EFiled: May 28 2025 02:03PM EDT
Filing ID 76352956
Case Number 368,2024

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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|---|---|---|
| KYAIR KEYS, | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | No. 368, 2024 |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

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Dated: May 28, 2025

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## NATURE AND STAGE OF THE PROCEEDINGS

On May 23, 2022, a New Castle county grand jury returned a 44-count indictment against Kyair Keys ("Keys"), Walkie Parham ("Parham"), Markel Richards ("Richards"), and Jahmir Morris-Whitt ("Morris-Whitt") for offenses including (i) Attempted Murder, (ii) Assault First Degree (two counts), (iii) Conspiracy First Degree, (iv) Reckless Endangering First Degree, (v) Felony Disregarding a Police Signal, (vi) Possession of a Firearm During Commission of a Felony ("PFDCF") (five counts), (vii) Possession of a Firearm by a Person Prohibited ("PFBPP") (five counts), and (viii) Conspiracy First Degree. (A26-46). On June 23 and 26, 2022, the Superior Court severed the PFBPP counts. (A009; A017). On July 19, 2022, the State dismissed thirteen counts of the indictment. (A001-02).[1]

On November 20, 2023, the State filed a motion in *limine* to admit into evidence the audio portion of an Instagram live video (the "Instagram Audio").[2] The State notified the court that it intended to demonstrate Keys was listening to this audio while driving a stolen vehicle and that the audio included a rap song about violence in Wilmington that included lyrics such as "get out the car, hit a switch and

[1] On December 4, 2023, the State entered a *nolle prosequi* on two indicted traffic offenses immediately prior to trial. (A001).
[2] Opening Br. Ex. B.

light them up" and "chase a n**** down," and had gunshots in the background. (Opening Br. Ex. B).[3] Keys opposed the motion. (Opening Br. Ex. C). On November 27, 2023, the court held a teleconference to address the Instagram Audio as well as other issues. (A047; A079; A084). The court deferred ruling on the motion. (A084).

Keys and Parham's jury trial began on December 5, 2023.[4] (A021). On December 8, 2023, the trial judge addressed the Instagram Audio issue and concluded that the audio evidence was admissible. (A760-67). Trial concluded on December 14, 2023, and the jury found Keys guilty of all but one of the charges.[5] (A021). On August 16, 2024, the Superior Court sentenced Keys to an aggregate 47 years of incarceration followed by decreasing levels of supervision. (A005; Opening Br. Exhibit A).[6]

Keys filed a timely notice of appeal and an opening brief. This is the State's answering brief.

[3] Opening Br. Ex. B.
[4] Richards and Morris-Whitt pled pre-trial.
[5] The jury acquitted Keys of one count of PFBPP. (A021); Opening Br. Ex. A.
[6] Opening Br. Ex. A.

## SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it admitted the Instagram Audio. The trial judge did not ignore recognized rules of law when he assessed the matter under Rule 404(b) and employed the *Getz* and *Deshields* factors as required by this Court. Even if this Court determines that the Superior Court abused its discretion in admitting the Instagram Audio, the error was harmless.

## STATEMENT OF FACTS

*January 14, 2022: The Daycare Shooting*

On January 14, 2022, just before 4:00 p.m., a teacher in the infant room of a daycare on Washington Street in Wilmington was changing infants so they would be ready to go home. (A191; A196). That's when the shooting started. (A196). She grabbed two babies and covered them with her body. (A198). The teacher screamed for someone to help another infant she could not reach. (A198; A200). The shooting continued for several minutes, and while the teacher could not see outside, she could see the rustle of the window curtains as bullets tore through them. (A200; A198). The bullets left holes in the windows of the daycare and glass everywhere. (A201).

Officers from the Wilmington Police Department ("WPD") responded to the daycare. (A206; A217). Officer Shauntae Hunt arrived within three minutes of the 911 calls. (A217-18). He observed "a lot of shell casings in the street," a vehicle that had been struck by the gunfire, shattered windows in the rear of the daycare windows, and bullets lodged in the daycare wall. (A225). In addition to the daycare, gunfire had struck a hair salon next door. (A219, A210; A238). While witnesses who the police spoke with were able to provide a general description of events, none could identify the shooters. (A228).

CityWatch surveillance cameras captured the incident. (A258; State's Trial Exhibits 25, 27, 29, 30). The surveillance video depicts three shooters arriving in a Hyundai. (A262-63; State's Trial Exhibit 25). Three occupants of the Hyundai exited and fanned out from one another. (A264-66; State's Trial Exhibit 27). The middle shooter, later identified as Keys, was wearing a black mask, black shoes, black pants, black hooded sweatshirt with a white emblem on the upper left chest, gloves, and holding a firearm with a silver slide in his left hand. (A266; A268-69; State's Trial Exhibits 28-30). On the edge of the video are two individuals who the shooters appeared to be targeting. (A270-71; A273; State's Trial Exhibit 26).

No one came forward to identify themselves as the targets of the shooting. (A271). Although officers located approximately ten adults in the salon, they declined to speak with the police about the shooting, and none of the individuals provided a name for officers to follow up with them if they changed their mind. (A245).

*January 20, 2022: The Lombard Street Shooting and the First Car Chase*

While Keys was not charged in connection with the event, part of the trial focused on a shooting and car chase that occurred on January 20, 2022. (A338-39; A493). At approximately 8:45 p.m., WPD officers heard approximately 20 gunshots from the direction of Lombard Street. (A339). Officers responded to the scene and saw two men standing next to a gray Kia Optima with its driver's side door open

stopped in the intersection of 10th and Lombard Street. (A340). When they saw the WPD patrol car, the men got into the car. (A340). Two other men, who were running on Lombard Street and holding firearms, also got into the vehicle. (A340-41). The driver of the Kia Optima led police on a chase and ultimately lost control of the vehicle, it came to a stop, and the four occupants fled on foot. (A343-44; State's Trial Exhibit 170). WPD officers apprehended only one of the vehicle's occupants, Morris-Whitt. (A344). The police recovered a firearm on scene, a black and silver 9-millimiter Ruger handgun. (A351).

