



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYAIR KEYS, :
 :
 :
 Defendant Below, :
 Appellant. : No. 368, 2024
 v. :
 :
 :
 :
 STATE OF DELAWARE : ON APPEAL FROM
 : THE SUPERIOR COURT OF THE
 : STATE OF DELAWARE
 Plaintiff Below, : I.D. NOs. 2205008790A/B;
 Appellee. : 2201008460; 2201008498A

APPELLANT'S OPENING BRIEF

FILING ID 76053796

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TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

NATURE OF THE PROCEEDINGS.....1

SUMMARY OF ARGUMENT.....2

STATEMENT OF FACTS.....3-6

ARGUMENT:

**I. THE TRIAL COURT ABUSED ITS DISCRETION
IN ALLOWING THE STATE TO ADMIT
THE AUDIO OF AN INSTAGRAM VIDEO THAT
CONTAINED REFERENCES TO KEYS AS A KNOWN
SHOOTER.....7-14**

CONCLUSION.....15

SUPERIOR COURT SENTENCING ORDER.....Exhibit A

STATE’S LETTER TO THE TRIAL COURT REGARDING
ADMISSION OF THE EVIDENCE.....Exhibit B

KEYS RESPONSE TO THE STATE’S LETTER.....Exhibit C

CERTIFICATE OF COMPLIANCE WITH TYPEFACE & TYPEVOLUME

TABLE OF CITATIONS

Caselaw

<i>Allen v. State</i> , 644 A.2d 982, 988 (Del. 1994).....	11
<i>Chavis v. State</i> , 235 A.3d 696, 700 (Del. 2020).....	10
<i>Deshields v. State</i> , 706 A.2d 502, 506 (Del. 1998).....	7, 8, 9, 12
<i>Floudiotis v. State</i> , 726 A.2d 1196, 1202 (Del. 1999).....	7
<i>Getz v. State</i> , 538 A.2d 726, 730 (Del. 1988).....	7, 8, 9, 10, 11
<i>Longfellow v. State</i> , 688 A.2d 1370, 1372 (Del. 1997).....	7
<i>Renzi v. State</i> , 320 A.2d 711, 712-13 (Del. 1974).....	10
<i>Wright v. State</i> , 25 A.3d 747, 752 (Del. 2011).....	7

United States Constitution

U.S. Const. Amend. VI.....	12
----------------------------	----

Delaware Constitution

Del. Const. Art. I § 7.....	12
-----------------------------	----

Delaware Statutes and Rules

D.R.E. 404.....	7, 8, 9
D.R.E. 602.....	10

Secondary Sources

1 MCCORMICK ON EVIDENCE § 10 (8 th ed. Jan. 2020).....	10
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NATURE OF PROCEEDINGS

On May 23, 2022, Kyair Keys was charged in a forty-four count, four-defendant indictment with Attempted Murder First Degree, two counts of Attempted Assault First Degree, five counts of Possession of a Firearm During the Commission of a Felony, two counts of Reckless Endangering First Degree, five counts of Possession of a Firearm by a Person Prohibited, two counts of Conspiracy Second Degree, Criminal Mischief Over \$5,000, Conspiracy First Degree, Criminal Mischief Between \$1,000 and \$5,000, Disregarding a Police Officer's Signal, Resisting Arrest, Driving Without a License, and Speeding.¹

Trial began on December 5, 2023 and lasted for eight days.² Keys was found guilty of all charges except one count of Possession of a Firearm by a Person Prohibited.³ He was sentenced on August 16, 2024 to 47 years at Level V to be followed by probation.⁴

This is his Opening Brief in support of a timely-filed appeal.

¹ A26-46.

² A5.

³ A1575-A1581. See also A333. The Criminal Mischief Over \$5,000 charge was amended on the first day of trial to Criminal Mischief Under \$1,000.

⁴ See Exhibit A.

SUMMARY OF ARGUMENT

1. The trial court abused its discretion when it allowed the State to admit the audio of an Instagram video of purportedly Keys in a stolen Dodge Charger. As interpreted by Detective Wham's testimony, the rap song playing in the background, "Fuck Ya Dead Patnaz," mentioned Keys by the nickname Puffy and spoke of his reputation of being a violent shooter in Wilmington. The introduction of this audio did not pass muster under the *Getz* and *Deshields* factors, thereby resulting in a violation of Keys' right to a fair trial.

