

**THIRD DIVISION
ELLINGTON, P. J.,
DILLARD and MCFADDEN, JJ.**

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July 30, 2015

In the Court of Appeals of Georgia

A15A0456, A15A0457. THE STATE v. BROWN, et al.

JE-017

JE-018

ELLINGTON, Presiding Judge.

The Superior Court of Fulton County entered directed verdicts of acquittal in favor of Javaris Brown, Meyetta King, and Kevin Rouse on charges of trafficking in cocaine, OCGA § 16-13-31 (a) (1) (A); possession of marijuana with intent to distribute, OCGA § 16-13-30 (j) (1); and other violations of the Georgia Controlled Substances Act. In Case No. A15A0457, the State appeals, contending, inter alia, that the judgments must be vacated as having been entered when jurisdiction lay in this Court and not in the trial court. In addition, in Case No. A15A0456, the State appeals from two interlocutory rulings, contending that the trial court abused its discretion in granting the defendants' motions to exclude certain evidence as a sanction for

discovery violations and in granting the defendants' motions to exclude evidence of other crimes. For the reasons explained below, we vacate the judgments of acquittal, reverse the exclusion of evidence as a sanction for discovery violations, vacate the exclusion of evidence of other crimes, and remand.

Case No. A15A0457

1. The trial court directed verdicts of acquittal on all counts. As a threshold matter, therefore, we must determine whether the State has any right to appeal.

Ordinarily, the State

may not appeal a trial court's grant to a criminal defendant of a directed verdict of acquittal based on an insufficiency of the evidence to support a conviction, in that a new trial would be barred by the double jeopardy clause of the Fifth Amendment. The government cannot appeal such a directed verdict of acquittal, even if it is erroneously granted.

(Citations omitted.) *State v. Williams*, 246 Ga. 788-789 (1) (272 SE2d 725) (1980).¹

In this regard, the State contends that, when the trial court called the case for trial, it

¹ See *Tolbert v. Toole*, __ Ga. __ (767 SE2d 24) (2014); *State v. Vansant*, 208 Ga. App. 772, 776 (2) (431 SE2d 708) (1993), reversed in part on other grounds, *Vansant v. State*, 264 Ga. 319 (443 SE2d 474) (1994); *State v. Fly*, 193 Ga. App. 190, 191 (2) (387 SE2d 347) (1989); *State v. Warren*, 133 Ga. App. 793, 795-796 (213 SE2d 53) (1975). See also *State v. Caffee*, 291 Ga. 31, 33 (2) (728 SE2d 171) (2012) ("The State does not have the right to appeal decisions in criminal cases unless there is a specific statutory provision granting the right.") (citation omitted).

lacked the authority to do so. Specifically, the State contends that it was authorized pursuant to OCGA § 5-7-1 (a) (5) to appeal from certain evidentiary rulings entered by the trial court a few days before the scheduled trial, that it filed a notice of appeal that was sufficient to divest the trial court of jurisdiction of the case and invest this Court with jurisdiction (Case No. A15A0456), and that the trial court will be reinvested with jurisdiction only after this Court disposes of the pending appeal, when we issue a remittitur and the same is filed in the trial court. Because the trial court lacked jurisdiction when it called the instant case for trial, the State contends, the judgments of acquittal must be vacated.

The record shows the following proceedings. The defendants were arrested and indicted in April 2014. On July 3, 2014, the State filed pursuant to OCGA § 24-4-404 (b) notice of intent to introduce evidence of other acts of Brown and Rouse.² On August 4, 2014, Brown filed a motion to suppress evidence seized pursuant to a search warrant executed on April 23, 2014. On August 18, 2014, Rouse filed a motion to suppress evidence seized on April 23, 2014, when he was detained outside the searched premises.³

² See Division 3, *infra*.

³ See Division 2, *infra*.

The trial court conducted a hearing on the evidentiary issues on August 7, September 9, and September 10, 2014. On September 11, 2014, the trial judge signed an order excluding certain evidence as a sanction for discovery violations and excluding the other-acts evidence, and the clerk of court stamped the order “filed” on September 12, 2014. The court placed the case on a trial calendar for September 17, 2014.

On September 12, 2014, the State filed a notice of appeal in the trial court pursuant to OCGA § 5-7-1 (a) (5). That Code section provides that in criminal cases the State may appeal “[f]rom an order, decision, or judgment excluding any . . . evidence to be used by the state at trial on any motion filed by the state or defendant at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first[.]” To take such an appeal, the State must file “the notice of appeal . . . within two days of such order, decision, or judgment[.]” and the prosecuting attorney must “certif[y] to the trial court that such appeal is not taken for purpose of delay and that the evidence is a substantial proof of a material fact in the proceeding[.]” *Id.* On September 12, 2014, the State also filed a separate “Certificate of Purpose” in which the prosecuting attorney stated, “I hereby certify that the State’s appeal of this Court’s order excluding evidence as a sanction

for discovery violations and excluding OCGA § 24-4-404 (b) evidence is not taken for purpose of delay, and the evidence is a substantial proof of a material fact in the proceedings.”

