

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 1109006066
	)	
JAMES M. SMITH.	)	
	)	

**ORDER**

AND NOW, TO WIT, this 17<sup>th</sup> day of July, 2012, **IT IS HEREBY ORDERED** as follows:

**Introduction**

Before the Court is Defendant, James Smith’s (“Defendant”) motion *in limine* to submit evidence for the purpose of a self-defense claim. The evidence of direct threats made to the Defendant by the victim, Raymond Phipps (“victim”), and the evidence of the victim striking his wife in the face are admissible. Thus, the Defendant’s motion is **GRANTED in part** and **DENIED in part**.

**Background**

The charges in this case arise from a confrontation that occurred between the Defendant and the victim near the intersection of Fourteenth and Walnut Streets in Wilmington, Delaware. The confrontation allegedly ended when the Defendant shot 10 shots in the victim’s direction, 6 of which struck his person.

The victim's friend, Joshua Russo ("Mr. Russo") was a tenant in an apartment building owned by the Defendant. The lease commenced in February, 2011. Mr. Russo and the victim were friends and would often be in each other's company at the apartment. The Defendant had interaction with both the victim and Mr. Russo in connection with his landlord status.

### **Parties' Contentions**

The Defendant seeks to admit the following evidence to prove that he was justified in using self-defense on the day of his encounter with the victim. The Defendant alleges that: (1) Mr. Russo was charged with a stabbing near the 1300 block of Walnut street that occurred the same month of the confrontation arising from this case; (2) the Defendant's complaints to the victim and Mr. Russo about their marijuana use resulted in verbal threats by Mr. Russo and verbal reinforcement by the Victim ("we are going to fuck you up"); (3) people in the neighborhood warned Smith to be careful because the victim and Mr. Russo were threatening to "rob and kidnap" him; (4) over the course of months leading up to the incident, Smith witnessed the victim purchase crack cocaine from third parties and knew that "crackheads" were potentially violent after having consumed cocaine; (5) "not too long" before the incident, Smith observed the victim strike his wife in the face.

The State responded in opposition to the Defendant's motion. As to Defendant's first contention that Mr. Russo was charged with a stabbing near the 1300 block of Walnut Street, the State submits that a search of DELJIS shows that he was never arrested or charged with anything related to the stabbing. It is the State's contention that the fact that the Defendant mistakenly believed that Mr. Russo was charged with a stabbing is unrelated to this case and should not be admissible.

For each other allegation the Defendant asserts, the State argues that under the *Getz* analysis, evidence of the victim's prior bad acts are inadmissible. In its response, the State analyzes each prong of *Getz* to show why the evidence is not admissible. The State however, concedes that as part of the Defendant's self-defense claim, the Defendant should be able to testify that he remembers being directly threatened by the victim, but only if the Defendant establishes how this affected his subjective belief concerning why deadly force was necessary on the day of confrontation. In addition, the State requests that the Court instruct the jury how to use the allegations as required under the sixth prong of *Getz*.

### **Discussion**

It is well settled in Delaware that a victim's violent propensities cannot be used to establish affirmatively that he was the aggressor in a confrontation that

resulted in injury.<sup>1</sup> However, a victim's propensity for violence may be admissible under an exception to the character exclusion rule. Evidence of other crimes, wrongs or acts may be permitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.<sup>2</sup>

Pursuant to 11 *Del. C.* § 471(a), deadly force is defined as, "force which the defendant uses with the purpose of causing death or serious physical injury."<sup>3</sup> "Purposely firing a firearm in the direction of another person . . . constitutes deadly force."<sup>4</sup> In Delaware, use of deadly force is justifiable, "if the defendant believes that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat."<sup>5</sup> Therefore, this is a subjective standard to be analyzed from the standpoint of the Defendant's belief.<sup>6</sup>

Here, the Defendant's actions constitute deadly force because he purposely discharged a firearm 10 times in the direction of the victim, 6 of which made contact with the victim. Therefore, for this evidence to be admissible, Defendant's allegations must help the jury to determine whether the Defendant subjectively

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<sup>1</sup> D.R.E. 404(b).

<sup>2</sup> D.R.E. 404(b); *Getz v. State*, 538 A.2d 726 (1988).

