



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MCARTHUR RISPER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 56, 2020
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

McArthur Risper, was indicted on murder 1<sup>st</sup> degree, conspiracy 1<sup>st</sup> degree, aggravated menacing and various firearm charges. Before trial, the State filed a motion to admit evidence of Risper's prior possession of illegal drugs and a weapon. It sought to introduce this prior bad act evidence through hearsay of the alleged victim and an unrelated home invasion in an effort to advance a theory that Risper shot the alleged victim because he stole his drugs and gun. Over objection, the trial court granted the State's request.<sup>1</sup>

On the eve of trial, the State gave Risper a recorded statement of an unnamed witness who told police that someone other than Risper confessed to killing the victim. The trial court denied the defense request for various forms of relief.<sup>2</sup> Similarly, the trial court denied the defense request for relief when the State failed to timely disclose impeachment evidence.<sup>3</sup>

Risper was convicted of murder, conspiracy and one count of possession of a firearm during the commission of a felony. He was sentenced to life plus 30 years in prison.<sup>4</sup> This is his Opening Brief in support of a timely-filed appeal.

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<sup>1</sup> Grant of State's Motion in Limine, Ex.A.

<sup>2</sup> Denial of Dismissal for Failure to Disclose Exculpatory Material, Ex.B.

<sup>3</sup> Denial of Dismissal for Failure to Disclose Impeachment Material, Ex.C.

<sup>4</sup> January 10, 2020 Sentence Order, Ex.D.

## SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion when it permitted the State's witnesses to testify about facts regarding prior bad acts about which they had no personal knowledge and when it permitted the introduction of other crimes without value apart from their relevance as character evidence.

2. The trial court erred as a matter of law when it refused to dismiss Risper's case in response to the State's failure to disclose both exculpatory and impeachment evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963).

## STATEMENT OF FACTS

On April 19, 2018, someone named “Marty” drove his friends Corey Bailey, a drug addict, and Staci Weldon, an avid shoplifter and drug addict,<sup>5</sup> to a trailer at Camellia Drive in Bridgeville, Delaware. It was Weldon’s understanding that she and Bailey were going to the trailer to steal a television so they could sell it.<sup>6</sup> Weldon was Bailey’s girlfriend and had just been released from the Violation of Probation Center the night before. Rather than taking a television, however, the couple ended up leaving with two to four pounds of marijuana and an AR 15 gun.<sup>7</sup> At trial, Weldon was very clear that she had no “personal knowledge” of who owned or lived in the trailer or who owned the marijuana or the gun that they stole.<sup>8</sup>

When Bailey and Weldon left the trailer, they stopped at one friend’s house then headed to Oshea Waples’ house.<sup>9</sup> Because Waples, a drug dealer, was a good friend,<sup>10</sup> Bailey decided to store the gun with him until he could sell it. He also gave Waples some of the stolen marijuana.<sup>11</sup> According to

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<sup>5</sup> A211-212.

<sup>6</sup> A199, 210, 214-215, 284.

<sup>7</sup> A198-200, 202.

<sup>8</sup> A217-218.

<sup>9</sup> A201.

<sup>10</sup> A236-237, 248-249.

<sup>11</sup> A201.

Weldon, she and Bailey kept the rest of the marijuana and distributed it to people in the neighborhood of Coverdale Crossing.<sup>12</sup>

It was only after the couple left Waples' house that Weldon had any idea that the illegal drugs and gun in the trailer may have belonged to Macarthur Risper. Bailey purportedly told her that there would be people after them for what they did. According to Weldon, Bailey said that "Bug" (Risper)<sup>13</sup> and Mike Lewis would retaliate for the theft.<sup>14</sup>

Waples testified that one night sometime during the first week in May, 2018, a man came to his door, pulled out a gun and demanded the gun and marijuana that Bailey had brought him.<sup>15</sup> Waples gave him the gun but explained that he did not have any marijuana.<sup>16</sup> The intruder, who Waples later identified as Mike Lewis, appeared to give up and left with another person who had been waiting in a Crown Victoria in the driveway.<sup>17</sup>

A short time later, Lewis returned to continue his search for the marijuana.<sup>18</sup> This time, he was joined by a second man. Both men wore

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<sup>12</sup> A201, 216, 218.

<sup>13</sup> A279-280.

<sup>14</sup> A202-203.

<sup>15</sup> A239.

<sup>16</sup> A240-241.

<sup>17</sup> A242.

<sup>18</sup> A242-243.



black clothes and black hoodies.<sup>19</sup> Waples identified the second man as Risper.<sup>20</sup> The men searched Waples' car, outside his trailer<sup>21</sup> and his bedroom.<sup>22</sup> When they still came up empty handed, they decided to take some of Waples' chains as payment for the missing drugs.<sup>23</sup>

Weldon testified that on May 11, 2018 at about 5:00 p.m., "Marty" picked her and Bailey up at one friend's house and drove them to another friend's house.<sup>24</sup> She said that on the way back, they rode through Coventry Crossing.<sup>25</sup> Weldon told the jury that once they were in the community, "a woman" stopped her and asked her "if [she] could get her some little boy clothes from the store, and how much [she] would charge her for them." Weldon agreed to get her 10 outfits for \$50.<sup>26</sup> The understanding between the women was that Weldon was going to shoplift the clothes. According to Weldon, while Bailey stayed behind, Marty drove her to the store and waited while she went inside and she shoplifted the items.<sup>27</sup>

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<sup>19</sup> A247.