The trial court called the case for trial on September 17, 2014. The State notified the court that it had filed a notice of appeal from the September 12, 2014 rulings and argued that its notice of appeal had divested the trial court of jurisdiction to try the case. The defendants disputed this, arguing that the State failed to comply with the procedural requirements of OCGA § 5-7-1 (a) (5) (B). Specifically, they argued that the Statute requires the State to serve *the trial judge* directly with the required certification, that is, the State’s filing of its Certificate of Purpose in the office of the clerk of the trial court was insufficient to certify to the trial court that such appeal was not taken for purpose of delay and that the excluded evidence was substantial proof of a material fact. They also argued that the State’s appeal was in fact for purpose of delay. They argued that, given the abuse of discretion standard of review that would be applied by this Court, the State could not prevail on appeal. The prosecuting attorney reiterated that the appeal was not taken for purpose of delay and stated that it was necessary to appeal the court’s evidentiary rulings because, without the excluded evidence, the State could not carry its burden of proof at trial. The trial

court found that, although “[t]he State filed a document purporting to be . . . [the] certification” required by OCGA § 5-7-1 (a) (5), the State did not provide it “to the trial court” as required. The trial court also found that the State’s purpose in appealing was delay. The trial court ruled that the State’s appeal was invalid and that the court would proceed with the trial.

The defendants all announced ready for trial. The State declined to participate, on the basis that the pending appeal divested the trial court of jurisdiction. The trial court then impaneled a jury. The State having failed to adduce any evidence, the defendants each moved for a directed verdict, and the trial court entered a directed verdict of acquittal as to each defendant.

If, contrary to the trial court’s ruling, the State’s September 12, 2014 notice of appeal was effective under OCGA § 5-7-1 (a) (5), then that notice of appeal deprived the trial court of jurisdiction to try the defendants until the State’s appeal was resolved and the trial court received the remittitur from this Court. *Chambers v. State*, 262 Ga. 200, 201-202 (1), (2), (3) (415 SE2d 643) (1992) (holding that the State’s appeal of an order suppressing evidence deprived the trial court of jurisdiction to try the accused and any proceeding so conducted in the trial court was coram non iudice and vacating the resulting judgment and that the return of the remittitur reinvests the

trial court with jurisdiction).⁴ Although a notice of appeal must be filed in the trial court, the appellate court “alone has the authority to determine whether such filing is sufficient to invoke its jurisdiction.” (Citation and punctuation omitted.) *Hughes v. Sikes*, 273 Ga. 804, 805 (1) (546 SE2d 518) (2001). Thus, we owe no deference to the trial court’s analysis of whether the State’s notice of appeal from the court’s evidentiary rulings was effective.

In this case, it is undisputed that the State filed its notice of appeal from the trial court’s evidentiary ruling within two days after the ruling was entered, that is, the date a written judgment was received and stamped “filed” by the clerk of the trial court. See OCGA § 5-6-31 (“The filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of [the Appellate Practice Act].”); *In the Interest of K. D.*, 272 Ga. App. 803, 805 (613 SE2d 239) (2005); *Brown v. Webb*, 224 Ga. App. 856, 857 (482 SE2d 382) (1997).⁵ Further, it is undisputed that the State filed with the clerk of the trial court a certification

⁴ See also *Styles v. State*, 245 Ga. App. 90, 92 (537 SE2d 377) (2000) (Blackburn, P.J., specially concurring) (explaining that the supersedeas resulting from an appeal in a criminal case applies to all “proceedings which either require a ruling on the matters on appeal or directly or indirectly affect such matters”).

⁵ See also Christopher J. McFadden et al., *Ga. Appellate Practice*, § 10.3 (updated November 2014).

executed by the prosecuting attorney, who is an officer of the court, that the appeal was not taken for purpose of delay and that the evidence excluded in the appealed rulings was material. We conclude that this was sufficient to invoke the jurisdiction of this Court.⁶ We find no basis for concluding that the prosecuting attorney’s certification of purpose and necessity “to the trial court” can only be satisfied by personally serving the judge presiding over a case.⁷ When the General Assembly has intended that certain communications be made personally to a judge – as compared to matters that are to be submitted to a trial court as a governmental entity and made part of the official court records by filing in the office of the clerk of court – it has so provided.⁸ Moreover, it is undisputed that, before the trial judge moved forward with

⁶ See OCGA § 5-7-2 (b) (1) (A certificate of immediate review shall not be required to appeal from an order suppressing or excluding evidence under OCGA § 5-7-1 (a) (5).).