<sup>3</sup> 11 *Del. C.* § 471(a).

<sup>4</sup> 11 *Del. C.* § 471(a).

<sup>5</sup> 11 *Del. C.* § 464(c).

<sup>6</sup> See 11 *Del. C.* § 464(c); *Moor v. Licciardello*, 463 A.2d 268, 270-71 (Del. 1983).

believed that shooting the firearm was necessary to protect against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat.

To prove self-defense, “[t]he essential element is whether the defendant subjectively believed the use of force was necessary for his protection, and not whether the victim acted in conformity with a character trait of aggressiveness.”<sup>7</sup>

While the victim’s character is not an essential element of a defendant’s self-claim, the victim’s character may be admissible to prove the defendant’s “knowledge or awareness of the victim’s past acts of violence . . . . [a] noncharacter purpose.”<sup>8</sup>

The defendant’s subjective state of mind at the time of the incident may include defendant’s fear of the victim.<sup>9</sup> Therefore, evidence of the victim’s past violent tendencies may be admissible to establish the Defendant’s state of mind at the time of the attack.

In assessing the relevancy of the defendant's testimony concerning the victim's alleged prior violent conduct towards the Defendant and others, the Delaware Supreme Court held that:

[s]ince one of the factors that influences the reasonable belief of a defendant, threatened with imminent assault, is the defendant's knowledge or awareness of the victim's past acts of violence, these instances are relevant for their proper noncharacter purpose. Subject to satisfaction of the requirements articulated in *Getz*, the defense was entitled to use this evidence under D.R.E. 404(b) to show the fear

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<sup>7</sup> *Tice v. State*, 624 A.2d 399, 401 (Del. 1993).

<sup>8</sup> *Id.* at 402.

<sup>9</sup> *Id.*

experienced by the defendant, and thus, establish the subjective state of mind required to assert the claim of self-defense.<sup>10</sup>

To be admissible under *Getz*, the following six guidelines must be met:

- (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
- (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
- (3) The other crimes must be proved by evidence which is “plain, clear and conclusive.” *Renzi v. State*, Del.Supr., 320 A.2d 711, 712 (1974).
- (4) The other crimes must not be too remote in time from the charged offense.
- (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.<sup>11</sup>
- (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.<sup>12</sup>

In addition to the *Getz* factors, for the victim’s aggressive character traits to be admissible, Defendant must show that the victim was the initial aggressor and must articulate a “connection between the proffered evidence and the defendant’s

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<sup>10</sup> *Tice*, 624 A.2d at 402.

<sup>11</sup> D.R.E. 403 provides that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”

<sup>12</sup> *Getz v. State*, 538 A.2d 726, 734 (Del. 1988).

state of mind.”<sup>13</sup> In *Moore*, evidence of the defendant’s state of mind pertaining to the victim’s aggressive traits was properly excluded. In that case, the defendant did not establish that his state of mind was connected to the victim’s prior misconduct “in which Moore was not personally involved and which had not been related to him.”<sup>14</sup>

*Evidence of an Alleged Stabbing that Occurred During the Same Month as the Incident is Inadmissible.*

The Defendant first contends that the victim’s friend was charged with a stabbing near the 1300 block of Walnut Street that occurred the same month of the confrontation arising from this case. The State submits that a search of DELJIS reveals that the victim’s friend was not charged with anything related to a stabbing. Therefore, this evidence is not relevant to show that the Defendant subjectively believed deadly force was necessary on the day of the shooting. Thus, any evidence pertaining to Mr. Russo being charged with a stabbing is inadmissible.

*The Alleged Marijuana Use is Not Admissible, But the Verbal Threats Are.*

The Defendant next contends that the Defendant’s complaints to the victim and Mr. Russo about marijuana use on his property resulted in verbal threats by Mr. Russo and verbal reinforcement by the victim. Evidence of the victim’s past marijuana use is inadmissible under *Getz* because of the following: (1) the fact that

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<sup>13</sup> *Moore v. State*, 645 A.2d 569, at \*3 (Del. 1994)(TABLE).