<sup>20</sup> A245-246.

<sup>21</sup> A243.

<sup>22</sup> A244.

<sup>23</sup> A244-245.

<sup>24</sup> A203.

<sup>25</sup> A203, 211.

<sup>26</sup> A144.

<sup>27</sup> A144-145.

According to Channel Gray, she was in Coventry Crossing at about that same time to visit her cousin Shika Cannon who lives on the horseshoe shaped road of Mill Park Drive.<sup>28</sup> At about 5:30 p.m., Gray was by her car when Corey Bailey, whom she had known since she was 8 years old, rode by, saw her and got out of the car. He purportedly asked Gray for money. The two hung out for a few hours talking. Bailey also played basketball with some kids.<sup>29</sup> At no time did Gray make any mention of any discussion with any regarding buying clothes or participating in any type of shoplifting scheme. Nor did she mention any protentional involvement on Bailey's part in any shoplifting. Further, she made no mention of Weldon or "Marty."

According to Gray, at around 8:00 p.m., while she and Bailey remained by her car, a black Jeep pulled up.<sup>30</sup> She said that Bailey handed her his phone and repeatedly said "these Mfers" got him or were going to kill him.<sup>31</sup> He instructed her to go get her husband.<sup>32</sup> As Gray stood next to her car, which was in front of Bailey, she saw one man get out of the backseat driver's side of the jeep and another dark-skinned man, wearing an elastic mask and

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<sup>28</sup> A122-123.

<sup>29</sup> A123-126, 132, 138 (a).

<sup>30</sup> A127,138 (a), 139.

<sup>31</sup> A128.

<sup>32</sup> A129.

carrying a black gun in his right hand, get out of the front passenger seat and begin to walk toward her.<sup>33</sup>

Gray testified that she ran straight passed the masked man toward a the next house.<sup>34</sup> She claimed that while she did so she made eye contact with the man for 30-40 seconds and, thus, was able to identify him as Risper.<sup>35</sup> She said the mask had an oval opening so that she could see the eyes, the nose and eyebrow.<sup>36</sup> She went on to claim that after she passed the masked man, she saw him aim and fire his weapon at Bailey.<sup>37</sup> She did not see the Jeep leave the scene.<sup>38</sup> Later that night she was shown a photo lineup with Risper's picture in it and she identified him.<sup>39</sup> Gray was the only witness who claimed to have actually seen the shooting.

According to Weldon, she had received a call from Bailey after she had finished shoplifting. He asked her to "pick up" some more items.<sup>40</sup> She turned down his request and purportedly heard "a disruption" on his end of the phone. It sounded like he was having a disagreement with someone. While on the line

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<sup>33</sup> A129-131, 140, 269-270.

<sup>34</sup> A129a, 141-142.

<sup>35</sup> A132.

<sup>36</sup> A132.

<sup>37</sup> A123-124, 129, 131-133, 137-138.

<sup>38</sup> A135.

<sup>39</sup> A136-137.

<sup>40</sup> A146.

for roughly 5 minutes, she heard more than two other voices and 7 to 8 gunshots.<sup>41</sup> After the phone went dead, Weldon tried to call Bailey back several times before Marty drove her to his mother's house in the neighborhood. One of Bailey's friends came to the house and informed Weldon that Bailey had been shot.<sup>42</sup>

At trial, the State presented the testimony of Guan Davis and Hayward Risper, McArthur's cousin, who claimed to be in Coventry Crossing on the day Bailey was shot. They were purportedly in the area all day drinking and having a barbeque.<sup>43</sup> Hayward and Guan both claimed to have seen Risper riding around the neighborhood in his Jeep at various times throughout the day.<sup>44</sup> According to Hayward, sometimes Laval Farmer was driving the Jeep while Risper sat in the front passenger seat and sometimes, Macarthur was the one who was driving.<sup>45</sup>

At some unknown point in the evening, Hayward purportedly heard gunshots and saw the Jeep speed around the horseshoe from the direction of the shooting. It appeared to him that Risper was driving but he was unable to

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<sup>41</sup> A148,204, 207-209, 213.

<sup>42</sup> A146.

<sup>43</sup> A162-164,172-173, 179-180.

<sup>44</sup> A165-166, 175.

<sup>45</sup> A166-167,169.

see who was in the front passenger seat.<sup>46</sup> Davis who was sitting outside with Hayward, said that after he heard “fireworks,”<sup>47</sup> he saw Farmer jump out of the driver’s seat and run to the back of the black “truck.” The passenger, who he could not see, moved into driver’s seat and drove off. He was not sure whether there were any others in the “truck.” Then, five minutes later, Laval came back out of house wearing different clothes.<sup>48</sup>

Deavon Sheppard, a convicted drug dealer who had been friends with Bailey “forever,”<sup>49</sup> provided a version of events leading up to the shooting that is inconsistent with Weldon’s and Gray’s accounts. He claimed that he spent most of his day riding around in his truck with Bailey.<sup>50</sup> He also claimed that, at one point, they stopped to buy ice cream for some kids in the neighborhood and as they were leaving they passed a Jeep.<sup>51</sup> Farmer was driving and looked right at Sheppard and Bailey. Purportedly, Risper was in the front passenger seat. Sheppard claims that when Bailey saw the men, he jumped in the driver’s seat as the truck came by and said, “there they go.”<sup>52</sup>

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<sup>46</sup> A167-169.