⁷ See OCGA § 5-7-6 (“This chapter[, that is, OCGA §§ 5-7-1 through 5-7-6,] shall be liberally construed to effectuate the purposes stated in this chapter.”).

⁸ See OCGA §§ 17-7-170 (“[A] demand for speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending.”); 44-14-161 (a) (“When any real estate is sold on [nonjudicial] foreclosure. . . , no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and

impaneling a jury in this case, the prosecuting attorney personally informed the judge of the pending appeal, on the record and in open court. There is no issue of any lack of actual notice. Finally, even if this Court were inclined to question the prosecuting attorney's representation that the State did not file its appeal from the trial court's evidentiary rulings for purpose of delay, we find no support in the record for finding that delay *was* the State's purpose, especially in light of the fact that the trial court's pretrial rulings excluded virtually all of the inculpatory evidence that the State planned to offer⁹ and effectively doomed the entire prosecution.

For the foregoing reasons, we conclude that the State's pretrial notice of appeal was effective and deprived the trial court of jurisdiction to try the defendants pending resolution of the appeal. *State v. Vansant*, 208 Ga. App. at 776 (2), affirmed in relevant part, *Vansant v. State*, 264 Ga. at 319 (3). Because the trial court lacked jurisdiction to proceed with a trial of the defendants, such proceedings were without

approval thereon.”). See also Uniform Superior Court Rules 16.1 (A notice of an attorney's leave of absence shall be submitted to the clerk of the court and, in addition, “[a] copy of the notice shall be sent, contemporaneously, to the judge before whom an action is pending and all opposing counsel.”); 17.1 (B) (A written notice of an attorney's conflict shall be given “to opposing counsel, to the clerk of each court and to the judge before whom each action is set for hearing (or, to an appropriate judge if there has been no designation of a presiding judge).”).

⁹ See Divisions 2 and 3, *infra*.

legal effect and the directed verdicts of acquittal are void. *Chambers v. State*, 262 Ga. at 201-202 (2). The final order of acquittal of all defendants is hereby vacated, and we turn to the underlying appeal.

Case No. A15A0456

2. The State contends that the trial court abused its discretion in granting the defendants' motion to exclude certain evidence, which was seized when investigators executed a search warrant, based on the court's finding that the State violated its reciprocal discovery obligations.

When a criminal defendant elects to engage in reciprocal discovery under Georgia's Criminal Procedure Discovery Act, the State and the defendant are required to produce certain types of evidence and information. See OCGA § 17-16-1 et seq. If it comes to the attention of the trial court that either the State or the defendant has failed to comply with the requirements of the Act, the court has wide latitude in fashioning a remedy for such violation. OCGA § 17-6-6; *Wilkins v. State*, 291 Ga. 483, 486-487 (5) (731 SE2d 346) (2012); *Leger v. State*, 291 Ga. 584, 588 (2) (b) (732 SE2d 53) (2012); *Jones v. State*, 290 Ga. 576, 577-578 (2) (722 SE2d 853) (2012). As we have noted, this broad discretion allows such remedy as is warranted "to ensure a fair trial." (Citation omitted.) *Blankenship v. State*, 229 Ga. App. 793,

794 (494 SE2d 758) (1997). See *Burton v. State*, - Ga. App. - (Case No. A14A1864, decided December 18, 2014) (accord). For example, when the State violates the Act by failing to timely identify a witness, “[i]t is usually a sufficient remedy for the defense to be afforded an opportunity to interview the witness.” (Citation and punctuation omitted.) *Leger v. State*, 291 Ga. at 588 (2) (b). Although the Act authorizes a trial court to prohibit the State from introducing evidence that it failed to disclose as required, “[e]xclusion of evidence is a particularly harsh sanction and should be imposed only where there is a showing of prejudice to the defendant and bad faith by the State.” (Citation and punctuation omitted.) *Id.* at 586 (2). “[T]he remedy a trial court fashions to cure a discovery violation is reviewed on appeal only for abuse of discretion.” (Citation omitted.) *Jones v. State*, 290 Ga. at 578 (2).

