 404(b).¹¹⁷ All of the cases lacked an analysis of

107. *Id.* at 885, 870 S.E.2d at 500.

108. *Id.* at 885, 870 S.E.2d at 501.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 885–86, 870 S.E.2d at 501.

114. *Id.* at 886, 870 S.E.2d at 501.

115. *Id.* at 886, 870 S.E.2d at 501–02.

116. *Id.* at 886–87, 870 S.E.2d at 502.

117. *Id.* at 887, 870 S.E.2d at 502.

whether a rational jury could conclude that the defendant committed the charge without intending to commit the charged crime.¹¹⁸

In *Hargrove v. State*,¹¹⁹ the prosecutorial need of the evidence was considered for reasons not at issue in *Wright*, because the evidence against the defendant for possession of drugs was merely circumstantial.¹²⁰ Here, the State presented direct evidence to the fact that Wright claimed ownership of the black bookbag that contained the drugs.¹²¹

In *Moton v. State*,¹²² the court did not engage in a discussion of the danger of unfair prejudice to the defendant under Rule 403.¹²³ The balancing test was considered to be satisfied because the prior act and the charged crime occurred in the same location.¹²⁴ Here, however, Wright's 2011 prior act and the charged crime did not occur in the same location. The court also concluded the limiting instruction provided to the jury reduced any unfair prejudice.¹²⁵ Here, the presence of a limiting instruction was found not to reduce the danger of unfair prejudice to Wright.¹²⁶ The majority concluded that "absent any substantive analysis of prosecutorial need" the decision from the court in *Moton* holds minuscule value to the current analysis.¹²⁷

Finally, the court in *Gunn v. State*¹²⁸ failed to delve into a discussion of weighing the prosecutorial need against any danger of unfair prejudice to the defendant.¹²⁹ The court in *Gunn* merely concluded, given the circumstances surrounding the case, the eleven-year gap between the prior act, and the charged crime was not detrimental to the probative value of the evidence.¹³⁰

4. The Chief Justice's Dissent

Given the similarity of Wright's prior conviction and the charged offense, the dissent concluded that the evidence was highly probative to

118. *Id.*

119. 361 Ga. App. 106, 863 S.E.2d 364 (2021).

120. *Wright*, 362 Ga. App. at 887, 870 S.E.2d at 502.

121. *Id.*

122. 351 Ga. App. 789, 833 S.E.2d 171 (2019).

123. *Wright*, Ga. App. at 888, 870 S.E.2d at 502.

124. *Id.* at 888, 870 S.E.2d at 503.

125. *Id.*

126. *Id.* at 876, 870 S.E.2d at 495.

127. *Id.* at 888, 870 S.E.2d at 503.

128. 342 Ga. App. 615, 804 S.E.2d 118 (2017).

129. *Wright*, 362 Ga. App. at 888, 870 S.E.2d at 503.

130. *Id.*

show Wright's intent to possess the drugs and subsequent intent to distribute the drugs.¹³¹ Wright's lone contention and defense at trial was being merely present at the scene where the drugs were recovered and having no witnesses who testified to Wright being the owner of the black bookbag.¹³² Because Wright chose to raise a defense of mere presence, the prosecutorial need was significant to overcome Wright's defense.¹³³

Next, the dissent proclaimed the majority took a generalized approach in determining the prosecutorial need in the present case.¹³⁴ The prosecutorial need should not have been grounded in the analysis of whether a hypothetical defendant could intend to possess the drugs at issue, but more specifically if Wright intended to possess the drugs at issue.¹³⁵ In order to answer the pointed question of whether Wright intended to possess the drugs, the prosecutorial need for the evidence of prior acts was high.¹³⁶ Thus, the State's need for evidence pertaining to similar crimes that Wright committed was significant enough to weigh in favor of admission under Rule 403.¹³⁷

V. IMPLICATIONS

Although the discussion of evidence admissibility under O.C.G.A. § 404(b) is not a new issue for courts in the State of Georgia, the interpretation put forth in *Wright* goes against the traditional model of the Georgia Rules of Evidence. Following the precedent established by *Wright*, evidence of the defendant's prior acts—even if closely identical to the current charged crime—will be determined erroneously admitted at the trial court level if prosecutorial need is scarce and danger for unfair prejudice to the defendant is high. Accordingly, there are multiple implications that arise from the court's reasoning in *Wright*.

First, the court's interpretation of when evidence is admissible pursuant to O.C.G.A. § 404(b) places tighter restraints on the rules of evidence, requiring prosecutors to rely more on facts of the case at hand to paint a picture of the defendant rather than his past convictions. Although the prior acts of the defendant may be relevant to the charged crime, relevance will no longer be sufficient to sneak potentially prejudicial evidence into the court room under O.C.G.A. § 404(b).¹³⁸ The

131. *Id.* at 892, 870 S.E.2d at 505 (Rickman, C.J. dissenting).

132. *Id.*

133. *Id.*

134. *Id.* at 892, 870 S.E.2d at 506.

135. *Id.*

136. *Id.*

137. *Id.*

138. Kirby v. State, 304 Ga. 472, 480, 819 S.E.2d 468, 476 (2018).

admission of evidence is a binary test, with relevance only being the first step that evidence must cross in determining if admissibility is just within the context of the case at hand. Once the evidence is determined to be relevant, the evidence may only be admitted into the trial court if the prosecutorial need is not substantially outweighed by the danger of unfair prejudice. The evidence of Wright's prior acts was extremely relevant to the charged offense, but the evidence failed to pass the second part of the admissibility test. Any evidence wrongly admitted because of a failure to pass an in-depth Rule 403 analysis will be overturned on appeal.

Second, the interpretation of the admissibility of evidence pursuant to O.C.G.A. § 404(b) provided by the Georgia Court of Appeals places a higher analytical burden on trial court judges when ruling on evidentiary matters. Though there was a prosecutorial need for the prior acts evidence in *Wright*, the court reasoned a mere existence of prosecutorial need will not render evidence admissible when the danger of unfair prejudice to the defendant is extremely prevalent.¹³⁹ The court in *Wright*, even when viewing the evidence in a light most favorable to the verdict, placed a stronger requirement for the prosecutorial need to outweigh the danger of unfair prejudice to the defendant. Trial judges must now extensively weigh the true prosecutorial need of the prior acts character evidence against the Rule 403 analysis when determining the admissibility of the evidence.

Finally, if the court would have followed the reasoning of the dissent, defendants would be subject to a quasi-double jeopardy because of the substantial risk of a jury using the prior acts evidence for the prohibited propensity purpose. To follow Chief Justice Rickman's methodology, evidence of a defendant's prior acts would only be excluded by Rule 403 if admission of the evidence would guarantee a conviction of the defendant. Defendants would face catastrophic danger of unfair prejudice because Rule 403 would be implemented so sparingly that a mere showing of prosecutorial need would grant the admission of the defendant's prior acts evidence. Under the court's ruling, prior acts character evidence will only be considered properly admitted where more than mere prosecutorial need is present, and the need is not substantially outweighed by a danger of unfair prejudice to the defendant.

139. *Wright* at 882, 870 S.E.2d at 498–99.