



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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| KEITH GIBSON, | : | |
| Defendant, Below- | : | |
| Appellant | : | |
| | : | Case No. 111, 2024 |
| v. | : | |
| | : | ON APPEAL FROM |
| STATE OF DELAWARE, | : | THE SUPERIOR COURT OF THE |
| Plaintiff, Below- | : | STATE OF DELAWARE |
| Appellee | : | |
| | : | Criminal ID Nos. 2107000514A/B |
| | : | 2106004704A |
| | : | 2106004632A |
| | : | 2107000202A |

**ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE
APPELLANT'S OPENING BRIEF**

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ORDER (B) (Denying in Part and Granting in Part Pretrial Motions, entered 11/2/22)

ORDER (C) (Denying in Part and Granting in Part Pretrial
Motions, entered 12/5/22)

ORDER (D) (Denying in Part and Granting in Part Pretrial
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ORDER (E) (Denying in Part and Granting in Part Pretrial
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NATURE OF THE PROCEEDINGS

On June 21, 2021, Appellant Keith Gibson was indicted on forty-one charges of First-Degree Murder, First-Degree Attempted Murder, Possession of a Firearm During the Commission of a Felony, First-Degree Robbery, First-Degree Reckless Endangering, Possession of a Firearm by a Person Prohibited, Theft of Motor Vehicle and drug offenses.¹ The charges stem from five separate criminal investigations that took place between May 15, 2021 and June 8, 2021.

The Court severed counts and established three trial groupings. On the first grouping's jury trial (see list below), Mr. Gibson was convicted of all counts. In a bifurcated trial, Mr. Gibson was convicted of four counts of Possession of a Firearm by a Person Prohibited.²

Mr. Gibson was sentenced as follows:³

IN21-07-0104-W: First-degree murder: Custody of the Department of Correction (DOC) for life at Supervision Level 5 (L-5, herein) without parole; Restitution: \$5000.00.

IN21-07-0111-W: First-degree murder: Custody of the DOC for life, L-5, without parole;

¹ A.1; A.26; A.38; A.65; A.94.

² A.20; A.32; A.59; A.86; A.113; On March 8, 2024, the State filed a *nolle prosequi* on the remaining charges in Groups 2 and 3, which was granted on April 2, 2024. A.23; A.34; A.61; A.89.

³ Exhibit A.

IN21-07-0044-W: First-degree murder: Custody of the DOC for life, L-5, without parole;

IN21-07-0052-W: First-degree murder: Custody of the DOC for life, L-5, without parole;

IN21-07-0115: First-degree attempted murder: Restitution: \$468.55; Custody of the DOC for life, L-5, without parole;

IN21-07-0107-W: First-degree robbery: Custody of the DOC for 25 years, L-5;

IN21-07-0047-W: First-degree robbery: Custody of the DOC for 25 years, L-5;

IN21-07-0117: First-degree robbery: Custody of the DOC for 25 years, L-5;

IN21-07-0112: First-degree robbery: Custody of the DOC for the balance of his natural life, L-5. Appellant was declared a Habitual Offender and was sentenced pursuant to 11 Del. C. 4214(b) on this charge;

IN21-07-0110-W: Possession of Firearm by a Person Prohibited ("PFBPP") with injury: Custody of the DOC for 15 year(s), L-5;

IN21-07-0105-W: Possession of a Firearm During the Commission of a Felony ("PFDCF"): Custody of the DOC for 25 years, L-5;

IN21-07-0106/108/050/045/048/116/118/113-W: PFDCF: Custody of the DOC for 25 years, L-5, on each conviction;

IN21-07-0096: Wearing Body Armor During the Commission of a Felony: Custody of the DOC for 3 years, L-5;

IN21-07-0114: Second-degree conspiracy: DOC of Correction for 2 years, L-5;

TO IN21-07-0109-W: Theft of a Motor Vehicle:
Custody of the DOC for 2 years at Supervision Level
5 followed by 6 months at Supervision Level 4 DOC
discretion; Hold L-5 until space is available at
Supervision Level 4 DOC discretion.

Mr. Gibson was alleged to have committed robberies of a telephone store, a deli, and a drug store. During the robberies he was alleged to have shot and killed the manager of the telephone store and attempt to murder the deli clerk. Additionally, Appellant was alleged to have murdered a local drug dealer at the house from which he sold his drugs, and taking from the victim a black sling bag that contained controlled substances.

At the core of this case, Appellant alleges that he did not receive a fair trial due to the trial court's errors in allowing unduly prejudicial evidence and the failure to sever the murder of the drug dealer from the other charges.

SUMMARY OF THE ARGUMENT

I. The trial court committed reversible error in denying Appellant's motion to sever the Ronald Wright murder counts from the Basilio and Almansoori cases. Evidence that Appellant may have been involved in the Wright's murder contained inadmissible evidence against him in the other cases, and admission of the evidence constituted to undue prejudice denying him of the right to a fair trial.⁴

II. The trial court committed reversible error by failing to suppress evidence seized from Appellant's cellphone. The allegations in the affidavit in support of the Warrant lacked particularity, and there was no logical nexus between these alleged crimes and Mr. Gibson's iPhone. Evidence obtained from the phone, namely that the phone had been turned off prior to and shortly after the Basilio murder, was improperly admitted, denying him the right to a fair trial.⁵

III. The trial court committed reversible error in allowing evidence of the bad acts of the Dunkin'® robbery suspect, specifically the video of the suspect grabbing and pushing the female victim into the store. This evidence was inadmissible prior bad act evidence used to paint Appellant as a bad

⁴ Preserved in the trial court at Def.'s Motion to Sever, D.I. 45.

⁵ Preserved in the trial court at Def.'s Motion to Suppress Evidence Seized from Appellant's iPhone, D.I. 41.

person who abuses and manhandles women, prejudicing his right to a fair trial.⁶

IV. The trial court committed reversible error in overruling Appellant's objection to the receipt for the bicycle repair service. The receipt contained inadmissible hearsay evidence not subject to any exception. The evidence was unduly prejudicial to Appellant because it contained inadmissible evidence identifying Appellant as the "owner" of the bicycle located just a few blocks from the Basilio murder, thus denying him the right to a fair trial.⁷

V. The trial court committed reversible error by permitting Amanda Masteller to testify that Appellant's statement that he committed a "lick" meant that he had committed a robbery. This inadmissible evidence led the jury to believe that Appellant was confessing to having committed the robbery at the Metro[®] PCS store, denying him the right to a fair trial.⁸

⁶ Preserved in the trial court at N.T. 11/2/23, 71-76.

⁷ Preserved in the trial court at N.T. 11/6/23 (P.M. Session), 14-15.

⁸ Preserved in the trial court at N.T. 11/8/23 (A.M. Session), 19-22.

STATEMENT OF FACTS

I. The Leslie Basilio Murder/Metro[®] PCS Robbery/Vehicle Theft:

The State alleged that on May 15, 2021, Gibson shot and killed Leslie Basilio (“Basilio”) while robbing her where she worked at the Metro[®] PCS store (now Metro[®] by T-Mobile)⁹ in Elsmere and stole her car.

Kevin Peterman lived in a second-floor apartment across the street from the Metro[®] PCS store.¹⁰ On May 15, 2021 at approximately 5:30 p.m., a loud bang drew his attention to the store. A man wearing a ski mask, a heavy gray sweatshirt exited the store carrying a plastic bag.¹¹ He entered Basilio’s Cadillac Escalade and drove off eastbound towards Wilmington.¹² Although the man was wearing a pull-over ski mask, Peterman gave a description to police that his hair was curly.¹³

Peterman walked over and, seeing no one inside, and dialed 9-1-1.¹⁴ Elsmere Police responded. The cash register was open. Leslie Basilio’s body was found in the rear garage area. She had been shot in her head at close

⁹ N.T. 11/7/23, 27. (“N.T.” refers to Notes of Testimony from trial transcript followed by transcript date and page number(s)).