The record shows the following. In early 2014, the Atlanta Police Department received information that illegal drugs were being sold out of 1808 Brewer Boulevard, a single-family house. An investigator arranged for a confidential source to buy cocaine and marijuana there, on April 7 and April 16. After the second controlled buy, the investigator obtained a search warrant for the premises. A team executed the search warrant on April 23, 2014. When the team arrived, Rouse was beside his car in the driveway, and Brown and King were inside the house. Brown

jumped out of a window and was immediately captured. Officers found a total of over 50 grams of cocaine, 9.72 grams of marijuana, and three scales in the kitchen and 10.27 grams of cocaine in one of the bedrooms. Officers arrested Brown and King. In a search incident to that arrest, officers found 11.51 grams of a Schedule 1 controlled substance¹⁰ in Brown's sock. King told officers that Rouse had been selling drugs from the house. Officers then searched Rouse and seized a large quantity of cash that he had in his pocket and 16.81 grams of heroin that was concealed in his underwear.

In their motions to suppress all evidence seized as a result of the search, the defendants argued that the issuance of the search warrant was not supported by probable cause, that they were merely present in the house at the execution of the warrant, and that there was not probable cause to arrest them. Before the hearing on the motions to suppress, the State represented to the trial court that it had provided discovery to the defendants. At the motions hearing on August 7, 2014, the State advised the court that investigators had recorded the execution of the search warrant, but the State had not produced the recording to the defendants. The court suspended

¹⁰ See OCGA § 16-13-25 (3) (DDD) (ethylone).

the hearing to allow the State to make a supplemental discovery response and to allow the defendants an opportunity to review the recording.

The hearing resumed on September 9, 2014. During the State's direct examination of the investigator who obtained the search warrant, the prosecutor asked whether the investigator had conducted surveillance on 1808 Brewer Boulevard before arranging for controlled purchases by her confidential source. The investigator replied that she had gone to the house twice in the weeks before the controlled buys. She saw some people going in and out of the house but could not determine what they were doing there. When asked whether she included information about the surveillance in her affidavit in support of her application for a warrant, the investigator responded, "I think I just have it in my . . . personal notes," but testified that she had discussed the surveillance with the magistrate who handled the warrant application. Defense counsel cross-examined the investigator about her surveillance and whether she had written down information about the surveillance and turned it over to the State. The investigator responded that she had written it down but had not turned it over to the State. At this point, the trial court asked where the investigator "maintain[ed] a log about the surveillance[.]" and the investigator replied, "on the computer. We just type our own notes." The trial court asked whether defense counsel

wanted “time with [those] notes” before proceeding with the hearing and, when they said they did, suspended the hearing to allow the State to “get the notes off the computer” and produce them to the defendants.

When the hearing reconvened the following day, the prosecuting attorney reported that the investigator had searched her computer and her files and had prepared a narrative summary of everything she could remember about the surveillance. The investigator testified that she had used the wrong terminology in referring to a “log” or “personal notes” and that the only thing that she had typed on the computer was her investigative summary, which she created and then added to as her investigation progressed. She had provided that document to the State, and the prosecuting attorney had previously produced it to the defendants. According to the investigator, the only notes that she had ever created in connection with the case that she had not provided to the State were handwritten on scraps of paper and were limited to a description of the house and “what [she] saw that day,” which was information she needed to include in her warrant application and affidavit. After she had transcribed this information verbatim into her warrant application, the investigator had discarded those scraps of paper; they were not part of the State’s discovery production.

The trial court stated to the prosecuting attorney, “the State is responsible for everything that law enforcement has. So it is the State’s obligation to get it, determine whether it is discoverable, determine whether it is Brady material, and produce it. . . . When law enforcement has [information], the State has it.”¹¹ The trial court then instructed the investigator “for future reference,” that

when a case gets indicted . . . everything counts[.] Your scrap notes, your personal notes, everything associated with that case . . . is subject to discovery[.] And[,] when you don’t produce it, it puts everyone, including the State, because they’re responsible for producing it, in a position where folks start [wondering], [“]well, what are they hiding . . . , what got covered up, what else don’t we know[?]” . . . It puts me in a position where I have to decide whether there’s been intentional misconduct[.] And if there’s been intentional misconduct, [evidence] gets thrown out[,] because the Constitution pretty much says that’s what happens when there’s intentional misconduct[:] it gets held against the State. So when you testify under oath there are notes on the computer and then[,] the next day, there are no notes on the computer, that’s a problem.

The court found that “the failure to preserve notes pertinent to the case . . . raise[d] an issue of spoliation.” Taking this together with the delayed production of the

¹¹ See *Brady v. Maryland*, 373 U. S. 83 (83 SCt 1194, 10 LE2d 215) (1962).

recording of the execution of the search, the trial court found a “pattern of failure [of the State] to provide full discovery.” The court found that this pattern of behavior was “grossly unfair” and “violate[d] these folks’ rights.” On this basis, the trial court granted the motions to suppress everything seized in executing the search warrant. The trial court expressly found, however, that the warrant was supported by probable cause and was properly executed and ruled that the suppression was “for reasons independent of the validity of the warrant itself.”