<sup>47</sup> A176.

<sup>48</sup> A176-177.

<sup>49</sup> A279, 285.

<sup>50</sup> A283.

<sup>51</sup> A281.

<sup>52</sup> A281.

Bailey had supposedly told him earlier in the day that Bugs was going to kill him.<sup>53</sup>

Sheppard claimed that he and Bailey drove to Sheppard's mom's house. A while later, a white car came and Bailey got inside. After they circled around, Bailey told Sheppard he would be back then rode off again. About 5 minutes later, Sheppard heard gunshots.<sup>54</sup> He walked two houses down and held Bailey while someone called 911.<sup>55</sup>

When police arrived, Bailey was not breathing.<sup>56</sup> The crime scene was not secured for another 20 minutes, thus, a crowd had gathered.<sup>57</sup> After he arrived, Trooper Marvel received information that a black Expedition had left the scene heading south on Coverdale Road. However, police never followed up on this information.<sup>58</sup> Police did collect several pieces of evidence from the scene of the shooting: 9 fired cartridges, 1 shell casing, 2 projectiles and 2 cigarette butts.<sup>59</sup> They also collected projectiles from Bailey's body.<sup>60</sup>

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<sup>53</sup> A281.

<sup>54</sup> A282.

<sup>55</sup> A282.

<sup>56</sup> A150.

<sup>57</sup> A149, 153, 161.

<sup>58</sup> A151, 152.

<sup>59</sup> A154-159.

<sup>60</sup> A160.

Hayward testified that he called Macarthur later that night and asked him if he killed Bailey. Macarthur denied shooting Bailey and asked if “Coco” was dead. After Hayward responded, “what do you think?” Macarthur hung up.<sup>61</sup>

Risper’s girlfriend, and mother of his children, Desira Sutton, owned the Jeep Cherokee that was suspected to be involved in the shooting.<sup>62</sup> Risper spent the weekend at a hotel with her and the children as part of a previously planned Mother’s Day getaway.<sup>63</sup> She learned that weekend that Risper was wanted in the shooting.<sup>64</sup> On Monday, Risper voluntarily turned himself in to police.<sup>65</sup>

Sutton did not know her Jeep had been used in the shooting and she did not know where it was located at the time police asked her.<sup>66</sup> Later, Teara Harris, a close friend of Risper, told Sutton that she drove the Jeep to Preston, Maryland.<sup>67</sup> After Sutton learned where the Jeep was located, she informed police.<sup>68</sup> The Jeep was later found abandoned in Preston, Maryland.<sup>69</sup> It was

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<sup>61</sup> A170-171.

<sup>62</sup> A181-183.

<sup>63</sup> A185.

<sup>64</sup> A184.

<sup>65</sup> A197.

<sup>66</sup> A187-188.

<sup>67</sup> A186, 188, 194.

<sup>68</sup> A188-189.

<sup>69</sup> A191.

left in a public place in a convenience store parking lot, and was not found by Maryland police until May 16, 2018.<sup>70</sup>

After the Jeep was located, Cpl. Cresto searched it, took photos and processed it for prints and DNA.<sup>71</sup> Inside the Jeep, he found 15 cell phones, cigarette butts, an identification card for a James Lamar Harmon and empty bottles.<sup>72</sup> In the rear hatch area he found a black cap and a black ski mask.<sup>73</sup> The only DNA matches that were found were: on one of 15 phones, the steering wheel and the black ski mask.<sup>74</sup>

On the day before trial, the State provided defense counsel with a recorded interview of an unidentified individual, “AE,” conducted over 7 months earlier. AE told police that one of Bailey’s drug suppliers, not Risper, confessed to shooting Bailey, provided details of the shooting and showed her the gun that was used. She said that the shooting was in retaliation for Bailey stealing from that dealer and not from stealing from Risper.<sup>75</sup> In fact, AE told the detective that multiple dealers had “hits” out on Bailey’s life because he regularly stole from them.<sup>76</sup>

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<sup>70</sup> A192.

<sup>71</sup> A250-251.

<sup>72</sup> A252.

<sup>73</sup> A253.

<sup>74</sup> A262.

<sup>75</sup> A111.

<sup>76</sup> A107.



**I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE’S WITNESSES TO TESTIFY ABOUT FACTS REGARDING PRIOR BAD ACTS ABOUT WHICH THEY HAD NO PERSONAL KNOWLEDGE AND WHEN IT PERMITTED THE INTRODUCTION OF OTHER CRIMES WITHOUT VALUE APART FROM THEIR RELEVANCE AS CHARACTER EVIDENCE.**

*Question Presented*

Whether the trial court abused its discretion when it found that second-hand knowledge was plain clear and conclusive evidence of Risper’s prior possession of illegal drugs and a weapon and when the trial court allowed the State to introduce that evidence of prior crimes and evidence of a subsequent home invasion to advance a theory that Risper shot Bailey in retaliation for a theft.<sup>77</sup>

*Standard and Scope of Review*

This Court “review[s] for abuse of discretion a trial judge’s admission of evidence under D.R.E. 404 (b).”<sup>78</sup>

*Argument*

The State relied solely on second-hand knowledge that Risper possessed illegal drugs and a weapon to establish that he was a target of a theft that Bailey committed so that it could advance a theory that Risper caused

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<sup>77</sup> A85.

