



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID M. WATSON, )  
 )  
 Defendant Below, )  
 Appellant, ) Case No. 665, 2013  
 )  
 v. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

**STATE OF DELAWARE'S ANSWERING BRIEF**

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## NATURE AND STAGE OF THE PROCEEDINGS

On January 7, 2013, a Sussex County grand jury indicted Appellant, David M. Watson (“Watson”), with one count of attempted first degree murder, two counts of first degree reckless endangering, three counts of possession of a firearm during the commission of a felony (“PFDCF”), one count of possession of a firearm by a person prohibited (“PFBPP”), one count of conspiracy first degree and one count of criminal mischief. A11-14, 23. Upon defendant’s motion, the court severed the PFBPP charge prior to trial. A5-6.

On September 20, 2013, the State filed a Motion in Limine, seeking to admit evidence that Watson and his co-defendant, Orrin Joudrey (“Joudrey”), had engaged in acts similar to those alleged in this case (“the Delaware incident”) in Maryland near in time to the date of the Delaware incident. A6; 16-18. The judge ruled that two of the three Maryland incidents were admissible, but that he would give a limiting instruction. A33, 35, 37-38.

The Superior Court held a four and a half day trial from September 23, 2013 until September 26, 2013. A6-7. During trial, the State sought to admit photographs showing a tattoo on Watson’s body, along with a photograph of a painted poster board showing the same figure. *See* Ex. A to Op. Br. Over defense counsel’s objection, the court allowed the photographs. *Id.* On September 27, 2013, the jury found Watson guilty of three counts of first degree reckless

endangering (one of which was as the lesser-included of attempted first degree murder), three counts of PFDCF, one count of conspiracy second<sup>1</sup> and one count of criminal mischief. B92-95.

After a presentence investigation, the Superior Court sentenced Watson as follows: on each of the three PFDCF convictions, to twenty-five years of Level 5 incarceration, with no probation to follow; on each of the three reckless endangering first degree charges, to five years at Level V, with no probation to follow and all time to be served pursuant to 11 *Del. C.* § 4204(k); for conspiracy second degree, to two years at Level 5, suspended for two years of Level 4 Home Confinement; and for criminal mischief, thirty days at Level 5, suspended for thirty days of Level 3 probation. Ex. B to Op. Br. Watson appealed his convictions and sentences. He filed a timely opening brief. This is the State's Answering Brief.

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<sup>1</sup> Watson was charged with first degree conspiracy. A13. Although the court did not instruct the jury about the lesser-included of second degree conspiracy, since the jury did not find Watson guilty of attempted first degree murder, the judge reduced the conspiracy charge to second degree. *See* B95.

## SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion in permitting the State to introduce evidence that Watson and his co-defendant had shot at two police officers' residence prior to shooting at Officer Dempsey's home. Watson was charged with attempted murder, among other things. In the month of December, 2012, Watson and Joudrey shot at three homes, including Dempsey's. The State's firearms examiner connected a 7.62x54r bullet recovered from one of the Maryland shootings to a 7.62x54r bullet recovered from Dempsey's home. Both bullets were fired from the same gun, a Mosin-Nagant rifle, which was found at Watson's home. Watson and Joudrey chose each home because they believed a police officer lived there. The Maryland shootings evidence was relevant to show Watson's state of mind and motive, that he was intent on killing or causing harm to a police officer, and not just recklessly shooting up random houses.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in permitting the State to introduce photographs of Watson's tattoos and of a poster board depicting the number 187. Watson believed the number meant "murder on a cop" and painted the poster board within the same timeframe as the shootings. The fact that Watson had 187 tattooed in two places

on his arm and had painted it on the poster board was directly relevant and material to his state of mind at the time of the shootings.