¹⁰ N.T. 10/31/23 (A.M. Session), 94-95, 99.

¹¹ *Id.*

¹² *Id.*; N.T. 11/1/23, 63, 103.

¹³ N.T. 10/31/23 (A.M. Session), 101.

¹⁴ N.T. 10/31/23 (A.M. Session), 95-96.

range.¹⁵ Twenty-three cellular phones worth \$8,000.00 were taken.¹⁶

A few blocks from the store, police recovered a blue Retrospec® bicycle.¹⁷ The bicycle had been serviced at Kayuh Bicycles in Philadelphia on January 23, 2021 and May 13-14, 2021. The name on the receipts was Keith Gibson.¹⁸ An OnGuard® Doberman cable lock on the bicycle was purchased at that store on May 14, 2021. The name on the purchase receipt was Keith Gibson.¹⁹

On May 19, 2021, Basilio's Escalade was located in front of 2421 North 19th Street in Philadelphia.²⁰

Shortly after the robbery/murder, one of the stolen phones was activated in the name of Nevone Stinson. Law enforcement "pinged" the phone to the 400 block of West 7th Street in Wilmington.²¹ On May 25, 2021, police located Stinson there and in possession of the phone.²² A search of the phone revealed

¹⁵ N.T. 10/31/23 (A.M. Session), 114-118; N.T. 10/31/23 (P.M. Session), 5-7, 11, 24, 35-36, 43; N.T. 11/1/23, 47-52.

¹⁶ N.T. 10/31/23 (P.M. Session), 44-45; N.T. 11/7/23, 28.

¹⁷ N.T. 10/31/23 (A.M. Session), 105-109, 119; N.T. 11/1/23, 15, 101.

¹⁸ N.T. 11/6/23 (A.M. Session), 30-34. (Note: Transcript labeled 11/6/23 was a morning session although at page 3 it is indicated that the proceedings started at 2:00 p.m. This is not correct, and the proceedings in that transcript concluded at 12:13 p.m. as noted on page 85.)

¹⁹ N.T. 11/6/23 (A.M. Session), 34-36 .

²⁰ N.T. 11/1/23, 63-65.

²¹ N.T. 11/1/23, 106-107; N.T. 11/7/23, 30.

²² *Id.*

a contact name, “Beast,” with that name attached to Appellant’s phone number.²³

Reyna Medina, Stinson’s friend, later identified a photograph of Stinson holding the cellular phone that she had activated for him.²⁴

Amanda Masteller, Mr. Gibson’s friend at the time, testified that he used the nickname “Beast,” and a phone number of 267-243-3272.²⁵ When she first met him, he used the blue Retrospec® bicycle referred to above.²⁶ When he no longer had the bicycle, he told her it was stolen while he was “doing a lick.”²⁷ She did not know what a “lick” meant but later learned “from the streets” that it meant a robbery.²⁸

Masteller had observed him carry a black or brown revolver and a large knife.²⁹ She identified the gun found under a handicap ramp and the knife seized after the Rite Aid robbery (see “IV. The Rite Aid Robbery” below) as items she saw him with.³⁰

Masteller became aware of the Dunkin’ Donuts® (“Dunkin’®”) robbery

²³ N.T. 11/1/23, 108-109.

²⁴ N.T. 11/9/23, 9-10.

²⁵ 11/8/23 (A.M. Session), 10-13, 23.

²⁶ 11/8/23 (A.M. Session), 13-14.

²⁷ 11/8/23 (A.M. Session), 19-21.

²⁸ 11/8/23 (A.M. Session), 21-22; A.237-276.

²⁹ 11/8/23 (A.M. Session), 16-18.

³⁰ 11/8/23 (A.M. Session), 18.

(See “V. The Dunkin’[®] Robbery/Murder of Christine Lugo” below) when seeing a video on Facebook[®]. She identified Appellant as the one on the video committing that robbery.³¹ She made an anonymous call to the police to report her observation, and later gave a statement to police.³² She identified Appellant as the person in the Metro[®] PCS robbery surveillance video based upon the way the suspect was standing and walking and by viewing him in clothes he had worn previously, despite the fact that she could not see his face on the video.³³

The projectile recovered from the Metro[®] PCS robbery (State’s Exhibit 93) contained fragments of a plastic coating, dark blue or black in color, that were consistent with Nyclad (nylon coated lead bullets) ammunition.³⁴

The phone purportedly belonging to Appellant had no activity from 4:43 p.m. to 6:30 p.m. on May 15, 2021, possibly from being powered off during that time.³⁵

The projectile recovered from the Leslie Basilio murder was a Nyclad projectile.³⁶

³¹ 11/8/23 (A.M. Session), 25-26.

³² 11/8/23 (A.M. Session), 26-27, 32.

³³ 11/8/23 (A.M. Session), 27-30

³⁴ N.T. 11/6/23 (A.M. Session), 46-47.

³⁵ N.T. 11/1/23, 109; N.T. 11/2/23 (A.M. Session), 110-113.

³⁶ N.T. 11/6/23 (P.M. Session), 47-64.

II. The Ronald Wright Murder:

On June 5, 2021, Gibson was alleged to have shot and killed Ronald Wright (“Wright”) and stolen his sling bag. Walter Davis was living at 1200 West 3rd Street in Wilmington with his mother, and his best friend, Wright, had been “coming in there . . . back and forth” selling crack cocaine from the house.³⁷

On June 5, 2021, while standing about fifty feet from his front door, Davis heard a “muffled boom,” and saw two men (Donald Miller and “Shotty”) running from the house.³⁸ Davis scaled the roof from the rear of the house, and saw Wright on the floor.³⁹ After entering through the window, he took Wright’s cash, car keys and identification and left before the police arrived.⁴⁰ Wright had an egregious wound to the top of his head and met the criteria for telemetric pronouncement of death.⁴¹

Nicastro, a regular fentanyl customer of Wrights’, testified that Wright kept the drugs he was selling in a sling bag or in a dresser in the bedroom.⁴² He identified State’s Exhibit 138 as “like a black sling bag that [Wright] usually

³⁷ N.T. 11/1/23, 120-122, 123.

³⁸ N.T. 11/1/23, 123-125, 131.

³⁹ N.T. 11/1/23, 125.

⁴⁰ N.T. 11/1/23, 129-130, 132, 138.

⁴¹ N.T. 11/1/23, 154-155.

⁴² N.T. 11/2/23 (A.M. Session), 96-98, 101.

wore.”⁴³

A partial bullet projectile labelled Exhibit 116 was located underneath Wright’s body.⁴⁴ A similar projectile was found at the scene of a separate robbery that occurred the same night at the “Good Deli” located on the corner of 9th and West Streets in Wilmington (see “III. The Good Deli Robbery/ Attempted Murder of Belal Almansoori” below).⁴⁵

On the night of the Wright murder on June 5, 2021, surveillance footage of the abutting street captured a person in dark clothing wearing a backpack and walking past Davis’s house at 10:45 p.m., and then appearing at the front of the residence.⁴⁶ Amanda Masteller, who identified Appellant in various surveillance videos, gave the opinion that the person captured walking near the house where Wright was killed was Appellant based upon the way he walked.⁴⁷

Wright was in a surveillance video from a prior date showing him exiting the residence and carrying a satchel bag that, according to his sister, he always had with him.⁴⁸ She also identified State’s Exhibit 242, a small, black cross-body bag (the bag found on Appellant at the time of his arrest after the

⁴³ N.T. 11/2/23 (A.M. Session), 98-99.