*January 22, 2022: Culmination and Capture*

Matters culminated on January 22, 2022, with five separate but related events: (1) a shooting at a BP gas station; (2) a theft of a white Dodge Charger; (3) the Instagram Live video posted on Keys' account; (4) a shooting in the 300 block of West 7th Street; and (5) the second car chase.

2:30 a.m.: The BP Shooting

At around 2:30 a.m. on January 22, 2022, WPD officers responded to the BP gas station in Southbridge in response to a ShotSpotter notification. (A579-81). Surveillance footage from the BP station depicted a white Kia Soul pulling into the BP parking lot and the driver, later identified as Najiar Chapman ("Chapman"), exiting the car. (A504-05; State's Trial Exhibit 370). Two cars, a Honda CRV and a Mazda 3, drove past the BP, returned, and entered the parking lot together. (A505-

08; A513-14; A522; State's Trial Exhibit 370). Chapman ran back to his car. (A512; A1002; State's Trial Exhibit 370).

The passenger of the CRV, later identified as Richards, exited and extended his arm like he was shooting at the Kia. (A508; State's Trial Exhibit 370). The surveillance did not capture a muzzle flash or smoke coming from the firearm while Richards pointed it at the Kia, suggesting the gun may have malfunctioned. (A504-05; State's Trial Exhibit 370). The driver later looked at the gun as if trying to discern why it did not fire. (A517-19; State's Trial Exhibit 370). Richards was wearing jeans with light blue above the knee and white below, a puffy jacket, and black shoes with white laces. (A508-10; A514-16; State's Trial Exhibit 370).

The driver of the Kia attempted to flee from his vehicle, but the Mazda sideswiped the Kia with sufficient force to break its window. (A522-23; State's Trial Exhibit 370). Two people exited the Mazda. (A523; State's Trial Exhibit 370). The driver, later identified as Keys, fired four times and the passenger seven times. (A524-25; State's Trial Exhibit 370). He was wearing gray sweatpants with a white stripe going down both sides, a black hooded sweatshirt with a white t-shirt underneath, and black shoes. (A527-28; State's Trial Exhibit 370). Both the driver and the passenger stood in "shooter stance" as they aimed and fired at the Kia. (A528-29; State's Trial Exhibit 370). The Kia fled and was chased by the Honda and Mazda. (A514; A520-21; State's Trial Exhibit 370).

The firefight continued onto South Heald Street, with shots fired at approximately 2:34 a.m. (A580). Lanasia Turner, who lives on South Heald Street, approximately two blocks from the BP Station, witnessed the shooting. (A605; A601-02). Out of her window, she saw a black SUV shooting at a white Kia. (A602-03). According to Turner, the black SUV pulled alongside the Kia and gunfire came from its driver's side. (A604). The driver of the Kia fled on foot into a nearby alley. (A606). WPD officer Scott Gula responded to the accident scene on South Heald Street and found the Kia and another car that had been involved in a collision, both cars were heavily damaged. (A616; A619; State's Trial Exhibit 406). The Kia appeared to have two bullet holes on its exterior and police recovered two projectiles from the interior, one on the rear passenger floor and another on the front driver's side floor. (A651-52). Chapman, the target of the BP shooting, declined to speak with police. A801).

5:30 a.m.: The Theft of the White Dodge Charger

In the early morning of on January 22, 2022, the Philadelphia Police Department ("PPD") was called to investigate a report of a stolen vehicle from a Walmart parking lot. (A685-88). PPD located surveillance video of that theft. (A691; State's Trial Exhibit 464). The video depicted a 2020 white Dodge Charger and a gray Mazda 3 in the parking lot at approximately 5:30 a.m. (A692-93; A696; State's Trial Exhibit 464). The Mazda circled the parking lot and then tapped the

rear of the Charger. (A695; State's Trial Exhibit 464). When the sole occupant of the Charger got out of the car to check on it, two individuals exited the Mazda, and the occupant of the Charger fled. (A695; State's Trial Exhibit 464). The pair drove away in the Charger, leaving behind the Mazda 3. (A693-94; State's Trial Exhibit 464). PPD recovered the Mazda 3 and located four .40 caliber casings, including one on the driver's seat floorboard. (A693-94). PPD also discovered that the Mazda 3 had no glass in the driver's side door and that there was a bullet hole between the rear door and the back window on the passenger side. (A699-701).

11:05 a.m.: The Instagram Video

At around 11:05 a.m. on January 22, 2022, WPD Corporal Daniel Shea ("Cpl. Shea") received a notification on his cell phone that Keys was posting a live feed on Instagram. (A770-72; A780). Instagram is a social media platform that, among other things, allows users to post a live video feed from their phone's camera that publishes the video to their followers. (A772-73). Cpl. Shea, in his capacity as a WPD officer, followed Keys and others on Instagram, which is why he received the notification of Keys publishing a live feed. (A774-75). Cpl. Shea recorded the live feed with his cell phone. (A776-77; State's Trial Exhibit 353).

The recorded video of the live feed depicts Keys on the driver's side of a vehicle with another person holding the phone. (A780-81; State's Trial Exhibit 353). By comparing photographs that had previously been taken of the Charger's interior

with the video, WPD determined Keys was driving the Charger stolen from the Walmart parking lot in the Instagram video. (A804-07). The only audio in the Instagram video was a song by the rapper named "C Bands." (A808; State's Trial Exhibit 353). Its lyrics reference events in the city of Wilmington and specifically reference Keys in the following lyrics:

Puff in the back
Don't lack
Don't let that draco up.[7]

Det. Wham testified that these lyrics meant that Keys was standing by on their side, that you should not let him catch you without a weapon, and that Keys would use a gun. (A808-09; A811-12).