## STATEMENT OF FACTS

In the very early morning hours of December 27, 2012, Officer Clifford Dempsey, of the Dewey Beach Police Department, was awakened in his home in Laurel<sup>2</sup> by two very loud crashes. B23, 27. He grabbed his service weapon and checked on his nine and four-year-old sons, sleeping in bunk beds in a separate room. B25, 28. Both were okay. B28. Then he went to his daughter's room, although she was sleeping at Dempsey's brother-in-law's house, down the street. B25-26. In her room, he discovered a bullet hole in the window and damage to the drywall. B29. Dempsey called SUSCOM. B30. In a room, adjacent to his daughter's, Dempsey found additional damage and what he estimated to be a .30 caliber bullet on the floor. B31.

The light of day revealed that someone had shot three rounds at Officer Dempsey's house. B40. One projectile had hit the foundation of the house and ricocheted into the ground. B35, 48. Another passed through the siding of the house into Dempsey's daughter's room, skimmed the wall and became embedded in a ceiling joist. B42, 47. The third round went through the window in Dempsey's daughter's room, passed through the room, struck the door casing on an adjacent room, passed through a wooden entertainment center, skimmed several books, went through a plastic container and finally struck an interior wall. B43-45.

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<sup>2</sup> Dempsey lived about ten miles from the Maryland line. B23.

The bullet ended up on the floor, where Dempsey found it.<sup>3</sup> B31, 46. It was a 7.62x54r, steel-jacketed, Russian-manufactured round, typically used in sniper rifles.<sup>4</sup> B74-76, 80, 82-84.

Dempsey's was not the only police officer's house to have been targeted. The same morning, about half an hour before, someone had shot at Deputy Sheriff Jennifer Hall's ("Hall") house in Maryland. B19, 21-22. Hall works for the Worcester County, Maryland Sheriff's Office and resides in Wicomico County, Maryland off of Parsonsburg Road. B15. Police recovered a 7.62x54r, Russian-manufactured, steel-jacketed round lodged between two cabinets in Hall's kitchen. B20, 80, 82-83.

A little more than two weeks prior to the shootings at Dempsey's and Hall's houses, on the night of December 10, 2012, someone had fired three shots at Deputy Chuck Bratten's ("Bratten") house. B3-4, 8-9. Bratten works for the Wicomico County Sheriff's Office and lives in Parsonsburg, Maryland about four to four and a half miles from the Delaware state line. B1, 12-13. Officers recovered several shotgun pellets from the scene of the shooting at Bratten's house. B10-12, 14. All three of the officers whose homes had been targeted had been issued marked police vehicles that they kept in their driveways when they were not

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<sup>3</sup> Officers were not able to recover the other two rounds. B41-42, 46-47.

<sup>4</sup> The 7.62x54r round should not be confused with the more common 7.62x39mm round, which was used in the AK-47. B75-77. The 7.62x39mm is a shorter round with less firing range and distance than the 7.62x54r. B76.

on duty. B2, 16. All three officers were home on the nights of the shootings. B3, 5, 17-18, 24-25, 27.

Maryland and Delaware police stepped up patrols in the areas where the officers' homes had been targeted. B36, 65. On January 2, 2013, sometime after midnight, a Wicomico County Sheriff's deputy noticed a speeding vehicle near the Delaware line. B37. He followed the vehicle as it crossed into Delaware and asked his dispatch to notify the Delaware State police. B38. The deputy continued to follow the vehicle until Delmar, Delaware and Delaware State police officers pulled it over. *Id.* Orrin Joudrey, who was twenty years old at the time, was the driver and it was apparent to officers that he had been drinking. B66. Officers took Joudrey into custody, arresting him for driving under the influence. B66, 68. From the back passenger seat of Joudrey's vehicle, officers recovered camouflage paint, two shotgun shells and a Russian-manufactured, steel-jacketed 7.62x54r round. B39, 67, 69, 81-83.

Joudrey told officers he had been on the way to visit his friend, David Watson. Initially Joudrey denied that he had any involvement in the shootings at the three officers' houses, but after being confronted with the 7.62 round found in his car and a video on his phone of Watson shooting his shotgun, Joudrey admitted he and Watson had carried out all three shootings. A207-09. Watson lived in

Laurel, Delaware and Joudrey lived in Wicomico County, Maryland. B49, 71. Officers executed search warrants on both houses. B49, 70-71.