<sup>78</sup> *Morse v. State*, 120 A.3d 1, 8 (Del. 2015).

Bailey's death in retaliation for that theft. Using that second-hand knowledge as a springboard, the State also introduced evidence of a home invasion in which Risper purportedly participated in order to support the narrative of retaliation. However, none of the witnesses upon whom the State relied to establish that Risper was the target of the theft had personal knowledge of the possession illegal drugs and gun. Thus, the State failed to establish those prior bad acts by plain, clear and conclusive evidence as is required under *Getz v. State*.<sup>79</sup> Absent sufficient evidence of those prior bad acts and Bailey's purported theft thereof, evidence of the subsequent home invasion has "no independent logical relevance." Thus, Risper's convictions must be reversed.

**The State's Request To Introduce Evidence Of Risper's Prior Bad Acts.**

The theory of the State's case was that Risper shot Bailey in retaliation for Bailey's theft of Risper's illegal drugs and gun. In support of this theory, the State filed two related requests prior to trial to introduce evidence at trial of Risper's prior bad acts of the possession of illegal drugs, possession of a weapon and his purported participation in a home invasion. In order to establish Risper's illegal possession, the State sought to introduce various statements Bailey purportedly made to various individuals indicating that he stole drugs and a gun from Risper. The State claimed these statements were

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<sup>79</sup> 538 A.2d 726 (Del. 1988).

admissible under D.R.E. 804(b)(3) as a statement against interest and under D.R.E. 807 (a), the residual hearsay rule. The State sought to introduce Risper's purported involvement in a home invasion to show his intent to retrieve the stolen items through Waples' account of the events.<sup>80</sup>

In response to the State's request, Bailey argued that none of the evidence the State sought to introduce was relevant. He further argued that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and the State failed to satisfy any of the *Getz* factors.<sup>81</sup> Finally, Bailey explained that none of the hearsay statements the State sought to introduce were admissible under any exception to the hearsay rule.<sup>82</sup> The State did introduce the evidence at trial pursuant to the court's ruling. However, in many cases, the statements and testimony that actually made its way into evidence was not as specific as the State had anticipated.<sup>83</sup>

The trial court issued an oral decision, finding the evidence was relevant to intent and identification.<sup>84</sup> In rendering its decision, the court explained that the admissibility of the home invasion was linked to the admissibility of the underlying possession of illegal drugs and weapon.

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<sup>80</sup> A22.

<sup>81</sup> A95-102.

<sup>82</sup> A97-98.

<sup>83</sup> A20-22, 34,

<sup>84</sup> Exhibit A, at pp. 6-7.

Ultimately, the court found that State satisfied all of the *Getz* factors and that each of the hearsay statements was admissible as either a statement against interest or under the residual exception rule.<sup>85</sup>

### **The Law Governing Delaware Rule of Evidence 404 (b).**

Under *D.R.E.* 404 (b), evidence of “other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, that evidence may “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” Rule 404 (b) is designed to prevent the introduction of evidence in a manner that would encourage the factfinder to infer that if the defendant acted in a specific manner in the past, he likely acted that way in the case at bar.<sup>86</sup> And, the State bears the burden of proving the admissibility of evidence that is otherwise prohibited under *D.R.E.* 404 (b).<sup>87</sup>

In *Getz*, this Court set forth five guidelines governing the admission of other crimes or bad act evidence under Rule 404(b). These include:

- (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of

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<sup>85</sup> Exhibit A, at pp. 9-12, 16, 20.

<sup>86</sup> *Norwood*, 95 A.3d at 595.

<sup>87</sup> *Taylor v. State*, 777 A.2d 759, 764 (Del. 2001).

such a material issue.(2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition. (3) The other crimes must be proved by evidence which is “plain, clear and conclusive.” *Renzi v. State*, Del.Supr., 320 A.2d 711, 712 (1974). (4) The other crimes must not be too remote in time from the charged offense. (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.<sup>88</sup>

### **Secondhand Knowledge Is Not Sufficient Evidence To Establish That Risper Possessed the Illegal Drugs and Gun in The Trailer.**

The trial court abused its discretion when it concluded that the State had eyewitness testimony regarding Risper’s illegal possession. To the contrary, because the State relied solely on second-hand knowledge to prove the illegal possession, it failed to “satisfy *Getz*’s third guideline, which is that the proof of the prior crimes must be ‘plain, clear and conclusive’”<sup>89</sup> None of the testimony provided, not even that by Weldon, relayed any personal knowledge as to whether Risper possessed any illegal drugs or a weapon. And, the State failed to present any other evidence to support that fact.

It erroneously introduced statements that Bailey supposedly made to others that purportedly established that Risper possessed the

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<sup>88</sup> *Getz*, 538 A.2d at 734.

