IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

FILING ID 76442704

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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

The State misreads Keys' argument in concluding that "as was true in *Risper* [*v. State*], Keys does not argue the Instagram Audio or the statements by Cpl. Shea and [Detective] Wham were inadmissible."[1] In fact, the entirety of Keys' argument as laid out in the very heading of his Opening Brief is that the trial court abused its discretion in admitting the audio of the Instagram video. Collaterally, had the trial court disallowed admission of the audio/video, neither Cpl. Shea nor Detective Wham's testimony would have been permitted.

The State's reliance on *Risper* and *Andreavich v. State*[2] are similarly misplaced. First, *Risper* is distinguishable because in that case, the statement underlying the prior bad acts evidence was admissible in and of itself under D.R.E. 804(b)(3) and D.R.E. 807.[3] Here, the State fails to point to any rule of law that would have allowed admission of the underlying rap song contained within the Instagram video. The rap song was not written, sung or produced by Keys, thereby making it irrelevant and hearsay without an exception under the Delaware Rules of Evidence.[4] Neither Cpl. Shea nor Detective Wham testified to when or what

[1] State's Resp. Br. at p. 24 (citing *Risper v. State*, 250 A.3d 76 (Del. 2021).
[2] 2018 WL 3045599 (Del. June 19, 2018).
[3] *Risper*, 250 A.3d 76 at 89.
[4] See D.R.E. 401; D.R.E. 801; D.R.E. 803.

underlying crime(s) Keys committed to have earned a reputation as a shooter.[5] As a result, their testimony regarding the Instagram audio was secondhand knowledge consistent with this Court's ruling in *Chavis* as being insufficient to satisfy the plain, clear and conclusive *Getz* factor.[6]

The State's reliance on *Andreavich* and the remainder of cases it cites is also unavailing.[7] In *Andreavich*, the defendant was posting on Facebook to solicit customers for her marijuana edible business.[8] After her arrest, she again posted on Facebook stating that she was "100% guilty of this so-called crime."[9] This Court held that the Facebook posts were plain, clear and conclusive for purposes of the *Getz* analysis because "it directly showed Andreavich's intent to develop and sell marijuana-infused products by listing her prices and stating that she wanted others to learn and improve her recipes."[10]

Here, unlike *Andreavich*, Keys did not publish via the Instagram video, whether in writing or orally, any intent to commit crimes in line with his supposed reputation in the rap song. Cpl. Shea testified that it appeared from the Instagram video that someone else was controlling the video, given that Keys was operating a

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[5] See generally A770-86; A803-12; A846-50.
[6] See *Chavis v. State*, 235A.3d 696 (Del. 2020); *Getz v. State*, 538 A.2d 726 (Del. 1988).
[7] See State's Resp. Br. at p. 24-25 (citing *Andreavich*, 2018 WL 3045599; *Monroe v. State*, 28 A.3d 418 (Del. 2011) (citing generally *Bezarez v. State*, 983 A.2d 946, 948 (Del. 2009)); *Burrell v. Delaware*, 332 A.2d 412 (Del 2024).
[8] *Andreavich v. State*, 2018 WL 3045599 at *1-2.
[9] *Id*. at *1.
[10] *Id.* at *2.

vehicle during its recording.[11] There was no evidence that Keys made any statements within the video, but rather was listening to the song while someone pointed the camera at him.[12] Listening to a rap song with explicit lyrics does not equate to adoption of the ideas within the song.[13] Nor is listening to the rap song circumstantial evidence of Keys' involvement in the charged conduct or a desire to be known as a shooter as suggested by the State.[14] Thus, the State is incorrect to conclude that the Instagram audio was plain, clear and conclusive.

Second, the State argues that Keys is "wrong" to argue that the trial court abused its discretion as to the time remoteness factor of the Getz analysis because "the [trial] court determined that Keys effectively updated the relevant date for purposes of the fourth *Getz* factor."[15] The State goes on to reason that "circumstantial evidence suggests that the conduct implied by the song lyrics took place within the ten-year rule of thumb" because "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."[16] This response fails because nowhere in the record is there circumstantial evidence of when, if ever, the underlying prior bad

[11] A780; A782; see also A807.
[12] See *Id*.
[13] See D.R.E. 801(d)(2)(B).
[14] See State's Resp. Br. at p. 25 (citing *Burrell*, 332 A.2d at 427).
[15] State's Resp. Br. at p. 27.
[16] State's Resp. Br. at p. 29.

acts occurred. Keys' age is wholly irrelevant to this analysis given the State's inability to prove if he ever in fact committed such crimes, or whether the rap artist was bluffing or rapping about someone else. Without such proof, the trial court's decision to admit the Instagram audio exceeded the bounds of reason in view of the circumstances.