⁴⁴ N.T. 11/1/23, 215-216; N.T. 11/7/23, 150.

⁴⁵ N.T. 11/1/23, 216-221.

⁴⁶ N.T. 11/7/23, 151-155.

⁴⁷ 11/8/23 (A.M. Session), 45.

⁴⁸ N.T. 11/8/23 (P.M. Session), 5-6.

Rite Aid robbery) as her brother's bag where he kept his drugs.⁴⁹

Steven Deady testified as an expert certified in firearms identification, gunshot residue, and tool mark examination.⁵⁰ The projectile and projectile fragments from the Wright murder were .38 caliber "frangible" or "non-toxic" bullets that break up into little pieces when striking a hard object, eliminating ricochet concerns.⁵¹ Mr. Deady also examined projectiles recovered from the Almansoori attempted murder and Good Deli robbery case (see section III. below) and compared them with the projectiles from the Ronald Wright murder.⁵² He determined that they were all .38-caliber class, discharged frangible bullets.⁵³ He could not determine whether they were discharged from the same gun.⁵⁴

III. The Good Deli Robbery/Attempted Murder of Belal Almansoori:

The Appellant was accused of shooting and attempting to kill Belal Almansoori ("Almansoori") on the night of June 6, 2021, while robbing the Good Deli where Almansoori worked.⁵⁵ Almansoori, found lying down with significant head and body wounds in a pool of blood, sustained gunshot

⁴⁹ N.T. 11/3/23, 136; N.T. 11/8/23 (P.M. Session), 6.

⁵⁰ 11/8/23 (A.M. Session), 97-100.

⁵¹ 11/8/23 (A.M. Session), 104-109.

⁵² 11/8/23 (A.M. Session), 109-120.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ N.T. 11/2/23 (P.M. Session), 36.

wounds to his head and arms.⁵⁶ The suspect was wearing sneakers that had a bubble in back of the heel part, and he appeared to be carrying a bag underneath his sweatshirt.⁵⁷ Condoms sold in the store were on the floor near Almansoori.⁵⁸ (When Appellant was arrested after the Rite Aid robbery, he was found in possession of condoms that matched those style condoms.)⁵⁹

Almansoori testified that he had finished taking care of some customers that night, and looking at the surveillance cameras saw someone enter the store walking fast and in a suspicious manner.⁶⁰ After being hit by the bullets, he laid motionless.⁶¹ The suspect stood over him taking cigarettes and cash from the register.⁶² He was in the hospital for three months and underwent two surgeries followed by physical therapy.⁶³

Det. Kevin Nolan of the Wilmington Police Department reviewed videos from that robbery and noticed similarities between the Dunkin'® robbery and the Good Deli robbery regarding the perpetrator.⁶⁴ Bullet specimens from the scene of the Dunkin'® robbery were compared with a bullet on Mr. Gibson at

⁵⁶ *Ibid.*; N.T. 11/2/23 (P.M. Session), 46-47; N.T. 11/7/23, 147.

⁵⁷ *Id.*

⁵⁸ N.T. 11/7/23, 140, 144.

⁵⁹ N.T. 11/3/23, 50-52, 79, 81-83, 116-117, 122-123; N.T. 11/7/23, 161.

⁶⁰ N.T. 11/7/23, 141-146.

⁶¹ N.T. 11/7/23, 146.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ N.T. 11/3/23, 8.

the time of his arrest, and were the same caliber, weight, and general characteristics.⁶⁵

Reyna Medina, mentioned above in regard to the Metro[®] PCS robbery/murder, was also a witness with regard to the Good Deli robbery. She lived two blocks from the Good Deli and knew Almansoori.⁶⁶ On the night of the robbery, while outside her home and high from smoking marijuana, she observed a man with a mark on his forehead across the street holding his right hand in his pants and his left hand covering it.⁶⁷ After he walked away from the area, she heard gunshots, and she observed him walking down Tatnall Street before disappearing.⁶⁸ She made an in-court identified of Appellant as that man.⁶⁹

When Det. Sowden showed her a single photograph of Appellant with a mark on his forehead,⁷⁰ Medina said that he “looked like the guy” she saw.⁷¹

IV. The Rite Aid Robbery:

On June 8, 2021, Mr. Gibson and alleged co-conspirator, Alexander Delgado were accused of robbing a Rite Aid. According to the register clerk,

⁶⁵ N.T. 11/7/23, 58-64.

⁶⁶ N.T. 11/9/23, 6-8, 11.

⁶⁷ N.T. 11/9/23, 12-13, 22.

⁶⁸ N.T. 11/9/23, 14-16, 29.

⁶⁹ N.T. 11/9/23, 13.

⁷⁰ N.T. 11/9/23, 24-25.

⁷¹ N.T. 11/9/23, 33-34.

Sandra Collins, one suspect was a black male wearing dark clothing.⁷² A GPS pack, hidden in the cash that she handed over, pinged in the 800 block of West 5th Street, across the street from the Rite Aid.⁷³ Officer Ryan Kilmon of the Wilmington Police Department responded and, while walking down an alleyway behind the homes on West 5th Street, heard a fence rattle to his left. He said he observed Appellant coming down from the top of the fence.⁷⁴ Upon entering the rear yard, he approached Appellant who was wearing a black hooded sweatshirt, black sweatpants, black sneakers, a bullet-proof vest and a fanny pack containing suspected controlled substances, a small scale, some vials, and three condoms.⁷⁵ He was in possession of multiple .357 caliber rounds of ammunition, an empty firearm holster, and a large, sheathed knife.⁷⁶ Police located a loaded revolver containing five .357 Magnum cartridges and one .38 Special cartridge under a handicap ramp in that backyard.⁷⁷

At 810 West 5th Street, police recovered a cigarette box containing ten-dollar bills with the centers cut out where the GPS locator would have been.⁷⁸ In 812 West 5th Street, police located a gray hooded sweatshirt with rainbow

⁷² N.T. 11/3/23, 42.

⁷³ N.T. 11/3/23, 15, 32-33.

⁷⁴ N.T. 11/3/23, 45-46, 77-78.

⁷⁵ N.T. 11/3/23, 50-52, 79, 81-83, 116-117, 122-123; N.T. 11/7/23, 161.

⁷⁶ N.T. 11/3/23, 52-53, 83, 116, 140.

⁷⁷ N.T. 11/3/23, 84, 111-112.

⁷⁸ N.T. 11/3/23, 95-98.

colors with the sleeves cut off.⁷⁹ This gray sweatshirt had DNA attributable to Alexander Delgado.⁸⁰

A set of keys found on Appellant opened the cable lock found attached to the blue Retrospec® bicycle.⁸¹ The gun found under the handicap ramp fit into the empty holster that Appellant had.⁸²

Collins testified that the two men were wearing masks, hoods and gloves and could not describe their respective races.⁸³ One suspect brandished a gun, handed her a plastic bag saying, “Give me the money.”⁸⁴ She put the cash in the bag, along with the “security money” (containing the GPS tracker), while the other suspect wearing a light-colored sweatshirt went behind the register and took Newport cigarettes from the shelf.⁸⁵

The bullets recovered from the gun under the handicap ramp after the Rite Aid robbery contained a Nyclad or nylon-cover jacket.⁸⁶

V. The Dunkin’® Robbery/Murder of Christine Lugo:

On June 5, 2021, a robbery-homicide occurred at a Dunkin’® at 532

⁷⁹ N.T. 11/3/23, 102-105.