<sup>89</sup> *Chavis v. State*, 2020 WL 2747969 \*3 (Del. May 26, 2020).

illegal drugs and gun that Bailey stole from the trailer. It introduced Bailey's statements to Yonta Clanton, Deavon Sheppard, and Oshea Waples that he robbed "Bug" as self-inculpatory statement through D.R.E. 804(b)(3) and his purported statements that "Bug" was after him through the residual hearsay rule, D.R.E. 807 (a).<sup>90</sup>

The first major flaw in the trial court's decision is found in its analysis of Weldon's testimony regarding Risper's illegal possession. The trial court made much of the fact that Weldon was with Bailey when he stole the illegal drugs and gun.<sup>91</sup> However, she always maintained that, at the time, she had no knowledge as to whom the trailer, the drugs or the gun belonged.<sup>92</sup> And, the State never presented any evidence to the contrary.

The trial court also relied on the hearsay statement relayed by Weldon.<sup>93</sup> Weldon repeatedly explained that it was only after the couple left the trailer and dropped off a portion of the proceeds at Waples house that Bailey purportedly told her that "Bug" or Mike Lewis might retaliate for the theft.<sup>94</sup> Thus, while Weldon may have had personal knowledge of the theft, she did not have firsthand knowledge of Risper's prior bad acts of possession of

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<sup>90</sup> A34.

<sup>91</sup> Exhibit A, at p. 8.

<sup>92</sup> A202.

<sup>93</sup> Exhibit A, at p. 8.

<sup>94</sup> A202-203.

illegal drugs and a weapon. Therefore, she could not provide plain, clear and convincing evidence of Risper's possession of illegal drugs and gun.

The State paraded three other witnesses with close ties to Bailey to testify regarding Risper's prior unlawful possession. Each of them relayed statements that Bailey purportedly made that the State claimed at least indirectly pointed to Risper's unlawful possession.

Yonta Clanton, a friend of Bailey's for 20 years, claimed that she was in her car with her aunt one day when Bailey stopped her and said that he had "black angels flying around [him]." She said that "he had supposedly robbed somebody for their drugs." And, he thought [i]t was a guy named Bugs."<sup>95</sup> Clanton did not provide any specifics such as a date or location as to where the conversation occurred. Further, she only provided a paraphrase of what Bailey thought.

Oshea Waples claimed that Bailey told him that "it's angels on me, dark angels out trying to get me." And, supposedly, sometime during the week before the shooting, Bailey said that Mike and Bug (Risper) were trying to get him as a result of what he gave Waples.<sup>96</sup> He was a drug dealer and a close friend of Bailey. Further, he was also in illegal possession of drugs and a gun.

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<sup>95</sup> A286.

<sup>96</sup> A237-238.

Finally, Deavon Sheppard, who had been friends “forever” with Bailey, claimed that he spent the entire day with Bailey on May 11 and that Bailey told him that Bugs was going to kill him.<sup>97</sup> However, his version of events leading up to Bailey’s death is completely inconsistent with the accounts of both Gray and Weldon.

As an initial matter, the trial court’s decision with respect to allowing Bailey’s statements to be introduced pursuant to hearsay exception was an abuse of discretion because the statements were not reliable. All four of the witnesses the State relied on had close ties to Bailey. Weldon was a regular drug user and shoplifter. Waples and Sheppard were drug dealers. None of them provided specific circumstances surrounding the actual statements. Also, Sheppard’s account of when Bailey purportedly relayed his statement contradicts the accounts of Gray and Weldon in significant and meaningful ways that suggests that the information is not reliable and trustworthy.<sup>98</sup>

Even if Bailey’s statements were admissible under the hearsay rules, they were not admissible for the purpose of establishing Risper’s prior bad acts. While “the testimony of an eyewitness or other witness with personal knowledge typically satisfies the ‘plain, clear and conclusive’

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<sup>97</sup> A281.

<sup>98</sup> A95.



requirement[,]”<sup>99</sup> testimony of a witness with only secondhand knowledge does not. “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter....”<sup>100</sup> If prior crimes are relevant, clear and convincing evidence must be supported by the witness’s personal knowledge of the prior events.<sup>101</sup>

Here, the testimony of the witnesses should not have been admitted because it was not based on their personal knowledge of the prior events that they described.<sup>102</sup> For example, in *Chavis v. State*, this Court noted that a guilty plea is sufficiently ‘plain, clear and conclusive.’<sup>103</sup> However, it found that the officer’s recitation of facts, of which he had no personal knowledge, related to a crime to which Chavis had pled was not sufficient to establish the

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<sup>99</sup> *Chavis*, 2020 WL 2747969 \*4.

<sup>100</sup> D.R.E. 602.

<sup>101</sup> *McDonald v. State*, 1989 WL 68314, \*10 (Del. 1989) (“the State proved the prior sexual attack by McDonald through the testimony of an eyewitness to that attack”).

<sup>102</sup> *See Renzi v. State*, 320 A.2d 711, 712-13 (Del. 1974) (finding that evidence of defendant’s prior drug sale was not “plain, clear and conclusive” where the only evidence at trial regarding the sale was the testimony of officer who did not witness the sale). *See also* 1 McCormick on Evidence § 10 (8th ed. Jan. 2020) (“The common law system of evidence embodies a strong preference for admitting the most reliable sources of information.”).