STATEMENT OF FACTS

The State alleged that Keys and his co-defendants engaged in multiple shootings through Wilmington over the course of eight days.⁵ In the first incident in the late afternoon hours of January 14, 2022, Keys, his co-defendant Jahmir Morris-Whitt, and one unidentified individual shot at two young men on 23rd and Washington Streets in Wilmington.⁶ The gunfire struck the window of Kool Kidz Learning Center, a daycare located at 2215 Washington Street, as well as other buildings and a vehicle.⁷ No injuries were reported.⁸

Six days later on January 20th, co-defendant Markel Richards stole a gray Mazda 3, from the parking lot of a liquor store in Wilmington.⁹ Later that evening, Richards, Morris-Whitt, and Walike Parham committed a second shooting on 10th and Lombard Streets in Wilmington, where two individuals were struck by the gunfire.¹⁰ Keys was not charged for these incidents.¹¹

On January 22, 2022 in the early morning hours, the stolen Mazda 3 and a stolen Honda CRV arrived at the BP Gas Station in the Edgemoor section of Wilmington.¹² Najaire Chapman was patronizing the outside counter of the gas

⁵ A106-107.

⁶ A512-13; A257; A988-90; see also A27-31.

⁷ A191; A195; A201; A219.

⁸ A219.

⁹ A540; A994-97.

¹⁰ A339-44; A355; A370; see also A32-36.

¹¹ A493; A545.

¹² A508; A513; A533-35.

station's store.¹³ The State alleged that Keys, Richards, and Parham exited the stolen vehicles and began firing at Chapman.¹⁴ Chapman ran to his own vehicle and drove away.¹⁵ The trio re-entered their vehicles and followed Chapman's vehicle for a short distance.¹⁶ Chapman ultimately struck a parked car on South Heald Street and fled on foot.¹⁷

About three hours later, the stolen gray Mazda 3, occupied by Keys and one or two other individuals, travelled to South Philadelphia.¹⁸ The Mazda 3 rear-ended a white Dodge Charger that was parked in a Walmart parking lot.¹⁹ The occupants of the Mazda 3 took the Dodge Charger, abandoning the Mazda.²⁰

That afternoon, CityWatch surveillance captured the Dodge Charger driving on 7th Street in downtown Wilmington.²¹ The Charger stopped at Good Guys Deli, where surveillance showed a masked individual, alleged by the State to be Keys, exiting the vehicle with a gun in hand and entering the store.²² Keys left the store after a short period and re-entered the Charger.²³ Shortly thereafter, the CityWatch

¹³ A504-0; A529-30.

¹⁴ A508; A5171; A529.

¹⁵ A505.

¹⁶ A511.

¹⁷ A606-07.

¹⁸ A687-88; A710.

¹⁹ A693-95.

²⁰ A696-97.

²¹ A812-13; A817-18.

²² A839.

²³ A840-41.

surveillance showed an individual lean out of the Charger's window with a gun and fire several shots as the vehicle drove down 7th Street.²⁴ Wilmington Police located five shell casings at the scene.²⁵ Three vehicles were struck by the gunfire.²⁶

Later that evening, Wilmington Police Corporal Gula spotted the Dodge Charger driving on Northeast Boulevard in Wilmington.²⁷ He unsuccessfully attempted to initiate a traffic stop, and a police chase ensued.²⁸ The Charger made its way through the city and onto I-95.²⁹ After some time, Corporal Gula used his police vehicle to pin the Charger to the guardrail.³⁰ The driver, later found to be Keys, exited the Charger and fled on foot into a nearby wooded area.³¹ The remaining two passengers, Parham and Richards, were removed from the Charger and arrested.³² Keys was discovered in the nearby woods and arrested.³³

Two firearms were located in the Charger subsequent to arrest – a Smith and Wesson .40 caliber semiautomatic pistol and a Polymer 80 9mm semiautomatic pistol.³⁴ The .40 caliber was found between the gearshift and center console.³⁵ The

²⁴ A819.

