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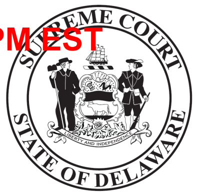

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN RASIN,	
Defendant-Below, Appellant,	No. 325, 2012C
v.	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY
STATE OF DELAWARE,	
Plaintiff-Below, Appellee.	

MARC T. TAYLOR,	
Defendant-Below, Appellant,	No. 293, 2012C
v.	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY
STATE OF DELAWARE,	
Plaintiff-Below, Appellee.	

STATE'S CONSOLIDATED ANSWERING BRIEF

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Dated: March 1, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant Rasin was arrested on September 17, 2010, and subsequently indicted for Gang Participation, two counts of Murder First Degree, two counts of Attempted Murder First Degree, three counts of Conspiracy Second Degree, two counts of Possession of a Firearm During the Commission of a Felony (PFDCF) and two counts of Possession of a Firearm by a Person Prohibited (PFBPP). (A23-38).[1]

Appellant Marc Taylor was arrested on August 10, 2010, and subsequently indicted for Gang Participation, Conspiracy Second Degree, two counts of PFBPP, Assault Second Degree, PFDCF, Possession With Intent to Deliver, Resisting Arrest and Non-Compliance with Bond. (A23-38).

Rasin and Taylor were indicted as co-defendants along with Terrence Mills, Quincey Thomas, Jeroy Ellis, Kevin Fayson, Darnell Flowers and Terry Smith. (A23-38). Prior to trial, their co-defendants entered guilty pleas pursuant to agreements with the State. Mills pled to Gang Participation, Manslaughter and PFDCF. (A190). Thomas pled to Manslaughter, Conspiracy Second Degree, and PFDCF. (B-199). Ellis pled to Conspiracy Second Degree. (B-93). Fayson pled to Robbery First Degree, Conspiracy Second Degree and PFDCF. (B-148). Flowers pled to Gang Participation, Robbery Second Degree and Conspiracy Second Degree. (B-81). Smith pled to Robbery Second Degree and Conspiracy Second Degree. (B-134). By separate indictment but related to the case, Valentine pled to Conspiracy Second Degree. (B-117).

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[1] "A" cites specify references to Rasin's Appendix.

On January 23, 2012, Rasin filed pre-trial motions to sever charges, dismiss Count I of the Indictment (Gang Participation), and exclude DNA evidence. Superior Court denied Rasin's motions at a pre-trial hearing[2] on February 3, 2012. (A109-120). Also on February 3, 2012, the State entered a nolle prosequi as to one charge of Murder First Degree and its associated PFDCF charge against Rasin. (A15, D.I. 104). On February 7, 2012, Rasin filed a motion in limine regarding Rasin's prior convictions (A79), which Superior Court denied on February 14th. (A121-23).

Jury trial began on February 14, 2012. On March 19, 2012, Rasin was convicted of Gang Participation, Murder First Degree, Attempted Murder First Degree, two counts of Conspiracy Second Degree, two counts of PFBPP and PFDCF. (A21, D.I. 136). Taylor was convicted of Gang Participation, Assault Second Degree, PFDCF, two counts of PFBPP and Non-Compliance with Bond. (Taylor D.I. 81). They have appealed their convictions. This is the State's Consolidated Answering Brief.

[2] At Rasin's request, the court revisited the DNA issues during trial and ultimately the DNA evidence was admitted. (A186-189; 224-225).

SUMMARY OF THE ARGUMENT

I. **Denied.** Delaware's Gang Participation Statute, 11 *Del. C.* § 616, is constitutional. The phrase "active participation" is unambiguous and is attributed its plain meaning. Section 616 sufficiently advises persons of the conduct which is prohibited and is understandable to the ordinary person. In addition, constitutionally protected conduct is not restricted. Sufficient evidence of Taylor's gang participation and other crimes was presented at trial justifying his conviction.

II. **Denied.** The Superior Court did not abuse its discretion in denying the motion to sever Count I (Gang Participation). Rasin cannot prove joinder caused him a reasonable probability of substantial prejudice. The evidence of gang participation was inextricably intertwined with the evidence of the other charges and would have been admissible even if the charges were severed.

III. **Denied.** The Superior Court did not abuse its discretion in allowing the State to introduce evidence of Rasin's prior drug convictions when the indictment alleged them to be predicate acts of Gang Participation. Evidence of the prior convictions had a very high probative value that was not substantially outweighed by unfair prejudice.