⁸⁰ N.T. 11/8/23 (A.M. Session), 67-74.

⁸¹ N.T. 11/8/23 (P.M. Session), 23-24

⁸² N.T. 11/8/23 (P.M. Session), 30-31.

⁸³ N.T. 11/8/23 (P.M. Session), 7-9.

⁸⁴ N.T. 11/8/23 (P.M. Session), 11.

⁸⁵ N.T. 11/8/23 (P.M. Session), 11-14.

⁸⁶ N.T. 11/8/23 (A.M. Session), 120-123.

West Lehigh Avenue in Philadelphia.⁸⁷ Det. Snowden of Elsmere Police reviewed videos from that crime and noticed similarities regarding the perpetrator in both the Dunkin’[®] and the Metro[®] PCS robberies.⁸⁸

The Dunkin’[®] surveillance videos were played for the jury.⁸⁹ Dunkin’[®] manager Christine Lugo was robbed and shot in the head by the assailant.⁹⁰ The bullet went through her head and lodged itself into a nearby wall.⁹¹

The Dunkin’[®] was located several blocks from the location where police located Basilio’s Cadillac Escalade.⁹²

⁸⁷ N.T. 11/1/23, 115-116; N.T. 11/2/23 (P.M. Session), 25; A.153-155. (This crime was committed in Pennsylvania and trial of that case is currently pending in Philadelphia.)

⁸⁸ *Id.*

⁸⁹ N.T. 11/2/23 (P.M. Session), 18-23.

⁹⁰ N.T. 11/2/23 (P.M. Session), 28.

⁹¹ *Id.*

⁹² N.T. 11/2/23 (P.M. Session), 30.

ARGUMENT

POINT I - THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER THE TRIAL OF THE RONALD WRIGHT MURDER COUNTS FROM THE BASILIO AND ALMANSOORI COUNTS BECAUSE UNREASONABLE AND SUBSTANTIAL PREJUDICE RESULTED.

A. Question Presented:

Did the trial court erred in denying Appellant Gibson's pretrial motion to sever the counts involving the murder of Ronald Wright from the other counts in Group 1 based on a reasonable probability of substantial prejudice resulting from trial of this murder with the Basilio murder and Almansoori attempted murder? This issue was set forth in Appellant's Motion to Sever filed in the trial court.

B. Scope of Review:

The decision to grant or deny a motion for severance rests within the sound discretion of the trial court.⁹³ As a general rule, it may be said that discretion has been abused by denial when there is a reasonable probability that substantial prejudice may result from a joint trial. *Bates v. State*, 3 86 A.2d 1139, 1141 (Del. 1978).

C. Merits of the Argument:

The Appellant moved for a severance of the counts in the indictment, and

⁹³ *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967).

specifically sought for the charges be grouped for trial as follows: (1) “business robberies” (counts 1-8 (Leslie Basilio) and 18-22 (Belal Almansoori), further severing the PFBPP counts (counts 8, 22, 33, 39, 40 and 41) and trying them as part of a bifurcated trial with the “business robbery” counts; and (2) “drug dealer robbery” [and murder] (counts 9-17 (Wright)), further severing and bifurcating for trial count 17 (PFBPP));⁹⁴

The Appellant argued that he would suffer prejudice if severance were not granted because the facts underlying the Basilio and Almansoori, respectively the robbery/homicide and robbery/attempted homicide, against the evidence in the Wright murder, were “not . . . sufficiently connected and do not follow a common plan or scheme.”⁹⁵ He also voiced concerns about how the jury would decide his case - that it would aggregate evidence and infer a general criminal disposition, ultimately finding him guilty on that basis.⁹⁶ Appellant argued below that severance was needed because the jury may be unable to consider each count separately and improperly infer a criminal disposition.⁹⁷

The trial court found severance of certain counts was appropriate,⁹⁸ but did

⁹⁴ The appellant also sought to sever the Secret Harris assault and robbery from the other counts, but issue that became moot when the State dismissed those counts.

⁹⁵ Exhibit B - Order on Omnibus Motions 11-2-22 at ¶ 4.

⁹⁶ *Ibid.*

⁹⁷ *Id.* at ¶ 5.

⁹⁸ *Id.* at ¶ 12.

not sever the Ronald Wright murder from the Basilio and Almansoori cases.⁹⁹ The Appellant submits that it was the trying of the Wright murder in the same trial as the Basilio and Almansoori trials that denied Appellant the right to a fair trial because the jury, hearing of the bad acts referenced in the Ronald Wright murder, would be unduly influenced by inadmissible evidence of prior bad acts when considering the evidence in the trial of the Basilio and Almansoori cases. Here, the jury heard evidence of the Wright murder when it was not material to whether or not Gibson was guilty of the Basilio murder or the attempted murder of Almansoori. Also, the probative value of the evidence from the Ronald Wright murder was so outweighed by its prejudicial effect that it denied Appellant to his right to a fair trial.

In *Getz v. State*,¹⁰⁰ this Court held that evidence of prior crimes and bad acts may be admissible if (1) it is material to an issue or ultimate fact in dispute; (2) introduced for a purpose sanctioned by DRE 404(b) or some other purpose not inconsistent with the basic prohibition against such evidence; (3) the evidence proving the prior crime or bad act is plain, clear and conclusive; (4) the prior crimes or acts are not too remote in time; and (5) the probative value of the

⁹⁹ *Id.* at ¶ 19; The Court adopted its own division of the cases and included the following into Group I - Basilio (Counts 1-8), Wright (Counts 9-17), and Almansoori (Counts 18-22).

¹⁰⁰ *Getz v. State*, 538 A.2d 726 (Del. 1988).

evidence sought to be introduced outweighs its prejudicial effect.¹⁰¹

As a general proposition, it is well established that evidence of other crimes is not admissible to prove that Appellant committed the charged offense.¹⁰² A defendant must be tried for what he did, not who he is.¹⁰³ As noted by the Court in *Getz*, “The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused’s guilt of the present charge.”¹⁰⁴

Superior Court Criminal Rule 8 provides that joinder of two or more offenses is permissible;¹⁵⁰ however, severance of charges is appropriate under Superior Court Criminal Rule 14¹⁵¹ where a defendant will be prejudiced by a joinder.¹⁵² This Court in *Wiest v. State*¹⁰⁵ identified three specific types of prejudice that will weigh against the interest of judicial economy promoted by joinder:

¹⁰¹ *Id.* at 734.

¹⁰² *Id.* at 730.

¹⁰³ *Getz v. State*, 538 A.2d 726 (Del. 1988).

¹⁰⁴ *Ibid.* (quoting *Wigmore*, Evidence § 58.2, at 1212-13 (Tillers rev. 1983)).

¹⁵⁰ Super. Ct. Crim. R. 8(a).

¹⁵¹ Super. Ct. Crim. R. 14.

¹⁵² *Jackson v. State*, 990 A.2d 1281, 1286 (Del. 2009), citing *Winer v. State*, 950 A.2d 642 (Del. 2008).

¹⁰⁵ *Wiest v. State*, 542 A.2d 1193 (Del 1988).

1) the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find;

2) The jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime of crimes;

3) The defendant may be subject to embarrassment or confusion in presenting different and separate defenses to difference charges.¹⁵³

Additionally, “a crucial factor to be considered in making a final determination on a severance motion should be whether the evidence of one crime would be admissible in the trial of another crime.”¹⁵⁴ The first prejudice cautioned by *Wiest* is that “the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find.”¹⁵⁶ Such was the case here.