Although, as posited by the trial court, when law enforcement has information, the State is deemed to have it for purposes of the reciprocal discovery Act,¹² this does not mean, as the trial court went on to conclude, that “everything associated with [a] case . . . is subject to discovery.” The Act specifies materials that must be produced, including statements attributable to the defendant,¹³ pictures, documents, and tangible evidence “intended for use by the prosecuting attorney as evidence” at trial;¹⁴ results

¹² See OCGA § 17-16-1 (a) (“‘Possession, custody, or control of the state or prosecution’ means an item which is within the possession, custody, or control of the prosecuting attorney or any law enforcement agency involved in the investigation of the case being prosecuted.”).

¹³ OCGA § 17-16-4 (a) (1).

¹⁴ OCGA § 17-16-4 (a) (3).

or reports of physical or mental examinations and of scientific tests or experiments, again, if intended for use by the prosecuting attorney at trial;¹⁵ and any statement of any witness that the prosecuting attorney intends to call as a witness at trial and that relates to the subject matter of the witness's testimony.¹⁶ See *White v. State*, 271 Ga. 130 (518 SE2d 113) (1999). The purpose of the Act is to promote fairness and efficiency in criminal proceedings and to prevent so-called "trial by ambush."¹⁷ We find no basis for concluding that the Act requires every member of law enforcement to preserve "everything associated with [every] case," including informal notes created by an investigator only for the purpose of helping the investigator include

¹⁵ OCGA § 17-16-4 (a) (4).

¹⁶ OCGA § 17-16-7.

¹⁷ *State v. Dickerson*, 273 Ga. 408, 410 (1) (542 SE2d 487) (2001) ("The purpose of the Act is to establish a closely symmetrical scheme of discovery in criminal cases that maximizes the presentation of reliable evidence, minimizes the risk that a judgment will be predicated on incomplete or misleading evidence, and fosters fairness and efficiency in criminal proceedings.") (citation and punctuation omitted); *White v. State*, 271 Ga. at 130 ("The purpose of the act is to prevent surprise and trial by ambush[.]") (footnote omitted). See also *Jones v. State*, 276 Ga. 171, 174-175 (575 SE2d 456) (2003) ("Contrary to the view of some, our legal system is not simply an elaborate game of 'Gotcha!' This Court does not endorse acquittal by ambush on the part of a defendant any more than it does trial by ambush on the part of the State. Nor do we condone induced error. The object of all legal investigation is the truth, and procedural rules are in place to further such goal in an orderly fashion.") (citation and punctuation omitted).

accurate information in a warrant application.¹⁸ The record does not show that the investigator's informal notes, which the State could not produce, were subject to discovery under any of the provisions of the Act.¹⁹ We conclude, therefore, that the trial court abused its discretion in imposing the extreme sanction of evidence exclusion for the State's failure to produce the investigator's notes.

3. The State contends that the trial court erred in ruling that the State's intended evidence of other crimes was not relevant for a proper purpose and abused its discretion in granting the defendants' motion to exclude the evidence on that basis.

¹⁸ Cf. OCGA §§ 17-5-55 (retention of property that is introduced into evidence during the pendency of a criminal case); 17-5-56 (a) (preservation of physical evidence collected at the time of a crime that contains biological material relating to the identity of the perpetrator of the crime).

¹⁹ To the extent the appellees suggest that the notes may have been exculpatory, they have not articulated how the investigator's description of the activity she observed during her surveillance could have been exculpatory. A finding of a *Brady* violation, that is, that the State failed to disclose evidence that is both favorable to the accused and material either to guilt or to punishment, *Brady v. Maryland*, 373 U. S. at 87, cannot be based on mere speculation. *Williams v. State*, 251 Ga. 749, 789 (7) (312 SE2d 40) (1983); *Jones v. State*, 276 Ga. App. 728, 730-731 (624 SE2d 275) (2005); *Pinson v. State*, 266 Ga. App. 254, 263-264 (8) (596 SE2d 734) (2004); *Nikitin v. State*, 257 Ga. App. 852, 854 (1) (a) (572 SE2d 377) (2002); *Merritt v. State*, 248 Ga. App. 709, 713-714 (3) (548 SE2d 427) (2001).

Georgia's new Evidence Code governs this contention.²⁰ OCGA § 24-4-404 (b) addresses the admissibility of evidence of a person's crimes or acts other than those directly at issue in a particular proceeding. That section provides:

Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

²⁰ See Ga. L. 2011, p. 99, §§ 2, 101 (Georgia's new Evidence Code, OCGA § 24-1-1 et seq., applies to any motion, hearing or trial commenced on or after January 1, 2013.).