4:07 p.m.: Shots Fired on the 300 Block of West 7th Street

At 4:07 p.m. on January 22, 2022, WPD received ShotSpotter notifications and 911 calls reporting shots fired in the 300 Block of West 7th Street in Wilmington. (A792-94). One of the 911 calls relayed that a black male wearing all black in a white four-door vehicle was shooting. (A793-94; State's Trial Exhibit 502). A WPD officer arrived approximately 2 minutes after the initial 911 call

[7] A807-08; State's Trial Exhibit 353. There is inconsistency on the exact wording of the last lane. *Compare* A807-08 ("Don't let that draco up") *with* A736 ("He'll let that draco up") *and with* A81 ("He light that draco up"). Regardless of the exact phrasing, the meaning has been interpreted to be that Keys was using a gun. *See* A81, A736-37, and A811-12.

observed three vehicles and a vacant building that had been struck by gunfire. (A790;795-96).

A CityWatch surveillance camera captured this shooting. (A813; State's Trial Exhibit 505). The video depicts an individual leaning out the passenger side of the Charger and shooting as people flee. (A814-19; A849-50; State's Trial Exhibit 505). WPD also located surveillance footage from a business approximately four and a half blocks from the scene that shows events shortly before the shooting. (A823-28; State's Trial Exhibit 509). The video surveillance depicts an individual, later identified as Keys, park the Charger, exit the car, and enter the business. (A827-28; A830-32; State's Trial Exhibit 509). When Keys entered the business, several of the patrons fled. (A836-37; A1008; State's Trial Exhibit 509). Keys then ran from the business, got back into the Charger, and drove away. (A830-32; A848; State's Trial Exhibit 509). Throughout, Keys wore a mask, a black hoodie with a small Nike symbol on the left chest, black shoes with some gray, black pants layered overtop other clothing below his waist, including gray pants or shorts and underwear with a black band and white Hanes lettering and gloves with a Nike swoosh on them and holding a firearm in his left hand. (A833-39; State's Trial Exhibits 509-10).

9:35 p.m.: The Last Car Chase

At around 9:35 p.m. on January 22, 2022, Officer Gula attempted to pull over the Charger. (A874-75). Officer Gula first saw the Charger in a parking lot on

Northeast Boulevard and followed the car to confirm it was stolen. (A876). After following the vehicle for approximately ten blocks, Officer Gula activated the lights and sirens on his patrol car. (A876-77). The Charger sped away and a chase ensued. (A877-878). Within the city of Wilmington, the chase reached speeds of 73 MPH and outside the city limits 112 MPH. (A879-80). To evade capture, the Charger weaved in and out of traffic, avoided stop sticks, and made U-turns, including one that would have taken the vehicle onto I-95, against the flow of and into oncoming traffic. (A880-82). The car chase ended when a WPD vehicle drove over the grass median and pinned the Charger against a guardrail. (A884; State's Trial Exhibit 540). The driver nonetheless tried to continue to flee and revved the engine, but the vehicle was stuck; the driver fled into the woods. (A884). Two people remained in the Charger in the front and rear passenger seats. (A884-85). Police took them into custody. (A885).

Richards was one of the individuals police removed from the Charger. (A897). Police searched Richards and discovered a cell phone and a firearm magazine in his jacket pocket. (A899). Parham was the other passenger in the Charger; officers located a cell phone when searching him. (A911-12; A948). WPD followed the driver, later identified as Keys, who had fled into the woods. (A909). They located him down an embankment underneath logs. (A910).

Police discovered two handguns in the Charger, one in the center console in front of the gearshift and the second on the rear floorboard of the driver's side. (A885). The firearm found on the rear floorboard was a 9-millimeter all black Polymer80. (A959; A1097). The magazine police recovered from Richards fit that firearm. (A961-962). The firearm in the front center console was a .40 caliber Smith and Wesson. (A954-55). It was all black with a silver slide and its handle was pointed towards the driver side of the Charger. (A954-55). Next to the firearm in the center cup's console, officers located a cell phone that belonged to Keys. (A954-55).

The clothing worn by Keys, Parham, and Richards at the time of their arrest proved critical to identification across earlier incidents. As to Keys, when officers located him, he was wearing a black mask, a black hooded sweatshirt with a white shirt underneath, gray pants, dark colored underwear, and dark blue gloves; he was not wearing shoes. (A912; A914; A950-53; A978; A982). Officers located one of Keys' shoes by the roadway guardrail and the other in the woods. (A952; A983). Police also located a pair of black sweatpants Keys had removed while fleeing; the sweatpants were dirty, consistent with being in the woods. (A914-15; A979). Keys' clothing had several identifying marks—the gray sweatpants had a white stripe down the full length of each side, with the left leg having the phrase "bread over beef" down its length. (A977; A981). His sweatshirt had a white Nike emblem on the left

chest, and his gloves had a Nike swoosh on them. (A950-51; A977; A986). Keys' underwear had "Hanes" written on them. (A978).

Richards had a face mask on. (A971). He also was wearing gloves. (A973). Richards wore a jacket overtop a hooded Nike Air sweatshirt with Nike written on the front and "Just Do It" on the sides. (A973; A976). Richards' pants were light blue and solid white from the knee down. (A974-76). His shoes had orange on the bottom. (A976).

Parham was wearing a plain black bubble-style or puffy coat with blue pants that had white striping. (A912; A969-70). Once the jacket was removed, officers could see that those pants were part of a navy-blue Nike jumpsuit that had a white stripe going from the waist to the knee and also along the arm to the base of the elbow. (A965-66). Parham was also wearing a black face mask. (A966). His sneakers were black. (A966). Parham's gloves had the words "thermal insulation" on the wrist area. (A957; 965).

**Evidence Linked Across the Three Shootings**

Four types of evidence were used to link Keys to all three shootings: (1) clothing; (2) ballistics; (3) cell phone location data; and (4) cell phone communication data.