<sup>103</sup> *Chavis*, 2020 WL 2747969\*3 citing *See Harden v. State*, 712 A.2d 475, 1998 WL 309841, at \*3 (Del. May 29, 1998) (ORDER) (“A conviction is clear and convincing evidence of a defendant’s participation in that crime.”).

prior bad act by plain, clear and conclusive evidence.<sup>104</sup> “Such secondhand knowledge does not satisfy *Getz*’s requirement that proof of other crimes be by evidence which is ‘plain, clear and conclusive.’”<sup>105</sup> Thus, the trial judge erred by allowing those witnesses to testify about facts to which they had no personal knowledge.

### **Evidence of the Home Invasion Has No Independent Logical Relevance.**

The State also sought to introduce Waples account of the night when the two men whom he believed to be Mike Lewis and Risper came to his house to retrieve the gun and marijuana that Bailey purportedly stole. According to the State, this evidence was relevant to “establish [Risper’s] state of mind in seeking return of, and revenge for, his stolen property [...] and to show[] the intentional nature of his acts during the week leading up to Mr. Bailey’s death.”<sup>106</sup>

“Stripped of the above-discussed underlying facts,” evidence of the purported home invasion has “no independent logical relevance. Without such facts, [it] simply become[s] evidence of [an]other crime[] of the same or similar character as the charged offenses without evidentiary value apart from [its] relevance as character evidence, which makes [it] inadmissible under

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<sup>104</sup> *Chavis*, 2020 WL 2747969 \*4.

<sup>105</sup> *Id.*

<sup>106</sup> A28.

D.R.E. 404(a).”<sup>107</sup> Without plain, clear and – evidence of the underlying theft, there is no logical independent relevance of this evidence of the home invasion.

The State cannot use a defendant’s prior offenses to establish that he had a propensity to commit the charged offense.<sup>108</sup> Without the underlying evidence of the theft, the State’s evidence of the purported crimes evidence merely showed that Risper had a propensity to commit violent crimes and for carrying a weapon. This propensity evidence admitted at trial was inadmissible because “no evidential purpose is served by proof that the defendant committed other intentional acts of the same type.”<sup>109</sup>

Evidence that Risper was involved in dangerous activity such as home invasions is likely to have been significant to a jury. One cannot conclude with assurance that the jury was not swayed by the admission of the hearsay evidence designed to establish his involvement in prior bad acts.<sup>110</sup> Thus, the introduction of evidence of the home invasion was unfairly prejudicial.

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<sup>107</sup> *Chavis*, 2020 WL 2747969 \*4.

<sup>108</sup> *Deshields v. State*, 706 A.2d 502, 506 (Del. 1998).

<sup>109</sup> *Id.* at 508 (quoting *Getz*, 538 A.2d at 733).

<sup>110</sup> *See Buckham v. State*, 185 A.3d 1, 13 (Del. 2018) (en banc) (“Not all errors call for reversal. But to deem an error harmless—and safely disregard it—we must have a ‘fair assurance ... that the judgment was not substantially swayed by the error.’ That is necessarily a case-specific inquiry;’ one that requires us to ‘scrutinize[ ] the record’ to evaluate ‘both the importance of the error and the strength of the other evidence presented at trial.’ ” (alteration and omission

**II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO DISMISS RISPER’S CASE IN RESPONSE TO THE STATE’S FAILURE TO DISCLOSE BOTH EXCULPATORY AND IMPEACHMENT EVIDENCE AS REQUIRED BY *BRADY V. MARYLAND*.**

*Question Presented*

Whether the trial court erred when it refused to dismiss Risper’s case or to grant the requested alternative relief when the State failed to disclose, as required by *Brady v. Maryland*, that: someone other than Risper confessed to shooting Bailey; and two of the State’s key witnesses participated in a shoplifting scheme together at the time of the shooting.<sup>111</sup>

*Standard and Scope of Review*

“[C]laims that the State failed to disclose exculpatory evidence[ ] are reviewed de novo.”<sup>112</sup>

*Argument*

In this case, the State committed two *Brady* violations. First, the State failed to provide defense, until the eve of trial, with a recorded statement of an unidentified witness given 7 months earlier wherein she tells police that someone other than Risper confessed to shooting Bailey and showed her the

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in original) (footnotes omitted)); Super. Ct. Crim. R. 52(a) (“Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” (emphases omitted)).

<sup>111</sup> A114, 117, 119-120, 227-228, 231-235.

<sup>112</sup> *Wright v. State*, 91 A.3d 972, 982 (Del. 2014).

gun that was used. The second violation was committed when the State waited until after Gray completed her testimony to disclose evidence that she was involved in a shoplifting scheme with Weldon at the time of the shooting. While the State informed the court that these violations were the result of oversight, they are substantial and undermine the confidence in Risper's convictions. Thus, his convictions must be vacated.

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>113</sup> A “*Brady* violation” is established when: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.”<sup>114</sup> “In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense.”<sup>44</sup> That entails a duty on the part of the individual prosecutor ‘to

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<sup>113</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>114</sup> *Wright*, 91 A.3d at 988 (quoting *Starling v. State*, 882 A.2d 747, 756 (Del. 2005)).

learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.”<sup>115</sup>

Prejudice from a *Brady* violation is established when there is “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>116</sup> “Whether suppression of the evidence caused prejudice to the defendant depends on the materiality of the evidence.” Evidence is material if there is a reasonable probability that had it been disclosed to the defense in this case, the result of the proceeding would have been different.”<sup>117</sup> The Delaware Supreme Court has listed six factors to consider when determining whether the suppressed evidence is material: 1) favorability; 2) admissibility; 3) probative value; 4) cumulative nature; 5) weight of other evidence; and 6) deference to the trial judge.<sup>118</sup> Examining the evidence in our case reveals that all of these factors support a finding of materiality.