At Watson's house, officers found, among other things, a pistol grip shotgun; a number of shotgun shells; a number of 7.62x54r rounds; and a Russian Mosin-Nagant 7.62 bolt action rifle with a 7.62x54r round still in the chamber. B50-54, 58-64; A111. They also found a poster board with the number 187 spray painted on it. A103; B55, 57. At Joudrey's house, officers discovered a makeshift shooting range in the back yard. B72. The shooting area was littered with spent 7.62x54r shell casings and shotgun shells. B72-73.

Carl Rone, the State's firearms expert, determined that the 7.62x54r bullets recovered from Hall's and Dempsey's homes were fired from the Mosin-Nagant rifle found at Watson's house. B78-80. The round recovered from the back seat of Joudrey's car was also consistent with the bullet recovered from Dempsey's house. B81.

Watson and Joudrey were charged in Maryland and in Delaware for the shootings. *See* A176, 213. Prior to trial, Joudrey entered a plea with regard to his Delaware charges and agreed to testify at Watson's Delaware trial.<sup>5</sup> A214-16. Over defense counsel's objection, the Superior Court allowed the State to present

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<sup>5</sup> Because his Maryland charges were still pending, Maryland authorities also agreed to give him limited immunity not to use his testimony in Watson's trial against him in Maryland. *See* A213, 216.

evidence at Watson's trial of the Maryland shootings in addition to the Delaware incident on the basis that the incidents were committed in the same peculiar manner, they were relevant to proving Watson's intent, and they showed there was no mistake as to Watson's state of mind during the incident.<sup>6</sup> See A33-34, B87.

Joudrey testified at trial that on the night of December 10, 2012, he and Watson ventured out in Joudrey's car to buy something in Salisbury. A136-37. Joudrey drove and they brought the shotgun and the Mosin-Nagant rifle with them. A137. At Watson's suggestion, they drove by a house where they knew a police officer lived because of the marked police car often parked in the driveway. A140-41. As Joudrey drove by the house, Watson fired three shots with the shotgun at it. A149. The house belonged to Bratten. A145; B5, 7.

Then, on December 27, 2012, in the early pre-dawn hours, the two of them again set out in Joudrey's car with the rifle, intent on shooting it at police officers' homes. A156, 161, 164. Joudrey and Watson targeted two houses, one in Maryland and one in Delaware, where they believed police officers lived.<sup>7</sup> A156,

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<sup>6</sup> Joudrey and Watson also shot up a fourth police officer's house in Maryland, but because it was vacant at the time of the shooting, police did not discover it until January 1, 2013. A82. The Superior Court excluded evidence of the fourth shooting on the belief that it had occurred after the Delaware shooting. A37. The State learned from Joudrey that he and Watson had actually shot at the vacant house sometime between December 10, 2012 and December 27 2012. A82. The court, however, refused to reverse its decision excluding the evidence of the fourth shooting. *Id.*

<sup>7</sup> Joudrey testified that they believed Dempsey was a police officer because there was often a Humvee parked outside of his house and Watson had seen him driving around in it. Watson believed (correctly) that it was a law enforcement vehicle. A167-68; B33-34.

164, 167-68. In Maryland, Watson drove while Joudrey fired two rounds at Hall's house with the rifle. A165-66. Afterward, they headed into Delaware, where Joudrey drove while Watson fired three shots with the rifle at Dempsey's house. A166-67, 170-71.

Over defense counsel's objection, the Superior Court permitted the State to introduce at trial photographs of two tattoos on Watson's arms and of a spray-painted poster board located in Watson's basement. *See* A103, 118-19; Ex. A to Op. Br. The tattoos and the poster board all depicted the number 187. *Id.* Joudrey testified that he had asked Watson about his tattoos. A100. Watson told him that that number 187 meant officer down or murder on a cop. A101-02. Watson, said Joudrey, had painted the number on the poster board sometime around December. A103-05.