This section tracks Rule 404 (b) of the Federal Rules of Evidence,²¹ and as such it embodies the longstanding and fundamental principle that evidence of a person's other acts is inadmissible for the purpose of showing that the person has a criminal disposition or a propensity for certain conduct because of the risks inherent in such evidence in compromising the presumption of innocence and the reasonable doubt standard.²² Like the Eleventh Circuit Court of Appeals, Georgia's courts apply a

²¹ Our new Evidence Code was based in large part on the Federal Rules of Evidence. And where the new Georgia rules mirror their federal counterparts, it is clear that the General Assembly intended for Georgia courts to look to the federal rules and how federal appellate courts have interpreted those rules for guidance. Thus, the uncodified first section of the statute enacting the new Evidence Code explains: It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence.

(Citations and punctuation omitted.) *Parker v. State*, 296 Ga. 586, 592 (3) (769 SE2d 329) (2015). See *Bradshaw v. State*, 296 Ga. 650, 655 (3) (769 SE2d 892) (2015) (OCGA § 24-4-404 (b) tracks Rule 404 (b) of the Federal Rules of Evidence.).

²² As the United States Supreme Court explained more than half a century ago: The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might

three-part test to determine admissibility of evidence of other crimes and acts under Rule 404 (b): “(1) the evidence must be relevant²³ to an issue other than defendant’s character; (2) the probative value must not be substantially outweighed by its undue prejudice; (3) the government must offer sufficient proof so that the jury could find

logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(Footnotes omitted.) *Michelson v. United States*, 335 U. S. 469, 475-476 (69 SCt 213, 93 LEd 168) (1948). See also *Amey v. State*, 331 Ga. App. 244, 248-249 (1) (770 SE2d 321) (2015) (accord).

²³ See OCGA § 24-4-401 (“As used in [OCGA §§ 24-4-401 through 24-4-417], the term ‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); *State v. Jones*, - Ga. -, n. 2 (Case No. S14G1061, decided June 1, 2015) (“[T]he relevance standard codified in [OCGA § 24-4-401] is a liberal one.”) (citations omitted); *Ashley v. State*, 331 Ga. App. 794, 799 (2) (771 SE2d 462) (2015) (“[E]vidence is relevant if it logically tends to prove or disprove any material fact at issue in the case.”) (citations omitted).

that defendant committed the act.” (Citation, punctuation, and footnote omitted.)

Bradshaw v. State, 296 Ga. 650, 656 (3) (769 SE2d 892) (2015).²⁴

Even when a trial court determines that all three prongs of the test for admissibility under OCGA § 24-4-404 (b) are satisfied, the trial court may still exclude the evidence pursuant to OCGA § 24-4-403. That Code section, which also tracks its federal counterpart,²⁵ provides: “[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” See *State v. Jones*, - Ga. -, - (3) (Case No. S14G1061, decided June 1, 2015) (Evidence of other acts is not

²⁴ See *Curry v. State*, 330 Ga. App. 610 (1) (768 SE2d 791) (2015) (accord); see also *United States v. Lamons*, 532 F3d 1251, 1265-1266 (II) (B) (11th Cir. 2008). We note that a somewhat different three-part test applied under prior law, but that test also required the State to show that the evidence was relevant to an issue other than the defendant’s character. See *Peoples v. State*, 295 Ga. 44, 54 (4) (b) (757 SE2d 646) (2014) (Under prior law, the State bore the burden of showing that “the independent offense or act [was] offered not to raise an improper inference as to the accused’s character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility[.]” In addition, the State was required to show that the accused committed the independent offense or act and that there was a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.) (citation and punctuation omitted).

²⁵ *Bradshaw v. State*, 296 Ga. at 655 (3).

necessarily admissible in every criminal prosecution even when it is relevant to prove intent and knowledge, because such evidence may be deemed inadmissible on the basis of those considerations set out in OCGA § 24-4-403.).

A trial court's decision under OCGA §§ 24-4-403 and 24-4-404 (b) to exclude or admit other acts evidence will be overturned only where there is a clear abuse of discretion. *State v. Jones*, - Ga. at - (1); *Bradshaw v. State*, 296 Ga. at 656 (3). See also *Reeves v. State*, 294 Ga. 673, 676 (2) (755 SE2d 695) (2014) ("Evidentiary rulings are reviewed under an abuse of discretion standard[.]") (citation omitted).

In this case, the record shows that the State filed its notice of intent to introduce evidence of other acts pursuant to OCGA § 24-4-404 (b) as proof of intent, motive, plan, and absence of mistake or accident. Specifically, the State identified the following acts: a 2005 charge against Brown and Rouse for trafficking in cocaine and a 2009 charge against Brown for possession of marijuana with intent to distribute.