Third, the State argues that the fifth *Getz* factor regarding unfair prejudice, as further analyzed through the *DeShields*[17] factors, was satisfied because "as the [trial] court observed, the Instagram audio demonstrates what Keys would do and how Keys wanted the world to see him."[18] It reasons that the ballistic, surveillance and cell phone evidence did not prove these points, thereby causing Keys' argument to "rest on a false equivalency."[19] To have convicted Keys of the charged offenses does not require the State prove whether Keys "wanted the world to see him" as an individual who commits violent crime. Thus, it is irrelevant to the State's burden of proof for the aformentioned evidence (namely the ballistic, surveillance and cell phone location evidence) to have simultaneously proved that Keys wanted people to know him as a violent person. Therefore, the State's argument that the additional evidence did not prove Keys' desire for such a reputation is unavailing to an analysis of the *DeShields* factors.

[17] *DeShields v. State*, 706 A.2d 502 (Del. 1998).
[18] State's Resp. Br. at p. 32.
[19] *Id*.

Ironically, the State goes on to argue that although "the ballistic, surveillance and cell phone evidence established Keys' identity as one of the shooters," albeit that "it differs in *kind*," that concurrently "identity was not the foregone conclusion Keys paints."[20] While it is true that the State did not have any eyewitnesses to the shootings and had Keys' cell phone location data placing him at the scene of merely two of the three shooting scenes, that does not detract the cumulative nature of the Instagram video as compared to the other evidence it used to prove his identity. The .40 caliber Smith & Wesson firearm found in the Dodge Charger at the time of Keys' arrest was a ballistic match to casings at every shooting scene for which Keys was charged.[21] At trial, the State painstakingly emphasized the clothing that Keys wore to each shooting, which it argued was the same clothing that Keys was arrested in.[22] The State did not need the Instagram audio to prove Keys' identity, leaving its admission to exceed the bounds of reason under the circumstances.

In another argumentative juxtaposition, the State ends its Response by arguing that even if this Court finds that the trial court erred in admitting the Instagram audio, it is harmless error because "there was more than sufficient

[20] *Id.*
[21] See State's Resp. Br. at p. 16 (citing A1315-17).
[22] See State's Resp. Br. at p. 15-16 (citing A990-7; A1003-14).

evidence to convict Keys of the charges even in its absence."[23] A harmless error analysis is "a case-specific, fact-intensive exercise."[24] "[T]he proper appellate focus in the analytical framework of the harmless error doctrine is 'not whether the legally admitted evidence was sufficient to support [the trier of fact's verdict], but rather whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'"[25] Here, given that Keys submits he has demonstrated error, the State has failed to prove that the Instagram audio's admission did not contribute to Keys' convictions. The State wove the Instagram audio into its argument in summation, replaying it for the jury and emphasizing the lyrics therein.[26] Thus, the State cannot prove to this Court that the admission of this evidence was harmless error because there is a "possibility that it influenced the jury adversely" to Keys.[27] As a result, Keys' convictions must be reversed.

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[23] State's Resp. Br. at p. 35.
[24] *Dawson v. State*, 608 A.2d 1201, 1204 (Del. 1992).
[25] *Id.* (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) (citing *Chapman v. California*, 386 U.S. 18 (1967))).
[26] A1470 ("And you heard about the song that he was playing (A video is published to the jury) A rap song that you heard, members of the jury, that references things that have happened in the city of Wilmington. And at the very end of that clip that I just played for you, there in an important line in the rap song. And what were those lyrics that Detective Wham talked about? 'Puffy in the back, so please don't lack. He'll let that draco up;'" A1471 "[T]o consider the identity of Kyair Keys involved in the shootings when he's listening to a rap song about himself shooting people who don't have their guns" "Other lyrics in the song: 'I may chase a N-word down and kill your dog like Michael Vick.' 'Dog' in this context meaning 'your friend,' and communicating to the world by posting this on his Instagram what [Keys] is going to do").
[27] See *Dawson*, 608 A.2d at 1204 (quoting *Chapman*, 386 U.S. at 23-24).

CONCLUSION

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

Respectfully submitted,

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Date: June 11, 2025