Watson presented no witnesses. *See* B86. In closing, defense counsel attacked Joudrey's credibility and implied that Watson was not present during the shootings. *See* B89, 91. Defense counsel argued that without Joudrey's testimony, all you have is evidence of two guys who liked to go out and shoot guns together. *Id.* "The State's theory is, Well [sic], these guys are gun fanatics and, therefore, if one of them did something, then the other one must have, too." B90.

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF TWO RELATED MARYLAND SHOOTINGS.

#### Question Presented

Whether the Superior Court abused its discretion when it permitted the State to present evidence that Watson and his co-defendant had shot at two police officers' residences in Maryland prior to shooting at Officer Dempsey's home.

#### Standard and Scope of Review

This Court "review[s] for abuse of discretion a trial judge's admission of evidence that is relevant for some purpose other than to prove the defendant's propensity to commit crimes pursuant to D.R.E. 404(b)."<sup>8</sup>

#### Merits of the Argument

Watson claims the Superior Court abused its discretion by admitting evidence regarding the Maryland shootings because it was not independently and logically relevant to prove the identity of the individual who had committed the offense in Delaware. Op. Br. at 8. He argues that identity was the only disputed issue at trial and the State had all of the evidence it needed at trial without the Maryland shootings to prove identity and the elements of the charged crimes. *Id.* at 8, 11. Watson claims "[n]o 'evidential purpose' was served by proof that the

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<sup>8</sup> *Campbell v. State*, 974 A.2d 156, 160 (Del. 2009) (citations omitted).

Defendant committed other similar crimes in Delaware. Watson's claim is unavailing.

In deciding to allow evidence of the Maryland shootings, the Superior Court opined that it was relevant to lack of mistake, state of mind and an ongoing conspiracy of intention or reckless conduct. A24, 33-35. Specifically, the court noted: "I think that the need for this is great in the sense that the State is attempting to establish this was no accident; this was no mistake; this was a reckless course of conduct or an intentional course of conduct that, fortunately did not lead to a tragedy, but could have led to a tragedy." A35.

Delaware Rule of Evidence 404(b) forbids the State from offering evidence of a defendant's other crimes, wrongs or acts in order to prove the character of a person in order to show action in conformity therewith. "The second sentence of D.R.E. 404(b), however, permits introduction of such evidence for reasons other than proving propensity, 'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"<sup>9</sup> In *Getz v. State* ("*Getz*"),<sup>10</sup> this Court established the following guidelines for admissibility of evidence under D.R.E. 404(b):

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<sup>9</sup> *Getz v. State*, 538 A.2d 726, 731 (Del. 1987) (quoting D.R.E. 404(b)).

<sup>10</sup> *Id.*



(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.”

(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.

(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>11</sup>

Watson challenges the Superior Court’s decision to admit the Maryland shootings evidence under the first and second prongs of the *Getz* test.

**A. The Superior Court Properly Found the Maryland Shootings Evidence Provided Independent Logical Relevance of Watson’s Plan, Motive and Intent.**

The State charged Watson with attempted first degree murder, first degree reckless endangering and first degree conspiracy. A11-13. As such, the State had a burden to prove the elements of each of those crimes, including that 1) Watson

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<sup>11</sup> *Id.* at 734 (citation and footnote omitted).

intended to kill someone by shooting at houses,<sup>12</sup> 2) his behavior was reckless and created a substantial risk of death,<sup>13</sup> and 3) that he and Joudrey agreed to attempt to kill someone by shooting at homes.<sup>14</sup>

Without the Maryland shootings, the State simply had a drive-by shooting at a house where a police officer just happened to live. In reality, however, Watson and Joudrey were specifically targeting houses with marked police vehicles outside. They fired a high-powered rifle at the houses late at night, at a time when the vehicles were there, meaning the officers were most likely home. Watson's plan, motive and intent for shooting at Dempsey's house was to cause harm to a police officer. Yet, his intention only becomes clear when viewed in the context of all three shootings. Because the State charged Watson with attempted intentional murder and recklessly disregarding a substantial risk of death, Watson's state of mind was vital to prosecution of the case.<sup>15</sup> Moreover, evidence that Watson was deliberately targeting police officers' homes was directly relevant to his motive.<sup>16</sup>

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<sup>12</sup> See 11 Del. C. § 636 (first degree murder); 11 Del. C. § 531 (attempt).