²⁵ A790.

²⁶ *Id.*

²⁷ A875-76.

²⁸ A877.

²⁹ A881; A883.

³⁰ A884.

³¹ A884.

³² A897; A911.

³³ A909-10.

³⁴ A167-68.

³⁵ A885.

9mm was found on the rear passenger floorboard.³⁶ Subsequent ballistic testing revealed that the firearms were identified as having been used in the aforementioned shootings.³⁷ Specifically, the Smith & Wesson .40 caliber firearm was matched to casings found at the Kool Kidz Learning Center, BP Gas Station, and 7th Street crime scenes.³⁸ The Polymer 80 matched casings at the BP Gas Station.³⁹

In addition to the ballistics evidence, the State largely relied upon cell phone location information and a visual comparison of Keys' clothing at each incident and the time of his arrest.⁴⁰ Over defense objection, the State introduced in its entirety a portion of an Instagram live video, which purportedly showed Keys driving the stolen Dodge Charger while listening to a rap song called "Fuck Ya Dead Patnaz."⁴¹ The State argued at trial that the song, which described shootings and other violence in Wilmington, specifically mentioned Keys by the nickname Puffy.⁴² The song described Puffy as a known shooter in Wilmington.⁴³

³⁶ *Id.*

³⁷ See A1180-A1197.

³⁸ A1180-81; A1191; A1194; A1195; A1197.

³⁹ A1194.

⁴⁰ See A1205-1307; A949-50; A952; A977-94; A1003-14.

⁴¹ A735.

⁴² A736-37.

⁴³ *Id.*

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO ADMIT THE AUDIO OF AN INSTAGRAM VIDEO THAT CONTAINED REFERENCES TO KEYS AS A KNOWN SHOOTER.

A. Question Presented

Whether the trial court abused its discretion in allowing the State to present to the jury the audio of an Instagram video that purportedly described Keys as a known shooter to prove his identity and plan under D.R.E. 404(b)?

B. Standard and Scope of Review

The standard for reviewing a trial court’s decision to admit evidence is an abuse of discretion.⁴⁴ It is considered an abuse of discretion when the court “exceeds the bounds of reason in view of the circumstances or so ignores recognized rules of law or practice” that it produces injustice.⁴⁵

C. Argument

Evidence of other crimes or wrongs is generally not admissible to prove a defendant’s propensity to commit the crime at issue.⁴⁶ Such evidence can be admissible to prove something other than propensity, such as motive, opportunity, intent, or identity.⁴⁷ However, “the fact that other crime evidence comports with one

⁴⁴ *Wright v. State*, 25 A.3d 747, 752 (Del. 2011) (citing *Longfellow v. State*, 688 A.2d 1370, 1372 (Del. 1997)).

⁴⁵ *Id.* (citing *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999)).

⁴⁶ D.R.E. 404; *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

⁴⁷ D.R.E. 404(b).

of the exceptions listed in [D.R.E.] 404(b) does not make it admissible *per se*.”⁴⁸

This Court announced a six-part framework to determine the admissibility of this type of evidence in *Getz*, which are as follows:

(1) the evidence of other crimes must be material to an issue or ultimate fact in dispute in the case; (2) the evidence must be introduced for a purpose sanctioned by D.R.E. 404(b); (3) the evidence must be plain, clear and conclusive; (4) the other crime or wrong must not be too remote in time from the charged offense(s); (5) the evidence’s probative value must outweigh its prejudicial effect pursuant to D.R.E. 403; and (6) if admitted, the Court must give a limiting jury instruction.⁴⁹

Ten years after *Getz*, this Court expanded upon *Getz* factor five regarding probative value versus prejudicial effect.⁵⁰ The *Deshields* Court adopted the following nine factors for further consideration of 404(b) evidence:

(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent’s need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior bad act evidence would prolong the proceedings.⁵¹

Here, the trial court allowed the State to introduce an Instagram video which purportedly showed Keys driving the stolen Dodge Charger on January 22, 2022 while listening to a rap song that mentioned Keys, by the nickname Puffy, as being

⁴⁸ *Deshields v. State*, 706 A.2d 502, 506 (Del. 1998) (citing *Getz*, 538 A.2d at 730).