*Clothing Comparison*

The surveillance video from the daycare shooting showed the middle shooter was wearing similar clothes as Keys was wearing when WPD apprehended him: black sweatpants and shoes and a black hooded sweatshirt with a white emblem on the upper left chest. (A990-92). The middle shooter's body-type also matched Keys'—both being heavy set. (A991). The surveillance video also showed the middle shooter's gun had a silver slide, which was consistent with the firearm found in the front console of the Charger. (A992-93). Similarly, the BP surveillance video showed the driver of the Mazda 3 wearing clothing matching what Keys was wearing when arrested: black shoes, gray sweatpants with a white stripe, and a white t-shirt beneath a black hooded sweatshirt. (A1003-04). The business surveillance video immediately prior to the 7th Street shooting also showed a person carrying a firearm in his left hand that had a silver slide like the one found in the center console of the Charger. (A1006-07; A1014). Keys is left-handed. (A1008). The surveillance video also showed the driver wearing the same black hooded sweatshirt with a white Nike symbol on the left chest, black sweatpants with gray pants or shorts underneath, shoes similar to those Keys was wearing, and underwear with the letters "H," "A," and "N" on the band. (A1007-13).

Police determined that the clothing worn by the two other shooters at the daycare shooting were inconsistent with the clothing Parham and Richards wore

when they were apprehended. (A994). However, police linked the clothing worn by Richards on the date of his apprehension to the individual seen on surveillance stealing the Mazda 3. Both were wearing blue pants with white below the knee and sneakers that were black with white around the laces. (A995-97). And police identified Richards and Parham on surveillance video from a Wawa in Elkton, Maryland a few hours before the BP shooting based on a clothing comparison. (A997-1000). Police also linked Richards to the BP shooting based on his jeans, shoes, and jacket. (A1002).

*Ballistics*

Ballistics showed the following with respect to the firearms recovered in this case: The .40 caliber Smith and Wesson with a silver slide recovered from the front console of the Charger was used in the daycare shooting, the BP shooting, and the 7th Street shooting. (A1315-17). The 9-millimeter Ruger that was recovered at Lombard Street was used in the daycare shooting and the Lombard Street shooting. (A1315-16). And the 9-millimeter Polymer80 was used in the BP shooting. (A1316-17). The following chart illustrates that breakdown:

| | .40 Caliber Smith and Wesson | 9-millimeter Ruger | 9-millimeter Polymer80 |
|---|---|---|---|
| **Daycare shooting** | X | X | |
| **Lombard St. Shooting** | | X | |
| **BP shooting** | X | | X |
| **7th St. shooting** | X | | |

*Cell Phone Location Evidence*

FBI Special Agent Garret Swick testified regarding use of historical cell phone records to place devices at specific places. (A1206). Agent Swick analyzed phone records of Richards, Keys, and Parham. (A1216-18). No relevant data was found for the daycare shooting. (A1245-46). Cellphone data placed Keys and Parham in the same general area in the early morning hours of January 22 shortly before the BP shooting. (A1275). And it placed Keys at the BP station at the time of the shooting. (A1277). Analysis of the data showed Keys moving south after the shooting, consistent with chasing the Kia. (A1276-79). Keys' cell phone data also placed him in the area at time of the theft of the Charger in Philadelphia. (A1285-86). Although there was a gap in Keys' data during the 7th Street shooting, the available data placed him to the east of the 7th Street location prior to the shooting and to the south immediately thereafter. (A1287-88).

Analysis of Richards and Parham's cell phone data placed them at the Lombard Street shooting at the time it occurred. (A1254-58). It also showed that

both traveled in the direction of the vehicle chase that followed and in the area where police saw the suspects flee on foot. (A1255-61). As to the BP shooting, Parham's data placed him in the same area as Keys before the shooting, but the network was unable to locate his phone during the time of the shooting. (A1275; A1280-81). Richards' data, however, showed him at the BP when that shooting occurred. (A1276-79). Richards' and Parham's cell phone data does not place them at either Philadelphia during the theft of the Charger or the 7th Street shooting. (A1281-83; A1286-87; A1288-89).

*Cell Phone Communication Evidence*

Several text messages and phone calls among Keys, Parham, Richards and Morris-Whitt also served as evidence. Morris-Whitt and Parham were texting one another about an hour before the theft of the Mazda 3. (A1335). Morris-Whitt texted Parham that "We 'bout to get our steam facts." (A1337). Contextually, "steam" meant a stolen car and "facts" meant that they were definitely going to do so. (A1337-38). The pair discussed stealing a car and added in a discussion of whether Richards would "ditch" them. (A1338-39; A1440-42). Phone calls among the four continued until shortly before the Mazda 3 was stolen. (A1342-45).

Prior to the surveillance video at the Wawa, WPD identified a call from Richards to Parham. (A1355-56). Shortly after the surveillance video occurs, at 12:21 a.m., Keys called Richards. (A1365-57). The two engaged in more calls and

text messages. (A1357). Among other things, the texts showed that Keys sent Richards an address by the University of Delaware Stadium. (A1358-59). Richards asked for a room number, and Keys told him where to go and said, "I'm gonna let you in." (A1360). Richards then called Parham. (A1362). No more phone calls between Keys, Parham, or Richards occur until the BP station shooting, approximately two hours later. (A1362). After the BP Station shooting, however, there were five calls between Keys and Richards, the first occurring just three minutes after the ShotSpotter alert for that shooting. (A1363-63). The calls between Keys and Richards continued for 30 minutes. (A1363). But during the same time, there were no calls between Parham and Richards. (A1363-64).

Police also identified relevant text messages from Morris-Whitt related to the daycare shooting. About ten hours after the Daycare Shooting, at 1:12 a.m. the next day, Morris-Whitt texted a person identified as "Rax" that "We fucked that shit up earlier." (A1366). Rax responded to the message with a heart emoji. (A1366). The conversation concluded, in relevant part, with Morris-Whitt sending a video along with the words "N**** scrambled on his man." (A1367-68). The video depicts the interior of the salon during the daycare shooting; police were unable to obtain either the video or cooperation from individuals in the salon. (A1368-69).