The second consideration under *Wiest* is “whether the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime of crimes.”¹⁵⁷ This form of prejudice predictably occurred in the instant case.

The trial court found that the common thread that tied the Basilio and Almansoori with the Wright homicide was Appellant’s choice to rob money-

¹⁵³ *Id.* at 1195.

¹⁵⁴ *Id.* n. 3, citing *State v. McKay*, 382 A.2d 260, 262 (Del. Super. 1978).

¹⁵⁶ *Wiest*, 542 A.2d at 1195.

¹⁵⁷ *Id.*

making enterprises, and the unifying thread was that these charges were of the “same or similar character” and part of a common scheme or plan to acquire money, thus warranting a joint trial.¹⁰⁶ However, Appellant submits that this common thread was insufficient reason to allow the Wright murder to be tried with the Basilio and Almansoori cases. The probative value, that Appellant was committing all of these offenses to obtain money, was critically outweighed by the prejudice incurred. It became highly likely that the jury cumulated the evidence of various crimes charged and found guilt when, if considered separately, it would not have so found. It became further likely that the jury used the evidence of the Basilio and Almansoori cases to infer Appellant’s general criminal disposition in order to find guilt of the Ronald Wright murder.

As a result, the failure to sever the Ronald Wright murder from the Basilio and Almansoori cases was error that resulted in undue prejudice to Appellant. Therefore, Appellant was denied the right to a fair trial, and his convictions should be reversed and remanded for a new trial.

¹⁰⁶ Exhibit B - Order on Omnibus Motions 11-2-22 at ¶ 15.

POINT II - THE APPELLANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO THE ERROR IN FAILING TO SUPPRESS EVIDENCE SEIZED FROM HIS CELLPHONE.

A. Question Presented:

Did the trial court commit error in denying Appellant Gibson's pretrial motion to suppress evidence seized from his cellphone?

B. Scope of Review:

The standard of review for the Superior Court's denial of a motion to suppress evidence is abuse of discretion.¹⁰⁷

However, where the facts are not in dispute and only a constitutional claim of probable cause is at issue, review of the Superior Court's ruling is *de novo*.¹⁰⁸

C. Merits of Argument:

On May 3, 2022 motion, Mr. Gibson moved to suppress evidence seized from his iPhone that was seized from him on June 8, 2021.¹⁰⁹

The police requested "the digital contents of 'any and all attached

¹⁰⁷ *Rambo v. State*, 939 A.2d 1275, 1278 (Del. 2007); *Lopez-Vazquez v. State*, 956 A.2d 1280 (Del. 2008).

¹⁰⁸ *Valentine v. State*, 207 A.3d 566 (Del. 2019); *Smith v. State*, 887 A.2d 470 (Del. 2005); *State v. Holden*, 60 A.3d 1110 (Del. 2013); *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008).

¹⁰⁹ Def.'s Motion to Suppress Evidence Seized from Appellant's iPhone, D.I. 41.

storage devices' from April 27, 2021 to June 8, 2021.”¹¹⁰ This application requested all calls, texts, multimedia messages, photos, and “any and all information that may identify a possible owner of said phones as well as any information related used or intended to be used for' Murder First Degree and Robbery First Degree.”¹¹¹

The warrant issued on November 8, 2021 authorized:

A forensic examination for the digital contents of a black in color Apple iPhone with phone number xxx-xxx-xxxx, that is currently in the custody of the Wilmington Police Department, the digital contents of any attached storage device for the following dates: May 10, 2021 to June 8, 2021 (all dates are for 0001 hours EDT to 2359 hours EDT); specifically for call logs, GPS or other location-based data, SMS (text) messages and MMS (Multimedia) messages, internet & browser history, address book and contact list, images and/or videos, and information that may identify the owner of said phone, as that information is used or intended to be used for [various crimes including murder first degree, attempted murder first degree and robbery first degree].¹¹²

On July 15, 2022, Appellant moved to suppress evidence seized from the iPhone he had in his possession at the time of his arrest. Police sought and obtained a warrant to search the phone on November 8, 2021.¹¹³

¹¹⁰ *Id.* at ¶ 3.

¹¹¹ *Ibid.*

¹¹² Search Warrant (Nov. 8, 2021), Ex. A, Def.'s Supplemental Briefing/Position, D.I. 108.

¹¹³ A.279-287.

In the Search Warrant application, the first mention of the suspect using a cell phone is on May 15, 2021 at about 8:27 PM. Video surveillance from the area of North 19th Street in Philadelphia captures the suspect exiting Leslie Ruiz-Basilio's vehicle. While walking on 19th Street in Philadelphia, the suspect's cell phone illuminated; the suspect picked it up and began looking at the phone. The suspect then appeared to be texting someone.

The only other mention of the suspect's cell phone derives from Paragraph 31 where a witness who claims that Mr. Gibson would often call or text them on the dates these crimes occurred, sometimes within half an hour of the incident. "Based upon this knowledge," Detectives Sowden and Wicks concluded that "there is probable cause to believe that Keith Gibson had his phone in his possession during the times that he was committing the actual crimes."

The detectives stated that, through their training, they know that persons involved in illegal criminal acts will utilize mobile electronic devices, such as cell phones, to facilitate their criminal acts further and to communicate with coconspirators. They believed that, since Mr. Gibson's release from custody on April 27, 2021, "it is possible there are additional victims and crimes that have been perpetrated by Keith Gibson." For these reasons, they alleged that a search of Mr. Gibson's iPhone was necessary to: (1) identify known crimes

and victims; (2) have a better understanding as to whether the known victims were of opportunity or if the crimes had been planned in advance; (3) “document any calls” between Mr. Gibson and the witness who activated one of the stolen Metro® PCS phones; and (4) to “track individuals” who Mr. Gibson contacted to sell the stolen phones.

The United States and Delaware Constitutions as well as Delaware statutory law govern the issuance of search warrants. Pursuant to these sources of law, a search warrant must describe the place to be searched with particularity and there must be a logical nexus between the items sought and the location to be searched.¹¹⁴ A valid search warrant must not only establish probable cause that the place to be searched will contain evidence of a crime, it must also state with particularity the places or things to be searched or seized.¹¹⁵ Warrants seeking to search for digital information stored on an electronic device, such as a cell phone, “call for particular sensitivity given the ‘enormous potential for privacy violations’ that ‘unconstrained searches of cell phones pose.’”¹¹⁶ Given the “unprecedented volume of private information” stored on modern cell phones, a “top-to-bottom” search of a cell phone can “permit the government access to ‘far more than the most exhaustive search of

¹¹⁴ U.S. Const. Amend. IV; Delaware Const. Art. I, § 6; 11 Del. C. § 2306.

¹¹⁵ *Buckham v. State*, 185 A.3d 1 (Del. 2018).

¹¹⁶ *Id.* at 18 (quoting *Wheeler v. State*, 135 A.3d 282, 299 (Del. 2016)).

a house.’’¹¹⁷ This reality “makes the particularity requirement that much more important,”¹¹⁸ and “necessitates heightened vigilance, at the outset, on the part of [the Court] to guard against unjustified invasions of privacy.”¹¹⁹

In order to satisfy the particularity requirement, the warrant “must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances.”¹²⁰ “[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible.”¹²¹ “And [w]here ... the investigators had available to them a more precise description of the alleged criminal activity that is the subject of the warrant, such information should be included in the instrument and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging.”¹²²

“[T]he constitutional requirement that there be a nexus between the crime and the place to be searched is also enshrined in Delaware law.”¹²³ To

¹¹⁷ *Id.* at 299 (citing *Riley v. California*, 134 S.Ct. 2473, 2491 (2014)).