<sup>13</sup> See 11 Del. C. § 604 (first degree reckless endangering).

<sup>14</sup> See 11 Del. C. § 513 (conspiracy first degree).

<sup>15</sup> Cf. *Diaz v. State*, 508 A.2d 861, 865 (Del. 1986) ("Because the State attempted to convict the defendant of first degree murder, defendant's state of mind—his intent to kill—was vitally important to the prosecution of the case. The defendant's violent and abusive behavior toward the victim was probative of the defendant's attitude toward the victim and therefore of an intentional, not accidental, killing.").

<sup>16</sup> *Zimmerman v. State*, 565 A.2d 887, 889 (Del. 1989) (finding evidence of threat by defendant to do harm to victim a few weeks prior to charged incident was admissible under D.R.E. 404(b)).

Furthermore, the fact that that Watson and Joudrey shot at police officers' homes on multiple occasions supported the State's argument that Watson's intent in firing at officers' houses was premeditated and more than recklessness. *See* Trial Tr. Vol. D at 290 (“[T]he State would then submit, look at the actions. . . . [O]ne act was not enough; that he persisted with that; that he had an absolute awareness of that weapon and its capabilities. . . .”). As the Superior Court noted when it denied Watson's motion for judgment of acquittal as to first degree murder:

I agree with you that the State's case on that is probably weak. But in the light most favorable to the State, this is what, if I were the trier of the facts, I would consider. . . . There is evidence that he is targeting houses of unknown law enforcement officers. . . . And . . . had this not been [sic] a single incident, you would have a much, much stronger position. But you've got a situation that, apparently, the evidence is, until they're caught, they're going to shoot up police officers' homes and something bad is going to happen.

B85-86.

Watson argues, however, that because he did not argue lack of intent or that his behavior was not reckless, the State was prohibited from presenting the other crimes evidence in its case-in-chief based on the holding in *Taylor v. State* (“*Taylor*”).<sup>17</sup> Watson misconstrues the holding in *Taylor*. There, this Court held that the State may not preemptively offer evidence of bad acts in its case-in-chief

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to prove motive); *Pope v. State*, 632 A.2d 73, 75 (Del. 1993) (finding evidence of robbery leading to shoot out was admissible in trial for shoot out charges as relevant to prove motive).

<sup>17</sup> 777 A.2d 759, 766 (Del. 2001).

in order to rebut an anticipated affirmative defense.<sup>18</sup> However, this Court also held that the State may introduce evidence of other crimes “where that evidence is independently relevant to an issue or fact that the State must prove as part of its *prima facie* case.”<sup>19</sup> Here, the State had to prove intent as part of its *prima facie* case. Therefore, the Superior Court did not abuse its discretion in permitting the State to present the Maryland shootings evidence in its case-in-chief under D.R.E. 404(b).

Watson also argues that the Superior Court erred in finding the three shootings were inextricably intertwined. Op. Br. at 15-16. Specifically, the court noted: “So it’s almost an intertwined under Pope, an ongoing conspiracy where we’re taking the night of the 27th where we happened in Delaware and we’re taking this slice of time . . . . But, really, the crime began when they started conspiring and agreeing to do these things.” A33-34.<sup>20</sup> To the extent the court was referencing cases addressing whether prior bad acts are inextricably intertwined with a charged crime,<sup>21</sup> the doctrine is relevant because all three shootings together

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The court then later reiterated, “[a]s I said, this is – at least, the events of the 27th are almost inextricably intertwined.” A36