## ARGUMENT

## I. THE SUPERIOR COURT DID NOT ABUSE ITS DISRECTION BY ADMITTING THE INSTRAGRAM AUDIO.

### Question Presented

Whether the Superior Court committed abused its discretion by admitting the Instagram Audio into evidence.[8]

### Standard and Scope of Review

This Court reviews a trial court's ruling on the admissibility of evidence for abuse of discretion.[9] An abuse of discretion occurs when the trial judge 'exceed[s] the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice.'"[10] And when reviewing claims for harmless error, this Court "'considers the probability that an error affected the jury's decision. To do this, it must study the record to ascertain the probable impact of error in the context of the entire trial'" and weigh "'the importance of the error and strength of the other evidence.'"[11] And if it finds "'the evidence exclusive of

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[8] A760-66.
[9] *Burrell v. State*, 332 A.3d 412, 424 (Del. 2024).
[10] *State v. Wright*, 131 A.3d 310, 320 (Del. 2016) (quoting *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006)).
[11] *Hansley v. State*, 104 A.3d 833, 837 (Del. 2014) (quoting *Van Arsdall v. State*, 524 A.2d 3, 9-10 (Del. 1987)).

the improperly admitted evidence is sufficient to sustain a conviction, error in admitting evidence is harmless.'"[12]

## Merits of Argument

Keys argues that the Superior Court abused its discretion when it admitted the Instagram Audio into after analyzing it under *Getz* and *Deshields*. For the reasons explained below, Keys is incorrect.

### A. Keys Has Not Shown the Superior Court Abused Its Discretion by Admitting the Instagram Audio.

When assessing the introduction of evidence of prior bad acts under Delaware Rule of Evidence 404(b), this Court has directed trial courts to the so-called *Getz* factors:

> (i) the evidence must be material to an issue or ultimate fact in dispute in the case;
> (ii) the evidence must be introduced for a proper purpose, including those described in Rule 404(b)(2);
> (iii) the other acts must be proved by plain, clear, and conclusive evidence;
> (iv) the commission of the other acts must not be too remote in time from the charged offense;
> (v) the court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E 403.[13]

[12] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).
[13] *Rivera v. State*, 2023 WL 1978878, at *6 (Del. Feb. 13, 2023) (citing *Getz v. State*, 538 A.2d 726, 734 (Del. 1988) (internal quotations omitted)).

While the Instagram Audio does not specifically identify prior bad acts, the trial court determined that its lyrics implied prior bad acts or acts to be committed at some future point and conducted a *Getz* analysis.[14] Other cases have similarly analyzed songs and statements of future intent using the *Getz* analysis.[15]

Here, Keys challenges three components of the trial court's *Getz*-analysis of the Instagram Audio. First, he contends that the audio was not plain, clear, and conclusive.[16] Second, he contends that the audio was too remote in time to satisfy *Getz*.[17] And third, he argues that its prejudicial effect outweighed its probative value.[18] Keys' contentions are unavailing.

### 1. Keys Has Not Shown the Superior Court Abused Its Discretion with Respect to the Third *Getz* Factor.

The third *Getz* factor considers whether the prior conduct has been proven by plain, clear, and conclusive evidence.[19] Keys argues the Superior Court abused its

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[14] A741; A761-62; Opening Br. 9 ("Given the implications of D.R.E. 404(b), the trial court analyzed the admissibility of the video under the *Getz* and *Deshields* factors.").

[15] *See, e.g., Taylor v. State*, 76 A.3d 791, 802 (Del. 2013) (observing trial court did not abuse its discretion when reviewing rap song under the *Getz* test); *Joynes v. State*, 797 A.2d 673, 677 (Del. 2002) ("The record reflects that the trial judge also properly admitted the rap song into evidence after engaging in the entire analysis required pursuant to this Court's holding in *Getz*."); *Campbell v. State*, 974 A.2d 156, 161 (Del. 2009) (analyzing evidence of future drug transaction under *Getz*).

[16] Opening Br. 10-12.

[17] *Id.*

[18] Opening Br. 12-14.

[19] *See, e.g., Rivera*, 2023 WL 1978878, at *6 (delineating *Getz* factors).

discretion because this Court has held secondhand knowledge cannot be the plain, clear, and conclusive.[20] He contends Cpl. Shea and Wham's testimony regarding the prior bad acts implied by the lyrics in the Instagram Audio is secondhand knowledge.[21] For that reason, he concludes, the trial court abused its discretion with respect to the third *Getz* factor.

Keys cites to this Court's decisions in *Renzi v. State*[22] and *Chavis. v. State*[23] for the proposition that secondhand knowledge cannot satisfy the third *Getz* factor. Both cases dealt with similar facts. In each, an officer testified as to prior bad acts of which they had no personal knowledge. In *Renzi*, the officer testified that the defendant had sold drugs to a confidential informant who used marked bills for the purchase; the officer had not seen the transaction, the defendant was not charged with it, the informant did not testify, and the marked bills were not entered into evidence.[24] Similarly, in *Chavis*, the officer testified regarding prior crimes committed by the defendant based on facts from police reports he did not author and investigations in which he did not participate.[25] In both instances, this Court found the trial court had committed an abuse of discretion in finding the evidence plain,

[20] Opening Br. 9-11.
[21] Opening Br. 11.
[22] 320 A.2d 711, 712-13 (Del. 1974)).
[23] 235 A.3d 696, 700 (Del. 2020).
[24] *Renzi*, 320 A.2d at 712-13.
[25] *Chavis*, 235 A.3d at 700-01.

clear, and conclusive.[26] From these cases, Keys draws the principle that secondhand knowledge cannot satisfy the third prong of *Getz*.