¹¹⁸ *Buckham*, 185 A.3d at 12, n. 74 (quoting *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009)).

¹¹⁹ *Wheeler*, 135 A.3d at 307.

¹²⁰ *Id.* at 304

¹²¹ *Id.* at 305 (quoting *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980)).

¹²² *Id.* (citing *Bright*, 630 F.2d at 812; *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999)).

¹²³ *Buckham*, 185 A.3d at 16.

establish a logical nexus, “the affidavit must set forth facts that would permit an impartial judicial officer to reasonably conclude that the items sought would be found in those locations.”¹²⁴ In other words, there must be more than just probable cause that a crime has been committed; there must also be, “within the four comers of the affidavit . . . facts adequate for a judicial officer to form a reasonable belief that . . . the property to be seized will be found in a particular place.”¹²⁵

Here, the Search Warrant failed both prongs: it lacked particularity and there was no logical nexus between these alleged crimes and Mr. Gibson’s iPhone. There can be no serious debate about whether the Warrant permitted a top-to-bottom search of Mr. Gibson’s iPhone. Detectives Sowden and Wicks knew that Mr. Gibson had been released from the Department of Corrections (“DOC”) on April 27, 2021 and then subsequently arrested on June 8, 2021. While in DOC custody and prior to his release on April 27th, Mr. Gibson could not have used or possessed that iPhone. Thus, as it relates to Mr. Gibson’s ownership, the Warrant’s supposed temporal limit is equivalent to the phone’s lifetime. Stated more simply, the Warrant allowed police to search Mr. Gibson’s iPhone for the duration of his ownership over that phone.

¹²⁴ *Jones v. State*, 28 A.3d 1046, 1057 (Del. 2011).

¹²⁵ *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006).

As for the specific types of data to be searched, the Warrant granted authorization to search “any and all attached storage devices” for:

- a. Call logs;
- b. SMS (text) messages;
- c. MMS (multimedia) messages and photos,
- d. “any and all information” that may identify a possible owner of said phones; and
- e. “any information related[,] used[,] or intended to be used for” Murder First Degree and Robbery First Degree.

Those last two types of data rendered this Search Warrant a “general warrant” - that scourge of executive overreach “abhorred by the colonists” that permitted “a general, exploratory rummaging in a person’s belongings” for vaguely-defined categories of contraband like “smuggled goods”¹²⁶ or “obscene materials.”¹²⁷ By allowing police to search for “any and all information” that might identify the owner and “any information” related to the crimes alleged, the Warrant’s scope was effectively limitless. It permitted unconstitutional rummaging in search of evidence that might be helpful to the three police agencies (Elsmere, Wilmington, and Philadelphia Police) investigating these crimes. They had blanket authority to indiscriminately search Mr. Gibson’s iPhone.

¹²⁶ *Wheeler*, 135 A.3d at 296 (internal citations omitted).

¹²⁷ *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137, 149 (3d Cir. 2002) (Alita, J.).

In addition to lacking particularity, there was no logical nexus between these alleged crimes and Mr. Gibson's iPhone within the four corners of the Warrant. The warrant was devoid of any facts to suggest that he communicated with others by phone regarding these alleged crimes. Other than May 15, 2021 when the suspect "appeared to be texting someone" while walking on 19th Street, there was no evidence that Mr. Gibson used his iPhone in connection with the offenses that occurred on June 5, June 6, or June 8, 2021.

Nor does the suspect's use of a cell phone on May 15, 2021 provide probable cause to believe that evidence of a crime would be found on Mr. Gibson's iPhone. Without specific factual support, this Court can only speculate that the text message sent by the suspect contained evidence of the May 15, 2021 Metro[®] PCS robbery.

The fact that the Mr. Gibson possessed and, on certain days, used a cell phone is insufficient to conclude that evidence of a crime would be found on his iPhone. Our Supreme Court, when confronted with the truism that "criminals often communicate through cellular phones," responded rhetorically by asking, "who doesn't in this day and age?"¹²⁸ That nearly every adult uses a cell phone is insufficient: (1) to establish probable cause; and (2) to provide a

¹²⁸ *Buckham*, 185 A.3d at 17.

logical nexus between Mr. Gibson's iPhone and evidence of a crime.¹²⁹ There must be more than just probable cause that a crime has been committed; in this case, that something "more" is missing. The sworn facts in the Warrant did not justify the intrusion that followed.

The other justifications the detectives relied upon in seeking this Warrant - to identify unknown crimes (or victims) and to "better understand" if the known crimes were premeditated - demonstrate that this was nothing more than a fishing expedition. The Fourth Amendment prohibits invasions of privacy based on the unsupported belief that there could be other "possible" unidentified victims and crimes.

Moreover, by acknowledging that the search of Mr. Gibson's phone was needed to "document any calls" between Mr. Gibson and the witness who activated the stolen Metro[®] PCS phone, the detectives revealed that they had no such information. The detectives had nothing more than an unverified supposition that Mr. Gibson called (or received a call from) this particular witness. No facts contained within the Warrant supported that belief.

Finally, any claim that this Warrant was sought to link Mr. Gibson's

¹²⁹ See *State v. Westcott*, 2017 Del. Super. LEXIS 41; 2017 WL 283390 ("The mere fact that a defendant owns a mobile phone is not, in and of itself, sufficient to warrant an inference that evidence of any crime he or she commits may be found on that mobile phone.").

iPhone location data, known as cell site location information (“CSLI”), to the alleged crimes is without merit. On June 22, 2021 (one day before the Search Warrant at issue was granted), Detectives Sowden and Wicks swore out a warrant to obtain Mr. Gibson’s CSLI from his cell provider, AT&T. The Honorable Judge Adams authorized a separate search warrant for Mr. Gibson’s CSLI. The iPhone Search Warrant did not seek CSLI and was not granted for that purpose.

Paragraph 29 of the affidavit explains only why law enforcement believed Appellant was carrying the phone requested to be searched on the dates in question. Simply because a witness claims Appellant called her close in time to the crimes does not mean that the phone was used to commit the crime nor that it would contain evidence of the crime, especially given that the witness herself was not alleged to have been involved in any of the criminal activity.

Paragraph 30 of the affidavit suggests that a search of the contents of Appellant’s phone would provide three types of evidence (1) it would allow the investigation to documents any calls between Gibson and the person described in paragraph 16 of the affidavit, who acquired one of the stolen phones, and to track individuals who Gibson was contacting in order to sell phones (2) since Gibson is a person prohibited from possessing a firearm and

since individuals use cellular phones to contact individuals selling firearms, it could provide evidence of attempt to illegally purchase a firearm, and (3) location data may assist officers in determining Appellant's Geographical location during the time of the offenses.

First, by acknowledging that the search of Mr. Gibson's phone was needed to "document any calls" between Mr. Gibson and the witness who activated the stolen phone, the detectives revealed that they had no such information. The detectives had nothing more than an unverified supposition that Mr. Gibson called (or received a call from) this particular witness. No facts within the warrant supported that belief. Secondly, the warrant contained no facts to support the belief that Appellant had utilized this phone in order to contact individuals to sell phones stolen from Metro[®] PCS. In fact, the information possessed by detectives was that the phones were being sold on the street, without the utilization of cell phone contacts.