⁴⁹ *Getz*, 538 A.2d at 734.

⁵⁰ See *Deshields*, 706 A.2d 502.

⁵¹ *Id.* at 506-07.

a known violent shooter in Wilmington.⁵² The State argued that Instagram video proved Keys' identity and plan in the instant case because "he [was] doing exactly what [was] being sung about him in this particular song," namely shooting at people in Wilmington.⁵³ The State further argued that the video proved Keys' motive to shoot rival gang members "even though that is not something [the State] addressed [at trial]."⁵⁴

Given the implications of D.R.E. 404(b), the trial court analyzed the admissibility of the video under the *Getz* and *Deshields* factors.⁵⁵ The court noted in its analysis that, "it [was] difficult to assess [at that moment] the State's need for the evidence."⁵⁶ It further noted that "the availability of less prejudicial proof [was] sort of up in the air."⁵⁷ Ultimately, the trial court ruled that the Instagram video in its entirety was admissible.⁵⁸ It specifically noted that the song was "in a sense a confession."⁵⁹ This was an abuse of discretion because the video does not pass muster under *Getz* and *Deshields*. Keys asserts that this evidence was not plain, clear and conclusive, unsatisfactory for time remoteness and substantially more prejudicial than probative.

⁵² A735.

⁵³ A741.

⁵⁴ See A739-40.

⁵⁵ A761; A766.

⁵⁶ A765-66.

⁵⁷ A766.

⁵⁸ A767.

⁵⁹ *Id.*

“Secondhand knowledge does not satisfy *Getz*’s requirement that proof of other crimes be by evidence which is ‘plain, clear and conclusive.’”⁶⁰ In *Renzi*, this Court on appeal held that the introduction of evidence of an uncharged prior drug sale was not plain, clear and conclusive.⁶¹ This Court so held because the police officer who testified about the uncharged conduct was not a party to the alleged drug sale, nor did the State produce the informant or introduce into evidence the drugs alleged to have been purchased or the money used to complete the transaction.⁶²

Here, the State admitted the Instagram video through Corporal Daniel Shea, with additional testimony by Detective Brendan Wham.⁶³ Corporal Shea testified that he screen recorded the video from Instagram and sent it to Detective Wham.⁶⁴ Detective Wham then testified about his familiarity with the song playing the background of the video.⁶⁵ Detective Wham testified that the song spoke of Keys, saying that “if [an opposing side] came in contact with [Keys], [they] better not be without a weapon.”⁶⁶ The primary issue with this evidence as viewed under the third

⁶⁰ *Chavis v. State*, 235 A.3d 696, 700 (Del. 2020) (holding that because the testifying officer had no personal knowledge that the defendant committed prior bad acts but for other officers’ police reports, his testimony about those incidents were not plain, clear and conclusive) (citing generally *Renzi v. State*, 320 A.2d 711, 712-13 (Del. 1974); D.R.E. 602; 1 MCCORMICK ON EVIDENCE § 10 (8th ed. Jan. 2020)).

⁶¹ *Renzi*, 320 A.2d 711 at 713.

⁶² *Id.*

⁶³ See A770-A786; A803-A812.

⁶⁴ A777.

⁶⁵ A807-812.

⁶⁶ A809.

and fourth *Getz* factors is the lack of knowledge of when, if ever, Keys committed such violent acts to have earned a reputation as a shooter. The court acknowledged that that the “quirk” to this evidence was “that there is somebody singing a song referencing [Keys], and there is no specific reference to any particular incident.”⁶⁷ The court erred in ruling that, while “we don’t really have any evidence but for the defendant’s adoption of those comments by his putting it out on the Instagram live . . . I think it’s in a sense a confession.”⁶⁸ Neither Corporal Shea or Detective Wham testified to having knowledge of any prior incidents that would have led to the rap song’s alleged mention of Keys. Their testimony was the result of their secondhand knowledge and interpretation of the rap song, rather than personal knowledge that Keys had in fact participated in shootings in the past.