This Court has clarified *Chavis*. In *Risper v. State*, the appellant advanced the same argument Keys does here.[27] In that case, the State admitted statements made by a murder victim to several others to demonstrate a prior bad act by the defendant under 404(b).[28] Risper argued the statements were secondhand knowledge and *Chavis*, accordingly, prohibited them from being found plain, clear, and conclusive.[29] This Court disagreed and explained that Risper misread *Chavis* and that the issue in *Chavis* was that the underlying police reports were inadmissible.[30] As was true in *Risper*, Keys does not argue the Instagram Audio or the statements by Cpl. Shea and Wham were inadmissible. Because Keys misreads the law as to secondhand knowledge, he has failed to show that the trial court abused its discretion when finding the Instagram Audio was plain, clear, and conclusive.

In any event, the Superior Court's decision is consistent with this Court's precedent. For example, in *Adreavich v. State*, this Court found social media posts were plain, clear, and conclusive because the posts bore defendant's name, picture,

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[26] *Renzi*, 320 A.2d at 713; *Chavis*, 235 A.3d at 700-01. *Renzi* pre-dates *Getz* by more than a decade; however, *Getz* derives its plain, clear, and conclusive factor from *Renzi*. *Getz*, 538 A.2d 726, 734 (Del. 1988) (citing *Renzi*, 320 A.2d at 712).
[27] 250 A.3d 76 (Del. 2021).
[28] *Id.* at 83-84.
[29] *Id.* at 88.
[30] *Id.* at 88-89.

and stated her intent and wiliness to commit a crime (drug dealing).[31] In *Monroe v. State*, this Court found the testimony of two witnesses who did not see the crime was plain, clear, and conclusive because it was circumstantial evidence of the crime, which the Court declined to treat differently than direct evidence.[32] And in *Burell v. State*, this Court found evidence of a conspiracy to intimidate witnesses was proven by plain, clear, and conclusive evidence where the statements constituted admissible hearsay and were "not open to reasonable interpretation and they were clear evidence of what occurred."[33]

Here, the Superior Court's finding that the bad acts implied by the lyrics of the Instagram Audio were based on Keys listening to the song, participating in the video in which the song was played, and publishing the video to his Instagram followers.[34] As the trial judge noted, this was effectively a confession.[35] Keys' participation in the video in which the song lyrics occur and publishing it to his Instagram followers is powerful circumstantial evidence.[36] And, like in

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[31] *Adreavich v. State*, 2018 WL 3045599, at *3 (Del. June 19, 2018).
[32] 28 A.3d 418, 429 (Del. 2011); *see also Bezarez v. State*, 983 A.2d 946. 948 (Del. 2009) (finding prior bad act of firing a gun proved by plain, clear, and conclusive evidence despite no witness seeing defendant fire the gun and instead only seeing defendant holding the gun shortly after hearing a gunshot and finding a projectile that ballistics matched to the gun).
[33] *Burrell*, 332 A.2d at 426-27.
[34] A760; A753; A766-67.
[35] A767.
[36] *See Monroe v. State*, 28 A.3d 418, 430-31 (Del. 2011) ("[F]or purposes of deciding whether evidence of defendant's prior uncharged misconduct is plain, clear, and

*Andreveavich*, Keys' social media post bore his name (here his nickname) and his picture (here, through Keys participating in the video), and contained a statement of his intent to commit a crime (shooting people).[37] And, as was the case in *Burrell*, there is no reasonable alternative explanation to the communication Keys was making by publishing the video to his Instagram followers—that he was or wanted to be known as a shooter.[38] The trial court's conclusion that the Instagram Audio satisfied the plain, clear, and conclusive standard was not an abuse of discretion.

### 2. Keys Has Not Shown the Superior Court Abused Its Discretion with Respect to the Fourth *Getz* Factor.

The fourth *Getz* factor considers whether the prior conduct is too remote in time to the charged offense.[39] Here, Keys contends that the Superior Court's error with respect to this factor is the absence of evidence regarding when the prior conduct implied by the rap song's lyrics occurred.[40] He reasons that in the absence of such a specific date "time remoteness cannot be determined."[41] Keys concludes that the court therefore abused its discretion by admitting the Instagram Audio. He is wrong.

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conclusive, this Court will not distinguish between direct and circumstantial evidence.").

[37] *Andreavich*, 2018 WL 3045599, at *3 (Del. June 19, 2018). A724; A753; A765.

[38] *Burrell*, 332 A.3d at 427; A765 ("It does I think prove, tend to prove, that Kyair Keys is a shooter. At least that's how he would like to be known.").

[39] *See, e.g.*, *Rivera*, 2023 WL 1978878, at *6 (delineating *Getz* factors).

[40] Opening Br. 11-12.

[41] Opening Br. 11.

This argument fails to meet Keys' burden to show the court "exceeded the bounds of reason or so ignored recognized rules of law as to produce injustice."[42] Below, the court determined that Keys effectively updated the relevant date for purposes of the fourth *Getz* factor because he was listening to the song, participating in the video, and broadcasting both to all of his Instagram followers.[43] These actions, it reasoned, evidenced that Keys wanted to be known as a shooter.[44] Keys, in his appeal, identifies no precedent, binding or otherwise, that the court ignored in connection with this conclusion. Nor does Keys show why or how the conclusion exceeded the bounds of reason. He has, therefore, failed to demonstrate the court committed an abuse of discretion with respect to the fourth *Getz* factor.