The affiants submitted that because there was evidence that Appellant possessed a firearm on the dates of the crimes charged against him, and because he was a person prohibited, that an examination of his phone could provide evidence of the illegal purchase of a firearm. Again, the warrant contained no facts to support the belief that Appellant obtained a firearm utilizing this cell phone during the time frame the search would cover. There

are no facts showing where or how the weapon was obtained within the warrant.

The affiants submitted to the issuing court that it was reasonable to search the GPS or location based data files or applications on the phone to determine Appellant's general geographic location at the time of the target offenses. However, on June 22, 2021, Detectives Sowden and Wicks swore out a warrant to obtain Mr. Gibson's CSLI from his cell provider. The Honorable Judge Adams authorized this separate search warrant. As indicated in paragraph 9, call detail records were subpoenaed for the number associated with the warrant. The call records store location information that can be used to determine if a phone is near a particular place. Law enforcement had these records at the time of this affidavit. There was no reason to believe that additional evidence would be recovered on the cell phone that was not available in these call records.

The impact of the evidence from the phone was significant in this case. Mr. Gibson was taken into custody shortly after a robbery that had occurred at the Rite Aid on June 8, 2021.¹³⁰ On June 23, 2021, Detectives from Elsmere Police and Wilmington Police applied for a search warrant for the iPhone Mr. Gibson had in his possession at the time of his arrest, namely, a black Apple

¹³⁰ N.T. 11/1/23, 118.

iPhone located on the right side of his belt.¹³¹ A search of the iPhone showed that the phone had no activity from 4:43 p.m. to 6:30 p.m. on May 15, 2021, possibly from being powered off during that time.¹³² The State used this evidence to support its theory that Appellant turned off his cell phone while he purportedly committed the robbery at the Metro® PCS store.

As noted above, Kevin Peterman heard the loud bang from the store at approximately 5:30 p.m.¹³³ Extrapolating from 5:30 p.m., presumably the moment that Basilio was shot, the suspect must have entered the store in the several minutes prior to the shooting. This would have put the suspect getting to the store, going inside, confronting Basilio, and then shooting her at some time between 4:30 p.m. and 5:30 p.m.

The information gleaned from the phone was significant because it led to the testimony by the State's cellphone expert, Stephen Bunting, that the suspect must have turned off his cell phone on May 15, 2021 between 4:43 p.m. and 6:30 p.m.:¹³⁴

Q. So let's talk about the first date that you were given, May 15 of 2021, between 5 p.m. and 5:30 p.m. What were you able to see when you looked at the extraction from that cell phone?

¹³¹ *Id.* at ¶¶ 2-3, D.I. 41.

¹³² N.T. 11/1/23, 109; N.T. 11/2/23 (A.M. Session), 110-113.

¹³³ N.T. 10/31/23 (A.M. Session), 94-95, 99.

¹³⁴ *Id.*, 111-113

A. . . . I was basically looking for 4 p.m. to 6:30. I did not see any activity in that period after 4:43 p.m. There were 17 entries for various types of activity prior to that, but nothing past that.

Q. Are there reasons why there would be no activity on a cell phone?

A. Well, activity takes many different forms. When a phone is just sitting here right now and you're not doing anything, it's powered off, the only thing that's active is the clock. When you turn it on, you put it on any kind of hibernation mode, it's still very active. Even though it's not receiving any phone calls, there's still a lot of activity and file system, so things are happening to your phone all the time even though you're not using it yourself. There's that kind of activity. Then there's actually user activity where you're doing things, making calls, sending messages, looking at maps, looking at the Internet. There's different types of activity. I didn't see any user activity at that time.

Q. What could cause that?

A. Well, actually there was no activity happening at all whatsoever after 4:43. Up until then there was very little user activity and then at 4:43 it ceased to exist for that remaining period I was looking at. For the period where the activity was very light before 4:43 the user wasn't using the phone much if not at all. After 4:43 probably the -- the phone could have been put in hibernation, but the fact that there were nothing I would suspect that it was turned off.

MS. DAVIES: Objection, Your Honor. Can we approach?

THE COURT: Overruled.

For all of the above reasons, the trial court erred in denying Mr.

Gibson's motion to suppress evidence obtained from the search of his

cellphone. As a result of that error, the jury heard evidence that would lead to the conclusion that Mr. Gibson turned off his cellphone in the hours prior to committing the robbery and murder, and then turned it on approximately one hour later. Such evidence would have led the jury to conclude that Mr. Gibson was attempting to keep his whereabouts secret while committing the aforementioned crimes.

As a result, the admission of this evidence was highly prejudicial and denied Mr. Gibson of his right to a fair trial. Therefore, his convictions should be reversed and the matter remanded for a new trial.

**POINT III – THE APPELLANT WAS DENIED
THE RIGHT TO A FAIR TRIAL DUE TO THE
IMPROPER ADMISSION OF PRIOR BAD ACT
EVIDENCE UNDER RULE 404(b).**

A. Question Presented:

Did the trial court commit error in allowing evidence of the bad acts of the Dunkin’[®] robbery suspect, specifically the video of the suspect grabbing and pushing the female victim into the store?

B. Scope of Review:

A judge’s decision to admit or exclude evidence is reviewed for abuse of discretion.¹³⁵ This requires a showing that the court acted in an arbitrary and capricious manner; “when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.”¹³⁶ The reviewing court first considers whether the evidentiary rulings were correct, and if not, the court then determines whether the mistakes constituted “significant prejudice so as to have denied Appellant a fair trial.”¹³⁷

¹³⁵ *Spencer v. Wal-Mart Stores E.*, 930 A.2d 881, 886-87 (Del. 2007).

¹³⁶ *Id.*

¹³⁷ *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987).

C. Merits of Argument:

Det. Sowden of the Elsmere Police Department testified that he reviewed video surveillance showing an incident where the person he believed to be Mr. Gibson pushed the Dunkin'[®] manager inside the store. Sowden testified that he received calls from his colleagues telling him to turn on the news:¹³⁸

A. I turned on the news and I watched what -- the videos snippets they were showing of the robbery-homicide at the Dunkin' Donuts.

Q. And what were those video snippets of?

A. They were of a subject entered the store with the clerk, pushed her inside the store, demanded money, and ultimately, there was a robbery-homicide that took place.

Specifically, the camera video from just outside the side or back entrance to the Dunkin'[®] showed the suspect grabbing the manager by the shirt and pushing her into the store.¹³⁹ The court denied Mr. Gibson's objection to this evidence, finding that there was no prejudice.¹⁴⁰

The law surrounding the admissibility of evidence under 404(b) has been detailed in Point I, above. Contrary to the requirement of *Getz*, the evidence of the grabbing and shoving of the female Dunkin'[®] manager was not material to an

¹³⁸ N.T. 11/1/23, 116.

¹³⁹ N.T. 11/2/23, 71.

¹⁴⁰ N.T. 11/2/23, 75-76.

issue or ultimate fact in dispute, was not introduced for a purpose sanctioned by DRE 404(b) or some other purpose not inconsistent with the basic prohibition against such evidence; and the probative value of the evidence sought to be introduced did not outweigh its prejudicial effect.¹⁴¹ The natural and inevitable tendency of the jury would be to give excessive weight to the abusive nature of the physical abuse, justifying a condemnation of Appellant as a woman abuser and irrespective of the Mr. Gibson's guilt of the present charge."¹⁴²

As a result of the admission of this inflammatory and non-probative evidence, Mr. Gibson was denied the right to a fair trial. His convictions should be reversed and the matter remanded for a new trial.

¹⁴¹ *Getz*, 538 A.2d at 734.

¹⁴² *Ibid.* (quoting *Wigmore*, Evidence § 58.2, at 1212-13 (Tillers rev. 1983)).