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<sup>115</sup> *Wright*, 91 A.3d at 988 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995)).

<sup>116</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985).

<sup>117</sup> *Bagley*, 473 U.S. at 682.

<sup>118</sup> *Stokes v. State*, 402 A.2d 376, 380 (Del. 1979).

**“AE’s” Statement Is Exculpatory And Was Required To Be Disclosed To Him Because It Was Material To Whether He Was Guilty.**

On the afternoon before jury selection, the State provided defense counsel with a recorded interview of an unidentified individual, “AE,” conducted by Det. Csapo over 7 months earlier. AE told police that one of Bailey’s drug suppliers, not Risper, confessed to shooting Bailey, provided details of the shooting and showed her the gun that was used. She said that the shooting was in retaliation for Bailey stealing from that dealer and not from stealing from Risper.<sup>119</sup> In fact, AE told the detective that multiple dealers had “hits” out on Bailey’s life because he regularly stole from them.<sup>120</sup>

During the recorded interview, the detective presented photos to AE for her to identify the person who confessed to her.<sup>121</sup> Similarly, AE marked a spot on a piece of paper where the individual took her and showed her the gun.<sup>122</sup> AE mentioned a possible name for the person who confessed to her. Defense counsel believed it to be Lavelle Hadley or Hatly.<sup>123</sup> However, the State believed she was referring to Lavelle Farmer.

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<sup>119</sup> A111.

<sup>120</sup> A107.

<sup>121</sup> A107.

<sup>122</sup> A108, 111.

<sup>123</sup> A108-109, 112.

Defense counsel requested a dismissal because the State committed a *Brady* violation when it failed to disclose “a confession by another person” that it had in its possession for seven months.<sup>124</sup> While the State asserted that the failure to disclose was inadvertent,<sup>125</sup> the trial court “agree[d] [defense counsel] should have had [the DVD] sooner.” Nonetheless, it denied defense counsel’s motion and, instead, allowed the defense to “play this interview, even though it’s all hearsay[,]” finding that to be a “reasonable remedy.”<sup>126</sup>

In response, defense counsel requested a continuance to further investigate the facts contained in the DVD since

someone confess[ed] to this witness about their involvement in a crime that does not implicate Mr. Risper, that this individual during the confession provided information on the motive for the killing of Mr. Bailey that also doesn’t seem to implicate Mr. Risper; given the nature of the information that was provided, we think that this is information that we need to have more time with to figure out how to fully implement that into our defense strategy.<sup>127</sup>

The State objected and the trial court denied the continuance request, sticking with its original remedy. The court did, however, order the State to disclose AE’s name to defense counsel.<sup>128</sup>

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<sup>124</sup> A115.

<sup>125</sup> A116-117.

<sup>126</sup> A116-117.

<sup>127</sup> A117

<sup>128</sup> A120.



The court allowed defense counsel to ask Det. Csapo pointed questions about AE's interview rather than playing the video in its entirety so as not to allow the State to "bring in extraneous facts to try to rebut that information given that it wasn't provided."<sup>129</sup> He did not do an investigation or write a report as a result of the information he obtained.<sup>130</sup>

The recording is exculpatory because it contains the confession of someone other than Risper for killing Bailey. The trial court's remedy was not sufficient method for defense counsel to make effective use of the evidence and defense counsel might have altered trial strategy from the beginning to accuse someone else of being the gunman.

The State did not present other substantial evidence to establish Risper's guilt. Coincidentally defense counsel had obtained a continuance around the time of AE's interview in order to investigate the possibility that another drug dealer was responsible for Bailey's death.<sup>131</sup> Thus, investigation of another drug dealer as the perpetrator was actually an alternative strategy. Further, additional time was necessary for further investigation because counsel could not decipher by watching the video who the individuals are or what they look like. Nor could they decipher from the video where she was

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<sup>129</sup> A265, 266, 274-278.

<sup>130</sup> A275.

<sup>131</sup> A110.

indicating where the gun was.<sup>132</sup> Further, the State claimed that it did not take any action of AE's information about the gun she was shown in the trailer because it was stale.<sup>133</sup>

***The Evidence of Channel Gray's Participation In Weldon's Shoplifting Scheme At The Time Of The Shooting Was Material Impeachment Evidence And Should Have Been Disclosed.***

Channel Gray was the only witness who claimed to have actually seen the shooting. She and Weldon provided a version of events that was inconsistent with Sheppard's version. She claims she was with Bailey for 3 hours on the night he was shot. She is the only one who claimed to have actually seen Risper shoot Bailey. She claimed he was wearing a mask; she was running past him but was able to make eye contact with him for 30-40 seconds. Thus, her testimony was critical to the State's case. She never mentioned any encounter with Weldon.

Defense counsel's cross-examination of Gray centered around exposing inconsistencies and other problems with her account of the events surrounding Bailey's shooting such as her claim that she was able to make eye contact for such a long period of time. He also pointed out that she had a conviction in Maryland for theft.<sup>134</sup>

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<sup>132</sup> A108.