<sup>21</sup> *See, e.g., Pope*, 632 A.2d at 76 (noting that “evidence is ‘inextricably intertwined’ with the charged offenses and, therefore, does not implicate the constraints of Rule 404(b) . . . if it forms an integral and natural part of the witness’s accounts of the circumstances surrounding the offenses for which the defendant was indicted.” (citations omitted)).

explained Watson's behavior and showed the pattern of the shootings. Nevertheless, the court was merely referencing the doctrine and, instead, properly determined that the Maryland shootings evidence was admissible under D.R.E. 404(b).<sup>22</sup>

**B. The Superior Court's Limiting Instruction Alleviated any Potential Prejudice.**

The Superior Court gave the following limiting instruction to the jury regarding the Maryland shootings:

During the course of this trial, you have heard evidence that the defendant was allegedly involved in acts similar to his present charges; that evidence that [sic] the State alleged events occurring in Maryland. You may not use that evidence for the purpose that the defendant has a certain character or certain character trait with respect to the crimes charged in the indictment. You may not use that evidence as proof that the defendant is a bad person and, therefore, probably committed the indicted offenses. You may use that evidence only to help you in deciding whether the defendant was the person or one of the persons who committed the indicted offenses charged in the indictment now on trial and, if so, the defendant's state of mind. The State claims that the Maryland evidence shows that those acts and the Delaware acts were committed in the same peculiar, distinctive fashion. The State also claims that the prior acts in Maryland evidences the defendant's state of mind as to the present charges. Finally, the State claims the prior acts provide evidence that there was no mistake as to the defendant's intention or State of mind.

I repeat, you may not use this evidence as proof that the defendant is a bad person and, therefore, probably committed the charged

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<sup>22</sup> See *id.* ("It is *only* if the evidence of uncharged misconduct offered by the State is not admissible pursuant to any of the exceptions set forth in D.R.E. 404(b), or for any other consistent purpose, that a trial judge may consider the admissibility of such evidence pursuant to the carefully circumscribed 'inextricably intertwined' doctrine.").

offenses. You may only use the evidence as to the Maryland allegations for the reasons stated above. You, the jury, decide the weight and the value of this evidence.

B87-88. The instruction properly told the jury it could only consider the Maryland shootings evidence in connection with Watson's state of mind and absence of mistake. This jury instruction alleviated any possible threat of prejudice to Watson in the admission of the Maryland shootings evidence.

**C. The Admission of the Maryland Shootings Evidence Did Not Result in Prejudice to Watson.**

The jury acquitted Watson of the charge of first degree murder, instead finding him guilty of first degree reckless endangering. His acquittal of attempted murder supports a finding that the jury was not swayed by the evidence of the Maryland shootings to support the contention that Watson was intentionally trying to kill a police officer. Moreover, without the Maryland shootings, the case against Watson for reckless endangering first degree, PFDCF, conspiracy and criminal mischief was strong.

Joudrey testified that Watson had fired three shots at Dempsey's house and that he had used a Mosin-Nagant rifle and 7.62x54r ammunition. A170-71. Dempsey testified that his home had been shot three times and police recovered a fired 7.62x54r bullet in an interior room. B29, 31, 35, 80. Police recovered a Mosin-Nagant rifle with a 7.62x54r round still in the chamber from Watson's home. B62-64. The State's firearms examiner matched the bullet found in

Dempsey's home to the Mosin-Nagant rifle found in Watson's home. B79. The jury verdict acquitting Watson of attempted murder, but convicting him of the remaining charges demonstrates that even if there was arguably any error in admitting the Maryland shootings evidence, it was clearly harmless beyond a reasonable doubt and caused Watson no prejudice.<sup>23</sup>

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<sup>23</sup> See *Hawkins v. State*, 2006 WL 1932668, at \*3 (Del. July 11, 1996) (finding that although admission of prior misconduct constituted an abuse of discretion, such error was harmless beyond a reasonable doubt as this was "not a close case"); *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991) (quoting *Collins v. State*, 420 A.2d 170 (Del. 1980) (stating, in defining harmless error, "where the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction, error in admitting the evidence is harmless").