**POINT IV – THE APPELLANT WAS DENIED
THE RIGHT TO A FAIR TRIAL DUE TO THE
ERROR BY THE TRIAL COURT IN
OVERRULING HIS OBJECTION TO THE
ADMISSIBILITY OF THE RECEIPT FOR THE
BICYCLE REPAIR SERVICE.**

A. Question Presented:

Did the trial court err in allowing the State to introduce the business receipts (hearsay) for the bicycle repair work and purchase of lock?

B. Scope of Review:

A judge’s decision to admit or exclude evidence is reviewed for abuse of discretion.¹⁴³ This requires a showing that the court acted in an arbitrary and capricious manner; “when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.”¹⁴⁴ The reviewing court first considers whether the evidentiary rulings were correct, and if not, the court then determines whether the mistakes constituted “significant prejudice so as to have denied Appellant a fair trial.”¹⁴⁵

¹⁴³ *Spencer v. Wal-Mart Stores E.*, 930 A.2d 881, 886-87 (Del. 2007).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Strauss*, 525 A.2d at 997.

Merits of Argument:

As noted above with regard to the Metro[®] PCS robbery and the murder of Leslie Basilio, it was discovered that the bicycle located a few blocks from the store had been serviced at Kayuh Bicycles on January 23, 2021 and May 13-14, 2021, and that the name of the customer on each of the work order receipts was Keith Gibson.¹⁴⁶ The cable lock that was wrapped around the frame and seat post of the bicycle was purchased at that store on May 14, 2021, and the name on the purchase receipt was Keith Gibson.¹⁴⁷

Mr. Gibson objected to this evidence as being inadmissible hearsay.¹⁴⁸ The objection was overruled, and the court cited the exception to the hearsay rule, under 803(15), that the documents affect an interest in property, and therefore would be admissible as a hearsay exception.¹⁴⁹

A statement in a document affecting an interest in property is admissible in evidence, and is defined by DRE 803(15) as:

[a] statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

¹⁴⁶ N.T. 11/6/23 (A.M. Session), 30-34.

¹⁴⁷ N.T. 11/6/23 (A.M. Session), 34-36

¹⁴⁸ N.T. 11/6/23 (P.M. Session), 14-15.

¹⁴⁹ N.T. 11/6/23 (P.M. Session), 27-29.

When there is no reported or unpublished decision in Delaware interpreting this rule, and DRE 803(15) tracks Federal Rule of Evidence (“FRE”) 803(15). The Federal Advisory Committee Notes illustrate how this exception was meant to apply to dispositive documents such as a deed, and not a bicycle shop receipt:

[d]ispositive documents often contain recitals of fact. Thus[,] a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the non[-]applicability of the rule if dealings with the property have been inconsistent with the document.¹⁵⁰

The exception might also apply to stock ownership. In *United States v. Weinstock*,¹⁵¹ the court admitted an affidavit through FRE 803(15) that was previously submitted to a corporation by the then-living declarant so that the declarant could obtain a new stock certificate to replace a lost stock certificate.¹⁵²

This exception to the hearsay rule applies to recitals of fact contained in

¹⁵⁰ *Fed. R. Evid.* 803(15) advisory committee’s note.

¹⁵¹ 863 F. Supp. 1529 (D. Utah 1994).

¹⁵² *Id.* at 1532.

documents that purport to establish or affect an interest in property. The proponent of the document must establish that “the matter stated was relevant to the purpose of the document.”¹⁵³ The receipt did not establish nor affect any interest in property. The receipt merely was, without any corroboration, a writing reflecting a hearsay statement suggesting that the person who brought the bicycle in for repair had the name Keith Gibson, and the purchaser of the lock was Keith Gibson. It did not establish or affect any interest in property.

Admission of the receipts over Mr. Gibson’s objections denied him the right to a fair trial. Therefore, the convictions must be reversed and the matter remanded for a new trial.

¹⁵³ *Ibid.*

**POINT V – THE APPELLANT WAS DENIED
THE RIGHT TO A FAIR TRIAL DUE TO THE
ERROR BY THE COURT IN PERMITTING
AMANDA MASTELLER TO TESTIFY THAT
THE APPELLANT’S STATEMENT THAT HE
COMMITTED A “LICK” MEANT THAT HE
HAD COMMITTED A ROBBERY.**

A. Question Presented:

Did the trial court err in allowing Amanda Masteller to testify that Appellant told her his bicycle was stolen when he was committing a “lick,” which Masteller later learned from the streets that “lick” meant a “robbery?”¹⁵⁴

B. Scope of Review:

A judge’s decision to admit or exclude evidence is reviewed for abuse of discretion.¹⁵⁵

C. Merits of Argument:

Mr. Gibson objected to evidence that he made a statement to Amanda Masteller that his bicycle was stolen while he was doing a “lick.” Masteller was permitted to testify, over objection, that “lick” meant “robbery.” Masteller testified as follows:

Q. Did there come a time where Keith Gibson didn’t have that bike anymore?

A. Yes.

¹⁵⁴ N.T. 11/8/23 (A.M. Session), 21-22; A.273-276.

¹⁵⁵ *Strauss*, 525 A.2d at 997.

Q. Do you remember when that was?

A. I don't remember exactly when it was, but I do remember that he told me it was stolen when I asked what happened to it.

Q. Did he tell you any details of how it got stolen?

A. He was doing a lick.

Q. Is that what he told you? His words?

A. In a text message, yes.

Q. When he said that, did you know what "a lick" was?

A. I did not.

Q. Do you know now? A. I absolutely do.

MR. SPARACO: Objection, Your Honor. Objection.

* * *

Q. Okay. And what have you learned a lick means?

MR. SPARACO: Objection.

THE COURT: Overruled.

THE WITNESS: A robbery.¹⁵⁶

This testimony was highlighted in the State's opening and closing arguments. In its opening statement, the State argued: "So [Amanda Masteller] asked him. She'll tell he said to her, [']he lost the bike while doing a lick.[']"

¹⁵⁶ N.T. 11/8/23 (A.M. Session), 19-22.

Amanda Masteller will tell you she didn't know what that meant, but she later found out it meant doing a robbery.”¹⁵⁷

In its closing argument, the State argued, “[‘]I was doing a lick.[‘] At that time, Amanda didn't know what the street term 'lick' meant. She has since found out that it means a robbery.”¹⁵⁸

From whom Masteller learned that the term “lick” means “robbery” was never determined. The State was offering Masteller's testimony to prove that Mr. Gibson admitted that he lost the bicycle while he was committing a robbery. This evidence was based solely on hearsay evidence and did not contain any foundation. Masteller did not know what “lick” meant and could only have testified to its purported meaning based upon what an unknown person told her it meant.

This purported statement was offered to prove that the bicycle that was recovered from a few blocks from the Metro[®] PCS robbery, and that Mr. Gibson was committing a robbery at that time. This testimony was extremely prejudicial. If interpreted in the manner the State sought the jury to interpret it, it amounted to a confession by Mr. Gibson that he committed the Metro[®] PCS robbery and, in turn, committed the murder of Leslie Basilio.

¹⁵⁷ N.T. 10/31/23 (A.M. Session), 61.

¹⁵⁸ N.T. 11/13/23, 19.

The error in allowing this testimony was exacerbated by the State's opening and closing arguments as set forth above. As a result, Mr. Gibson was denied the right to a fair trial and his convictions should be reversed. The matter should be remanded for a new trial.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully seeks a new trial and any other relief this Court considers just and appropriate.

Respectfully submitted,

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