As to the 2005 incident, a police officer testified that he received information from a concerned citizen that drugs were being "bagged" at a house in Fulton County. Upon arriving at the house, the officer observed through one of the windows three men, including Brown and Rouse, cutting and packaging crack cocaine and marijuana in the kitchen of the house. The team of officers forced entry and found the men

hiding in a bedroom closet. The house, which was in an area where most of the houses were vacant, had little furniture, but there was a TV with some cameras hooked to it. The officers seized 137 grams of crack cocaine and 11 grams of marijuana.

As to the 2009 incident, a patrol officer testified that he received a call that several men were selling and using drugs at a food mart in Fulton County. The officer went to that location, where he saw six men including Brown. The officer and his partner obtained the mens' consent to search their persons. Brown had on his person 11 bags of marijuana, collectively weighing 8.1 grams.

After hearing this evidence, the trial court noted that the State intended to adduce proof at trial that, when officers arrived to execute a warrant to search the house where the cocaine and marijuana was found, Rouse was in the driveway getting into a car and Brown was jumping out of a window. The trial court found that evidence of the 2005 incident, when Rouse was seen cutting and packaging cocaine and marijuana in a nearly vacant house, "would absolutely be nothing more than propensity evidence and is more prejudicial than probative." The court ruled that, as to Rouse, the evidence was not admissible for any purpose. As to the same 2005 incident, when Brown was also seen cutting drugs, the court found that

cutting drugs in a house, is, unfortunately, in this community and in this society, a common occurrence. It does not purport anything other than that one does that sort of thing. Insofar as that is the case, the court finds that admission of the evidence would be more prejudicial than probative. Insofar as [the evidence] might be offered for purposes of establishing that there was no mistake, that there was a plan or scheme, those purposes are actually in the court's view more consistent with [rebutting] a potential defense which might be raised,

and the evidence would therefore not be admitted during the State's case-in-chief. As to the 2009 incident, the trial court found that evidence that Brown had packets of drugs on his person was "not pertinent in terms of proving mistake, intent, plan, or scheme, and it will not be admitted for any purpose."

With regard to intent, the Supreme Court of Georgia recently explained that a defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying [OCGA § 24-4-404 (b)] evidence absent affirmative steps by the defendant to remove intent as an issue. Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the [OCGA § 24-4-404 (b)] test is satisfied.

(Citation and punctuation omitted.) *Bradshaw v. State*, 296 Ga. at 656-657 (3).²⁶

In this case, we cannot discern from the existing record whether the trial court considered whether Brown and Rouse, having entered pleas of not guilty to the charged offenses, had taken affirmative steps to withdraw intent as an element to be proved by the State.²⁷ Further, it is not clear from the record whether the trial court

²⁶ See also *State v. Jones*, - Ga. -, n. 4 (Case No. S14G1061, decided June 1, 2015) (“[A] defendant puts his intent in issue when he pleads not guilty unless he takes affirmative steps to withdraw intent as an element to be proved by the State.”) (citations omitted). See also *Mathews v. United States*, 485 U. S. 58, 64-65 (108 S.Ct. 883, 99 LEd2d 54) (1988) (“A simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged.”) (citation omitted); *United States v. Edouard*, 485 F3d 1324, 1345 (C) (1) (11th Cir. 2007) (“Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant’s state of mind in perpetrating both the extrinsic and charged offenses.”) (citation and punctuation omitted); *United States v. Costa*, 947 F2d 919, 925 (III) (B) (11th Cir.1991) (Where defendants did not “affirmatively take the issue of intent out of contention by stipulating that they possessed the requisite intent,” the trial court did not abuse its discretion in admitting evidence of unindicted extrinsic bad acts.) (citation omitted). But see *Chynoweth v. State*, 331 Ga. App. 123, 128 (3) (768 SE2d 536) (2015), cert. denied, (To determine whether intent is actually in issue in a case, “[t]he test is to ask: under the facts of the case, is there any danger that a rational jury could find that although the defendant committed the objective, charged acts, he did not intend to do so?”) (citation and punctuation omitted). See also *Amey v. State*, 331 Ga. App. at 250 (1) (b) (discussing use of other-acts evidence to show a defendant’s motive to commit the charged offense).

²⁷ Our review is complicated by the unique procedural posture presented, where, as noted above, the trial court acquitted the defendants after the State declined to present its evidence or otherwise participate in the trial, and where our decision to vacate the judgments of acquittal in Division 1, *supra*, effectively returns the

compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence.²⁸ To the extent the trial court discounted

prosecution to a pretrial status.