## **II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF WATSON'S TATTOOS AND A POSTER BOARD DEPICTING THE NUMBER 187.**

### **Question Presented**

Whether the Superior Court abused its discretion when it permitted the State to present evidence of Watson's tattoos and a painted poster board depicting the number 187, which Watson believed stood for "murder on a cop."

### **Standard and Scope of Review**

This Court reviews a trial court's decision to admit evidence for abuse of discretion.<sup>24</sup>

### **Merits of the Argument**

During trial, the court permitted the State to introduce, over Watson's objection, photographs of two tattoos Watson had on his arm, as well as of a poster board he had painted. The tattoos and the poster board depict the number 187. Joudrey testified that Watson had told him the number meant officer down or murder on a cop. A101-02. The State introduced no other evidence to explain the meaning of the number 187. Watson argues the admission of the photographs unduly prejudiced him because it permitted the jury to speculate about gang membership and to judge Watson "on the basis of character embracing other unknown, criminal objectives." Op. Br. at 19.

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<sup>24</sup> *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999).



Watson told Joudrey that 187 came from the California Penal Code. A101.<sup>25</sup> The jury, however, was not told that 187 had anything to do with gangs. According to Joudrey, Watson told him that 187, “officer down” was “his whole makeup,” that he lived by it. A101-02. Although Watson had made the tattoos himself when he was younger, Joudrey testified that he had watched Watson paint the poster board sometime around December, the month during which the two of them had shot at Officer Dempsey’s home. *See* A102-05. The real meaning of 187 was inapposite to the State’s case. The meaning of 187 to Watson, however, was directly relevant to his state of mind when he shot at Dempsey’s house.

This case is similar to *Joynes v. State*,<sup>26</sup> in which the State had introduced at trial the lyrics of a rap song written by the defendant. This Court found the Superior Court did not abuse its discretion in admitting the evidence, noting: “Writing a rap song is not a bad act. The song lyrics, however, stated that the complaining witness Morton was on [defendant’s] ‘hit list’ and that [defendant] was proposing to put the heads of his enemies on a shelf.” Thus, the rap song was relevant and material to show the defendant’s state of mind when he held a knife to

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<sup>25</sup> As noted by defense counsel on cross-examination, section 187 of the California Code addresses murder, but mentions nothing about killing police officers. *See* A248; Cal. Penal C. § 187. The term is popularly used as slang to mean murder, but it was infamously used in Dr. Dre’s song “Deep Cover,” to refer to murder of an undercover police officer. *See* [http://en.wikipedia.org/wiki/Deep\\_Cover\\_\(song\)](http://en.wikipedia.org/wiki/Deep_Cover_(song)); <http://rap.genius.com/Dr-dre-deep-cover-lyrics> (last viewed Sept. 15, 2014) (Dr. Dre and Snoop Dog sing in the hook, “[y]eah, and you don’t stop, ‘cause it’s 187 on an undercover cop.”).

<sup>26</sup> 797 A.2d 673, 677 (Del. 2002).

the complaining witness's neck. Here, too, tattooing oneself with the number 187 is not a bad act, but it was directly relevant to proving Watson's motive and intent in shooting at a police officer's home.<sup>27</sup> The Superior Court acted within its discretion when it admitted the photographs of the tattoos and the poster board.

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<sup>27</sup> Cf. *Marvel v. State*, 2007 WL 2713271, at \*2 (Del. Dec. 18, 2007) (“Here, the fact that Marvel was convicted of rape (and not some other, less personal, violent crime), provides compelling evidence to explain Marvel's motive to get revenge against Vinguerra—the victim and complaining witness.”).

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: September 16, 2014

**CERTIFICATION OF MAILING/SERVICE**

The undersigned certifies that on September 16, 2014, she caused the attached *State of Delaware's Answering* and *Appendix to State of Delaware's Answering Brief* to be delivered to the following person in the form and manner indicated:

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