<sup>14</sup> *Id.*

the victim smoked marijuana is not relevant to why the Defendant thought that the victim would seriously injure, kill, kidnap or rape the Defendant; (2) in his motion, the Defendant does not articulate how the smoking is connected to the Defendant's subjective belief that deadly force was necessary; (3) the defense offers no proof that this evidence is accurate; (4) the Defendant does not state when these events occurred; and (5) any probative value of the alleged marijuana use is substantially outweighed by the danger of unfair prejudice.

The Defendant next argues that evidence of the victim's prior threats to the Defendant, including the victim's statement that the victim and Mr. Russo that "we are going to fuck you up" is admissible. The victim's past verbal threats to the Defendant are admissible for the purpose of showing why the Defendant subjectively believed that deadly force was necessary on the day of the crime. In applying the *Getz* factors to this evidence, evidence of prior threats or verbal abuse towards the Defendant by the victim is admissible because: (1) The evidence of prior threats is material to showing why the Defendant subjectively believed deadly force was necessary; (2) the evidence is offered to show why the defendant felt threatened by the victim and believed deadly force was necessary to protect himself; (3) the evidence is "plain, clear and conclusive"; (4) the prior threats occurred after February 2011 and are thus, not too remote; and (5) the probative value is not substantially outweighed by the danger of unfair prejudice. Therefore,

evidence of the victim's prior verbal threats to the Defendant, including the statement, "we are going to fuck you up," is admissible.

*Evidence of an Alleged Robbery and Kidnapping is Inadmissible.*

Thirdly, the Defendant seeks to admit evidence that people in the neighborhood warned the Defendant that the victim and Mr. Russo were going to "rob and kidnap" him. This evidence is inadmissible as hearsay and additionally, the evidence does not meet the necessary prongs of *Getz*. First, the Defendant does not explain how hearing these rumors are material to why he shot the victim. Second, the Defendant also does not explain what this information would be used to prove. Third, there is not plain, clear and conclusive evidence that these rumors are even accurate. Next, the Defendant does not state when these rumors were heard in relation to the shooting. Lastly, any probative value of this evidence is substantially outweighed by the danger of unfair prejudice under D.R.E. 403. Therefore, because this evidence is hearsay and does not meet the prongs of *Getz*, it is inadmissible.

*Any Evidence Pertaining to the Victim Allegedly Purchasing Crack Cocaine or Evidence that "crackheads" are Violent is Inadmissible.*

Next, the Defendant seeks to admit evidence that he observed the victim purchase crack cocaine and that "crackheads" are violent. This evidence is also inadmissible under *Getz* because: (1) uncorroborated allegations that the victim may have purchased cocaine is not relevant to why the Defendant's subjectively

believed it was necessary to fire 10 shots at the victim; (2) the Defendant does not explain how this information would be used at trial to show why deadly force was necessary; (3) there is not plain, clear and conclusive evidence proving that the victim purchased or used crack cocaine; (4) the Defendant does not state when these alleged events occurred in relation to the shooting; and (5) under D.R.E. 403, any probative value that this evidence has is substantially outweighed by the danger of unfair prejudice.

*Evidence of the Victim Striking His Wife is Admissible.*

Finally, the Defendant argues that “not too long” before the incident, the Defendant observed the victim hit his wife across the face during an argument. Defendant submits that while outside of his building, he heard a disagreement between the victim and his wife, Stephanie Phipps. The Defendant proceeded to walk down the stairs to the second floor to the first floor when he observed the victim punch the right side of his wife’s face.

This evidence is admissible under *Getz* for these reasons: (1) Defendant’s knowledge that the victim resorted to violence in the past is material to his subjective state of mind at the time of the encounter; (2) the evidence will be used to show why the Defendant subjectively believed that deadly force was necessary, which is a proper non-character purpose; (3) the evidence offered by the Defendant is plain, conclusive and clear; (4) the event occurred “not too long” before the

incident and is thus not too remote from the time of the altercation; and (5) while the fact that the victim struck his wife “not too long” before the incident is prejudicial, it has significant probative value in assessing Defendant’s fear on the day of the crime.

**Conclusion**

Based on the foregoing, Defendant’s motion *in limine* to submit defense evidence on self-defense is **GRANTED in part** and **DENIED in part**.

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.