The Superior Court's determination falls squarely within this Court's jurisprudence regarding the fourth *Getz* factor, which is premised not a strict date-to-date comparison but rather on the prior conduct's relevance, with similarity between the prior and charged conduct being inversely proportional to the time between the two.[45] The analysis considers whether "there is no plain, visible, or necessary connection between [the prior conduct] and the proposition eventually to

[42] *Burrell*, 332 A.3d at 424.
[43] A753-56; A760; A764; A766-67.
[44] A765.
[45] *Allen v. State*, 644 A.2d 982, 988 (Del. 1994).

be proved."[46] This Court has rejected a brightline rule with respect to whether any particular evidence is too remote and applied instead a ten-year rule of thumb.[47] In rejecting a brightline rule, this Court has found prior conduct more than ten years old may nonetheless be relevant if it demonstrates the same pattern of misconduct.[48] Indeed, this Court has declined to find a conviction within ten years was not too remote when the court below had not considered that the defendant had taken steps towards rehabilitation in the interim.[49]

Here, the Superior Court's determination that Keys had effectively "updated" the relevant date falls squarely within the relevance inquiry the fourth *Getz* factor requires.[50] Keys was listening to the song in the Instagram Audio, he participated in the video, and he allowed the video to be published to his Instagram followers.[51] Whatever the underlying date of occurrence, Keys' actions reaffirm that the lyrics and the conduct they imply are accurate; they are, as the Superior Court observed, a statement of how Keys wants to be seen.[52] Keys' presentation of himself in that

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[46] *Taylor v. State*, 777 A.2d 759, 768 (Del. 2001) (quoting *Kendall v. State*, 726 A.2d 1191, 1195 (Del. 1999) (internal quotations omitted)).
[47] *Allen*, 644 A.2d at 988.
[48] *Kendall*, 726 A.2d at 1195-96; *see also Howell v. State*, 268 A.3d 754, 780 (Del. 2021) (finding no abuse of discretion as to remoteness inquiry when prior bad acts evidenced "continuous course of conduct leading up to the charged offenses").
[49] *Taylor*, 777 A.2d at 769.
[50] A764.
[51] A760; A753; A766-67.
[52] A765 ("It does I think prove, tend to prove, that Kyair Keys is a shooter. At least that's how he would like to be known.").

fashion parallels the continuous course of conduct this Court has looked to when assessing remoteness. And it demonstrates Keys has not engaged in rehabilitation sufficient to render that prior conduct too remote. Likewise, the lyrics imply the very same conduct the State charged Keys with— shooting another person. The Superior Court's conclusion that the Instagram Audio satisfied the fourth *Getz* factor was not an abuse of discretion.

Even if a strict date-to-date comparison were necessary, circumstantial evidence suggests the conduct implied by the song lyrics took place within the ten-year rule of thumb. The song in question was published in 2019.[53] It is not an abuse of discretion to conclude that the song describes conduct that occurred around the time the song was published, which would place it well within ten years. Additionally, Keys was twenty at the time of trial.[54] For the conduct implied by the song to be outside that ten-year rule of thumb would require it to describe Keys at ten years old and conduct that was six years old at the time the song was published—both assumptions strain credulity. And Keys has failed to show that the Superior Court abused its discretion by reaching the contrary conclusion.

Keys fails to meet his burden to demonstrate the court "exceeded the bounds of reason or so ignored recognized rules of law as to produce injustice."[55] The court

[53] A738.
[54] A001.
[55] *Burrell*, 332 A.3d at 424.

determined that Keys effectively updated the relevant date for purposes of the fourth *Getz* factor because he was listening to the song, participating in the video, and broadcasting both to all of his Instagram followers.[56] These actions, it reasoned, demonstrated that Keys wanted to be known as a shooter.[57] Keys fails to identify any authority the court ignored in connection with its conclusion. Nor does Keys show why or how the court's conclusion exceeded the bounds of reason. He has, therefore, failed to demonstrate the court committed an abuse of discretion with respect to the fourth *Getz* factor.

### 3. Keys Has Not Shown the Superior Court Abused Its Discretion with Respect to the Fifth *Getz* Factor

The fifth *Getz* factor requires a court "'balance the probative value of [the prior bad acts] against its unfair prejudice.'"[58] The *Deshields* factors guide the trial court's determination:

[56] A753-56; A760; A764; A766-67.
[57] A765.
[58] *Rivera*, 2023 WL 1978878, at *6 (quoting *Getz v. State*, 538 A.2d 726, 734 (Del. 1988)).

> (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 act evidence would prolong the proceedings.[59]

Here, the Superior Court applied each factor.[60] Keys nevertheless argues the court abused its discretion because the Instagram Audio's prejudicial effect substantially outweighed the probative value under the fourth, fifth, and sixth *Deshields* factors.

Keys contends the State did not need the Instagram Audio because it had ballistics, surveillance, and cell phone data to prove identity (the fourth *Deshields* factor).[61] The other evidence, he argues, was a less prejudicial means to prove Keys' identity as the shooter (the fifth *Deshields* factor).[62] And the Instagram Audio had a prejudicial effect (the sixth *Deshields* factor) because the jury learned "that Keys' reputation for being a violent shooter was so well-known that he was mentioned in a rap song about 'opposing sides.'"[63] In making these arguments, Keys does not contend the Superior Court ignored recognized rule of law. Thus, to show an abuse

[59] *Howell*, 268 A.3d at 780 (citing *Deshields*, 706 A.2d at 506-07)).
[60] A765-67.
[61] Opening Br. 12-13.
[62] Opening Br. 13-14.
[63] Opening Br. 14.

of discretion, he must demonstrate the trial court exceeded the bounds of reason. For the reasons that follow, he has failed to do so.

Keys' first argument is that the Instagram Audio is cumulative of the State's ballistic, surveillance, and cell phone evidence.[64] His argument rests on a false equivalency between the Instagram Audio and the ballistic, surveillance, and cell phone evidence. As the court observed, the Instagram Audio demonstrates what Keys would do and how Keys wanted the world to see him.[65] The ballistic, surveillance, and cell phone evidence do not. Thus, while the Instagram Audio demonstrates Keys' identity as one of the shooters, it differs in *kind* from how the ballistic, surveillance, and cell phone evidence establish Keys' identity as one of the shooters. Thus, they are not cumulative of one another.