Similarly, without personal knowledge of when, if ever, Keys was involved in prior shootings to have earned mention in the rap song, time remoteness cannot be determined. “In large part, the evidence’s relevance depends on how recently the defendant committed the act.”⁶⁹ The trial court incorrectly determined that Keys’ listening to the song in January 2022 “updates it from whenever [] those things occurred.”⁷⁰ Keys’ listening to the song was not the prior bad act at issue. The

⁶⁷ A764.

⁶⁸ A766-767.

⁶⁹ *Allen v. State*, 644 A.2d 982, 988 (Del. 1994) (internal citation omitted).

⁷⁰ A764.

underlying bad act was whatever violent ‘act(s)’ Keys committed before the song was written to have earned mention. As a result, the court’s rationale that Keys reignited the time remoteness of whatever bad acts were spoken about in the song exceeded the bounds of reason to the point of an abuse of discretion. Therefore, the trial court erred in ruling that this evidence was plain, clear and conclusive and satisfactory for time remoteness.

Next, the prejudicial effect of this evidence substantially outweighed its probative value based upon the *Deshields* factors. The trial court’s decision to admit the video in its entirety allowed the State to argue that by being mentioned in the rap song “Fuck Ya Dead Patnaz,” Keys thereby acknowledged his identity as a shooter and used it in furtherance of his plan to commit these shootings.⁷¹ Keys asserts that the prejudicial effect of the video substantially outweighed its probative value because the State did not need it to prove identity or plan, less prejudicial proof on those points was admitted as evidence by the State, and the prejudice was so great as to deprive Keys of his right to a fair trial.⁷²

The State did not need the Instagram video to prove Keys’ identity and plan given the remainder of evidence that they presented at trial. Ballistics expert James Storey testified that the firearms found in the Dodge Charger upon Keys’ and his co-

⁷¹ See A1470-72.

⁷² See U.S. Const. Amend. VI; Del. Const. Art. I § 7.

defendants' arrest matched casings found at each of the crime scenes.⁷³ Notably, the .40 caliber firearm found next to Keys' driver's seat matched casings at the scene of every shooting incident for which Keys was charged.⁷⁴ In addition, Detective Wham testified to the comparisons between Keys' clothing at the time of his arrest and at each shooting scene, noting that Keys wore the same clothing for every incident and at his arrest.⁷⁵ The jury furthermore heard that the suspect that matched Keys' clothing description from the Kool Kidz and BP incidents was seen in the surveillance videos closest to where all of the .40 caliber casings were found.⁷⁶ Special Agent Swick also testified as to Keys' cell phone location data, which placed Keys at the scene of every shooting incident as well as the theft of the Dodge Charger in Philadelphia.⁷⁷ The culmination of this evidence eliminated the State's need to otherwise identify Keys and his plan to commit the offenses charged through the Instagram video's audio.

The aforementioned evidence – that is, the ballistics matches, cell phone location data, and visual clothing comparisons – also provided the State with less prejudicial proof of Keys' identity and plan. Thus, the Instagram was an unnecessary item of evidence to prove those points. As the trial court mentioned, at the time it

⁷³ See A1107-1205.

⁷⁴ A1180-81; A1191; A1194; A1195; A1197.

⁷⁵ A949-50; A952; A977-94; A1003-14.

⁷⁶ See *Id.*; A634-35.

⁷⁷ A1205-1307.

ruled the video admissible, it was difficult to assess the State's need for the video at the time of the ruling.⁷⁸ Despite this, the court nonetheless allowed the State to admit the evidence, causing grave prejudice to the defense.

The introduction of the Instagram video to prove Keys' identity and plan was not only unnecessary, but it was also substantially more prejudicial than probative. While the State already had other evidence to prove these points, the jury additionally learned from the rap song that Keys' reputation for being a violent shooter was so well-known that he was mentioned in a rap song about "opposing sides."⁷⁹ As a result of the trial court's abuse of discretion in allowing this evidence to be admitted at trial, Keys was deprived of his right to a fair trial.

⁷⁸ A765-66.

⁷⁹ See A809.

CONCLUSION

Based on the facts and legal authorities set forth above, Appellant Kyair Keys respectfully requests that this Honorable Court reverse his convictions and remand this matter for a new trial.

Respectfully submitted,

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