<sup>133</sup> A113.

<sup>134</sup> A142-143.

Two days after Gray was released from her material witness warrant, Weldon testified. Among other things, she told the jury that, when they rode through Coventry Crossing after 5:00 p.m. on May 11, 2018, “a woman” stopped her and asked her “if [she] could get her some little boy clothes from the store, and how much [she] would charge her for them.” Weldon agreed to get her 10 outfits for \$50.<sup>135</sup> The understanding between the women was that Weldon was going to shoplift the clothes. So, while Bailey stayed behind, Marty drove Weldon to Roses and she shoplifted the items.<sup>136</sup>

At the conclusion of Risper’s cross-examination of Weldon, the State approached the bench and informed the judge, “as cross was going on, we were looking through the discovery that we sent to defense and noticed that there was a redaction that needs to be clarified for the defense prior to them redirect or crossing. We actually ended up redacting out the person she was shoplifting for is Channell Gray.”<sup>137</sup>

The defense requested either a dismissal of the case or a mistrial.<sup>138</sup> The State argued that the level of the *Brady* violation must reach that of “manifest necessity” in order for a dismissal or mistrial, and did not believe either were

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<sup>135</sup> A144.

<sup>136</sup> A144-145.

<sup>137</sup> A219.

<sup>138</sup> A231.

appropriate in this case.<sup>139</sup> The court agreed that the evidence should have been turned over to the defense prior to trial.<sup>140</sup> However, the court denied the defense's motion, finding that the evidence of shoplifting will be in front of the jury and the jury can make what they will out of it.<sup>141</sup> the court then told counsel that they could "explore it with her, she is a coconspirator, ask her if you want to argue Ms. Gray is dishonest, and she is a coconspirator stealing children's clothes from Roses, so be it."<sup>142</sup>

Because the jury's evaluation of a witness's credibility may be determinative of a defendant's guilt or innocence, Brady requires the State to disclose impeachment evidence.<sup>143</sup> "Impeachment evidence is part of an effective cross examination which is essential to the defendant's right to confront witnesses against him."<sup>144</sup> Here, the State did not dispute that Gray's participation in the shoplifting scheme was impeachment evidence or that the State's failure to timely disclose that information was a *Brady* violation. Rather, it argued that there was no prejudice as a result of that

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<sup>139</sup> A232.

<sup>140</sup> A232.

<sup>141</sup> A234-235.

<sup>142</sup> A221.

<sup>143</sup> *Bagley*, 473 U.S. at 676; *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001).

<sup>144</sup> *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001) (quoting *Jackson* at 515)

violation because the defense already exposed her dishonesty when it cross examined her on a theft conviction in Maryland.<sup>145</sup>

The impact of Gray's participation in Weldon's shoplifting scheme goes well beyond just another in the list of possible misdemeanor theft offenses. The information revealed that, on the very night of the shooting she was participating with another of the State's star witnesses in shoplifting or defrauding a store. Because the two witnesses participated together, the information may have impacted the jury's assessment of Gray's credibility and therefore the outcome of the trial.

By virtue of the fact that the State had to secure Gray's attendance by material witness warrant, she was, by definition, an essential witness. She had testified two days earlier and her testimony was already solidified in the jury's mind;<sup>146</sup> Thus, Risper was deprived of the right to the effective, meaningful cross examination.<sup>147</sup> As defense counsel explained, "we don't have the ultimate target on the subject of the issue available to confront with understanding the context of how to approach that." Makes a difference whether confronting her versus bringing it through another witness.<sup>148</sup>

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<sup>145</sup> A231-232.

<sup>146</sup> A230.

<sup>147</sup> A227-229.

<sup>148</sup> A221.

In fact, the impact of the evidence was dampened when Weldon insisted that she never told police that Gray was the woman she shoplifted for. Once she was rehabilitated, the significance of the evidence was lost.<sup>149</sup> Court says will allow cop to testify as to Weldon said it was Gray.<sup>150</sup> Thus, the delay in the disclosure of the information until after she testified had already been cross examined questions whether the verdict is worthy of confidence.

“This evidence was both favorable to [Risper] and material in that it may have affected the outcome of the trial. Because the State withheld this evidence making it unavailable for effective cross-examination, [this Court] must conclude that there is a ‘reasonable probability of a different result’ had the favorable evidence the State withheld been provided in a timely fashion. The Superior Court should have granted the Motion for a Mistrial.”<sup>151</sup>

“Applying the *Kyles* test, it is clear that the delayed disclosure constituted a suppression of favorable evidence that would be material to impeachment of one or more key witnesses. [Gray]'s credibility would have been significant to the jury and an opportunity for effective cross-examination was essential for [Risper] to receive a fair trial. Had the [shoplifting

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<sup>149</sup> A222-226.

<sup>150</sup> A226.

<sup>151</sup> *Atkinson*, 778 A.2d at 1064.

information] been made available to defense counsel before trial, the cross-examination of [Gray] may have changed the outcome of the trial.”<sup>152</sup>

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<sup>152</sup> *Atkinson*, 778 A.2d at 1064.

## CONCLUSION

For the reasons and upon the authorities cited herein, Risper's convictions must be reversed.

Respectfully submitted,

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