IV. **Denied.** The Superior Court did not abuse its discretion in allowing the State to introduce a Trapstars' rap video. It was direct evidence of Gang Participation rather than character or prior bad act evidence. Moreover, even if this Court concludes that it was prior

bad act evidence, the Superior Court properly analyzed admissibility under *Getz*[3] and *Deshields.*[4]

V. **Denied.** The Superior Court did not abuse its discretion in admitting as relevant an expert report and testimony that the Y-STR DNA test showed that Rasin could not be excluded as a contributor to the DNA found on the gun used in the April 30 and May 3 shootings. Even though the Y-STR results were not as definitive and could not be subjected to the statistical analysis like the autosomal STR result regarding Taylor, the Y-STR results had probative value.

VI. **Denied.** The Superior Court did not abuse its discretion in admitting the hearsay statement of a neighborhood boy that "Gunner shot him." It was a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter."[5] Moreover, if this Court finds the admission to be an abuse of discretion, any such error was harmless. The State presented other evidence sufficient to prove that Taylor shot the victim.

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[3] *Getz v. State*, 538 A.2d 726, 734 (Del. 1988).

[4] *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

[5] Del. R. Evid. 803(1).

STATEMENT OF THE FACTS

In 2006 or 2007, friends from the City of Wilmington's west side formed a rap group, calling themselves Trapstars. (B–74 & 85; B–149). The Trapstars performed rap songs in their neighborhood and at clubs. They posted videos and photographs on YouTube and Facebook and wore black hoodies depicting their "Trapstars" logo.[6] (B–23; B–75; B–85; B–150–51). By 2008, the Trapstars had become a criminally active gang. (A23–38). Members of the Trapstars included Appellant Kevin Rasin ("Jr. Black"), Appellant Marc Taylor ("Gunner", "Guntown", "Dreads" or "G"), Kevin Fayson ("Trapstar Kev"), Terrance Mills ("Trapstar Mills"), Darnell Flowers ("Trapstar Murda"), Jeroy Ellis (Trapstar Tone") and Quincey Thomas ("CEO"). Known associates were Robert Valentine ("Rico") and Terry Smith. (B–22; B–24; B–149–50; B–161). The Trapstars obtained money to promote their rapping by selling drugs. Their rap lyrics discussed selling drugs and shooting guns. (A271–72; B–150–51; B–152). Rasin sold marijuana and heroin, Fayson sold heroin, and Mills, Flowers and Ellis sold marijuana at 3rd & Harrison Streets. (B–5; B–74; B–94; B–151). After he met Rasin in jail in 2008, Taylor joined the gang. (B–161–62; B–214). Taylor and Rasin sometimes sold drugs together. (B–161–62). Taylor dealt heroin and cocaine on 8th & Adams Streets where his girlfriend, Lamyra Bundy, lived. (B–7; B–64; B–82–83; B–120).

The Trapstars had a "Trap House," the home of Nakevis Walker, where they stored firearms, money and drugs. (B–153). In December

[6] The Trapstars insignia portrayed two guns and the saying "Trapstars trap hard" flanked by wings. (B–75). "Trapping hard" means "sell drugs hard." (B–150). Being a Trapstar means you are a good drug dealer. (B–27).

2009, Tyaire Brooks and Carlos Rodriguez, who were members of another gang referred to as "Pope's Group,"[7] burglarized the "Trap House" in retaliation for drug money Mills owed them. (B-95; B-152). Money, drugs and other items were taken (A149). The Trapstars, as a group, decided to retaliate. (B-155).

A couple of weeks later, on 4th Street, Mills, his mother and Ellis confronted Brooks and Rodriguez about the burglary. They fought. (A158-59). Hill came to the aid of Pope Group's, shooting a gun in the air and thus ending the fight. (A159; B-96; B-203). Three weeks later, Mills started another fight, this time with Carlos Rosa at 7th & Franklin Streets. Ellis, Brooks, and Hill were again present. The fight ended when Hill took Mills' gun and pointed it at him. (A160; B-96).

Everyone was aware of the "beef" between the two gangs and problems continued to escalate. (B-204). Members of Pope's Group saw Mills repeatedly driving past Alvan Butcher's house. (A160; A180). Then, on February 28, 2010, Trapstar Fayson and a Latin King gang member were involved in a drug deal that turned into the robbery and murder of Anthony Doyle. As a result, Hill, who was related to Doyle, became more angry. (B-158-59; B-176; A195). On March 3, 2010, Hill shot at Fayson in front of the Metro PCS store. (B-159-60). On April 3, 2010, Pope's Group continued its attack on the Trapstars. Brooks, Hill, Charriez and Rosa went to Mills' house. (B-22). Hill shot

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[7] "Pope's Group" consisted of Jose Charriez ("Pope"), Brooks ("Gunner"), Rodriguez ("Dossi", "Little Los", or "Los"), Carlos Rosa ("Little Los" or "Los"), David Hill ("Black" or "Black Key"), Carlos Collazo ("Big Los"), Alvan Butcher and Marcus Crawford ("Marky D"). (B-22; B-26).

through Mills' front door, almost striking Mills' sister. (A160-61; B-28-29). The police arrested Charriez and Hill. (B-29a & 29b). The next day the Trapstars, including Rasin and Taylor, met at Fayson's house, discussed revenge and agreed to set up positions with weapons in the area of 3rd & Franklin Streets. (B-79; B-100; B-101; B-160-64; B-178-79).