²⁸ See *State v. Jones*, - Ga. at - (2) (The same state of mind was required for committing the prior act of DUI and the charged DUI offenses, “i.e., the general intent to drive while under the influence of alcohol,” and therefore the defendant’s previous DUI conviction was relevant under OCGA § 24-4-404 (b).); *Bradshaw v. State*, 296 Ga. at 656-658 (3) (Where the defendant was charged with murdering a drug buyer who balked at paying for drugs the defendant had delivered, another incident, six months earlier, when the defendant murdered another drug buyer who refused to pay for drugs his brother had delivered involved the same mental state and showed the defendant’s willingness to use violence when he or someone close to him was cheated in a drug deal. Consequently, the trial court did not abuse its discretion in admitting evidence of the earlier murder for the purpose of showing the defendant’s intent and motive to commit the later crime.); *Chynoweth v. State*, 331 Ga. App. at 127-128 (3) (Where the defendant was charged with riot in a penal institution and obstruction of a law enforcement officer, based on his attack on two law enforcement officers who were transporting him to a hearing, there was evidence that the defendant had been prescribed antipsychotic medication, and the defendant raised defenses concerning lack of mental capacity and mental illness, there was a disputed issue concerning the defendant’s state of mind and a danger that “a jury could have concluded that[,] while he committed the charged act, he did not intend to do so.” Consequently, the trial court did not abuse its discretion in permitting other-acts evidence of the defendant’s unprovoked attack on a cellmate for the purpose of showing his intent and the absence of mistake or accident.) (citation omitted); *Curry v. State*, 330 Ga. App. at (1) (Where the defendant was charged with trafficking persons for sexual servitude and related offenses, he squarely challenged the element of intent by arguing that he intended only to help the victims, but not to commit any criminal offenses; under the circumstances, evidence that he acted as a pimp, for whom a witness earned money as a prostitute against her will, was

the propriety of the evidence for the State's stated purpose of proving intent without considering these issues, the trial court failed to exercise its discretion. Because this uncertainty thwarts our review of the trial court's analysis of the first prong of the three-part test (that is, relevance of the evidence to an issue other than the defendants' character), we cannot meaningfully review the trial court's analysis of the second prong (that is, weighing the probative value of the evidence, which flows from that relevance determination, against any undue prejudice). In *State v. Jones*, the Supreme Court of Georgia

caution[ed] that the potential for prejudice caused by the introduction of other acts evidence is great and the often subtle distinctions between the permissible purposes of intent and knowledge and the impermissible purpose of proving character may sometimes be difficult to discern. The danger of the subtlety of this distinction is that a jury could consider prior acts evidence for an impermissible purpose, thus elevating the importance of [OCGA § 24-4-403's] balancing of the need for other acts evidence against the dangers of its introduction. Unfortunately, there is no mechanical solution for this balancing test. Instead, a trial court must undertake in each case a considered evaluation of the proffered justification for the admission of such evidence and make an independent determination of whether the probative value of the

admissible for a purpose other than his character, and the trial court did not err in finding that the first prong of the three-part test was satisfied.).

evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Citation and punctuation omitted.) *Id.* at - (3). As an appellate court, we afford great deference to a trial court’s decision in this regard,²⁹ but we cannot properly review a decision to exclude or admit other-acts evidence where, as in this case, the trial court stopped short of considering the proffered evidence under the applicable standard.

For all of the foregoing reasons, the trial court’s ruling that the other-acts evidence will not be admitted is vacated, and we remand this case for the trial court to reconsider the appellees’ motion to exclude such evidence under the applicable standard. *Id.* at - (3).

²⁹ *Harris v. State*, 330 Ga. App. 267, 271 (1) (765 SE2d 369) (2014), cert. denied (decided under comparable provisions of the former Evidence Code). See also *United States v. Doe*, 216 Fed. Appx. 874, 877 (II) (11th Cir. 2007) (“When employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.”) (citation and punctuation omitted); *United States v. Brown*, 415 F3d 1257 (11th Cir. 2005) (explaining reasons an appellate court gives a trial court’s rulings on the admissibility of evidence “considerable deference” under the abuse-of-discretion standard of review).

Judgment in Case No. A15A0456 reversed in part and vacated in part and case remanded. Judgment vacated in Case No. A15A0457. Dillard, J., concurs, and McFadden, J., concurs fully and specially.

A15A0456, A15A0457. THE STATE v. BROWN, et al.

MCFADDEN, Judge, concurring.

I concur fully in the majority opinion. I write separately to lament the ease with which this spectacle - an unauthorized criminal trial that the prosecutor was compelled to boycott leading to ineffective acquittals that an appellate court must unwind - could have been avoided.

When this case was called for trial, the state told the trial court that it had appealed her suppression order. The trial court erroneously replied that the state's notice of appeal was ineffective. At noon that same day, the state filed an emergency motion with this court. Less than four-and-a-half hours later, we granted the emergency motion and stayed the trial. But by that time, the purported trial had taken place and the purported acquittals had been entered.