Even were they cumulative of one another, identity was not the foregone conclusion Keys paints.[66] It was one of the primary arguments Keys made in closing: "Two [details] in particular are the biggest problems in this case: Identity

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[64] Opening Br. 12-13. This Court has observed that the fifth *Getz* factor is concerned with cumulative evidence. *See, e.g.*, *Ward v. State*, 2020 WL 5785338, at *5 (Del. Sept. 28, 2020) ("[E]ven if evidence of a prior bad act is relevant, it may be excluded if its 'probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'") (quoting D.R.E. 403)).

[65] A753-54; A766-67.

[66] Opening Br. 13 ("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.").

and state of mind."[67] And the photos the defense relies on now it described then as "grainy photo captured from surveillance."[68] The State had presaged this dispute over identity when it informed the court that no witnesses at trial would say "Keys shot at me."[69] Nor did the State have cell phone location data to place Keys at every shooting.

In asserting the prejudicial effect of the Instagram Audio, Keys misstates the standard as "substantially more prejudicial then probative."[70] The standard is "unfair prejudice."[71] As this Court has noted, "[a]ny evidence that is properly admissible during the State's case-in-chief is prejudicial to the defendant in the sense that it enhances the likelihood of a conviction."[72] Here, the Superior Court reasoned that Keys was listening to the Instagram Audio, participated in the video, and allowed both to be published to his Instagram followers.[73] It was "in a sense a confession."[74] Keys has failed to show that the court's analysis here exceeded the bounds of reason

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[67] A1485.
[68] A1486; A1495.
[69] A74.
[70] Opening Br. 14; Opening Br. 12 ("[T]he prejudicial effect of this evidence substantially outweighed its probative value.").
[71] *See, e.g.*, *Capano v. State*, 781 A.2d 556, 635-36 (Del. 2010) ("[The] question is whether the danger of unfair prejudice 'substantially outweighs' the probative value of the evidence.").
[72] *Stevenson v. State*, 709 A.2d 619, 632 (Del. 1998).
[73] A760; A753; A766-67.
[74] A767.

and thus amounted to an abuse of discretion.[75] Nor could he; there is no unfair prejudice in telling the jury what Keys told the world.[76]

### B. Even If the Superior Court Abused Its Discretion the Error Was Harmless.

When a trial court abuses its discretion by admitting prior misconduct evidence under 404(b), this Court has held "a reversal is not required when the error is harmless beyond a reasonable doubt."[77] For example, in *Williams v. State*, the appellant challenged the admission of a police dispatch to an attempted burglary unrelated to the charged crime.[78] At trial, the State showed the victim investigated noises in an adjoining room, saw through an open window a white male fleeing, and discovered his wallet was missing.[79] Shortly thereafter, officers were dispatched to a nearby gas station on reports of someone trying to break into the gas station, where they eventually apprehended Williams, who was in possession of the victim's wallet.[80] This Court analyzed the admission of the reason those officers were

[75] *Garden v. State*, 815 A.2d 327, 333 (Del. 2003) ("The defendant has the burden of demonstrating substantial prejudice, and mere hypothetical prejudice will not suffice.").
[76] *See Lloyd v. State*, 1991 WL 247737, at *4 (Del. Nov. 6, 1991) (finding prejudice of prior bad acts unlikely where the prior bad acts allegations were made by the same victim and alleged the same conduct).
[77] *Hawkins v. State*, 2006 WL 1932668, *3 (Del. July 11, 2006) (citing *Barnett v. State*, 893 A.2d 556, 559 (Del. 2006)).
[78] 98 A.3d 917, 919 (Del. 2014).
[79] *Williams v. State*, 98 A.3d 917, 919-20 (Del. 2014).
[80] *Id.* at 920.

dispatched to the gas station under the plain error standard, as it had not been objected to below, but also concluded that if it had been raised, the error was harmless.[81] The Court explained the reasons for the dispatch were not a "principal factor in the conviction."[82] It relied on the timeline of events between the stolen wallet and eventual arrest, the items found on Williams' person (the victim's wallet, license, and credit cards), and surveillance video of Williams making a purchase with the victim's credit card.[83] And it concluded that evidence was sufficient to establish guilt without the reasons for the dispatch, rendering the admission of the reasons for the officers' dispatch harmless.[84]

Here, the admission of the Instagram Audio was harmless because there was more than sufficient evidence to convict Keys of the charges even in its absence. The State used that evidence to show Keys' identity and plan across the daycare shooting, the BP shooting, and the 7th Street shooting.[85] The uncontested ballistics evidence showed that the same firearm was used at the daycare shooting, the BP shooting, and the 7th Street shooting. WPD recovered that firearm from the Charger Keys had been driving and fled from, found that firearm next to Keys' cell phone and with its handle pointed towards where Keys had been sitting. And the State

[81] *Id.* at 922.
[82] *Id.* at 923.
[83] *Id.* at 922-23.
[84] *Id.* at 923.
[85] A1470-73.

presented surveillance still shots to the jury comparing the surveillance footage during or immediately before each shooting with the clothes Keys was wearing at the time of his arrest. The comparison evidence demonstrated that someone of Keys' body type used a handgun with a silver slide, like the one recovered from the Charger. It also shows that individual wearing some combination of the same clothes that Keys was wearing at the time of his arrest at all three shootings: black face mask, black hooded sweatshirt with white emblem on the front chest, a white shirt underneath, black sweatpants, gray sweatpants with white stripes down the legs underneath, underwear with "Hanes" written across the band, and black shoes. The State also introduced uncontested cell phone location data that placed Keys at the BP shooting at the time it occurred and in the area of the 7th Street shooting shortly before it occurred. And the cell phone communication data showed that Keys and Parham were located in an area around one another shortly before the BP shooting. The totality of this evidence was more than sufficient to prove Keys' guilt beyond a reasonable doubt, rendering the admission of the Instagram Audio harmless. Here, like in *Williams*, the timeline, the surveillance video, and Keys' possession of the firearm used at all three shootings were the principal factors in his conviction, not the Instagram Audio. Any error in its admission is, therefore, harmless.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: May 28, 2025

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| KYAIR KEYS, | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | No. 368, 2024 |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATE: May 28, 2025