On April 5, 2010, in the 1200 block of W. 3rd Street, Rodgriguez and Brooks saw Mills and Quincey Thomas in a car circling the block. (A161; B-22). They contacted Butcher, who arrived and gave a gun to Rodriguez. Thomas and Mills confronted Butcher in the street and began shooting at him. Rodriguez returned fire. (B-39-40; B-201). Butcher was shot multiple times and died. (A161-62; B-35-37). Police recovered a .32 revolver that Rodriguez had thrown in a backyard. (B-38). Also found were .25-caliber and 9-mm casings and 3 projectiles. (B-31; B-38). Later, Rasin was seen in the area complaining that "the girls told." (B-33-34). The next day, April 6th, Ellis's parked white Mercury Marquis was set on fire. (B-99; B-139).

After Butcher's murder, Pope's Group decided to shoot Trapstars on sight, putting a bounty out for them. (A162-63; A172; B-130; B-162). The area of 3rd & Harrison became too dangerous for the Trapstars, so they moved their gang to 8th & Adams Streets, where Taylor was living. (B-82-83).

On April 30, 2010, in the area of Stroud & Marshall Streets, Fayson, accompanied by Rasin, and armed with a 9-mm gun procured through Taylor, repeatedly shot at Jazzmon Smith and Kenneth Swanson

("Chez" or "Shiz"),[8] as they were driving in a maroon Chevy Malibu. (B-41-42; B-52-53; B-166-68). Rasin and Fayson fled the scene in Rasin's Pontiac. (B-44; B-208-09). Fayson gave the 9-mm gun to Rasin. (B-168-69). Wilmington Police Department ("WPD") recovered three 9-mm casings with red primer at the scene. (B-46).

On May 3, 2010, the maroon car Fayson had repeatedly shot on April 30th was stopped for an unrelated matter by the Delaware State Police (DSP). (B-47). DSP found three bullet holes in the passenger side of the car and recovered two bullets. (B-47; B-49-50). One bullet had entered the passenger-side door, traveled through the car, and was lodged in the driver-side door panel. (B-50).

At approximately 9:00 p.m. on May 3, 2010, Pope's Group members Crawford and Charriez were driving down Adams Street in Crawford's black Impala. As they were stopped at a red light at 9th & Adams Streets, Rasin, in a dark grey and black striped hoodie and armed with a 9-mm gun, ran into the street behind their car and began shooting at them. (B-11-13; B-88-89; B-124). Crawford immediately drove off, taking Charriez, who had been shot in the head, to the Wilmington Hospital. Charriez died. (B-54; B-89). Eight 9-mm shell casings, most with red primer, were recovered in the 800 block of N. Adams Street Police determined that, in addition to Charriez being killed, Crawford's car had been struck by gunfire at least five times, including both front tires, which were flat, and a rear taillight. (B-54-55; B-57-61; B-90).

[8] Swanson was related to Butcher. After Butcher was killed, the Trapstars had heard that Swanson wanted revenge. Swanson also refused to pay Rasin drug money he owed him. (B-165-166).

Taylor, Valentine and Fayson were with Rasin at 8th & Adams Streets both before and after Charriez' homicide. (B-71-72; B-84; B-122). Erica Jenkins witnessed the murder and went immediately inside her home, telling her girlfriend, Felicia McKinnon, that Rasin had just shot somebody in a car. (B-68; B-69). Rasin later apologized to Jenkins for jeopardizing the kids on the street. (B-14). Rasin and Fayson also told fellow Trapstars that Rasin killed Charriez. (B-84; B-98). Rasin gave the 9-mm gun to Taylor to clean and reload. (B-173).

Around 12:30 a.m. on May 6, 2010, Taylor, after seeing a member of Pope's Group, was shot while walking in the 800 block of N. Adams Street. (B-14; B-92; B-173). He fled into the home of Julie DeLeon ("Mommy") and hid in her entertainment center a 9-mm Hi-Point gun, that WPD found almost immediately. (B-102-04; B-105; B-128-29; B-174; B-194; B-196-97).

At approximately 1:00 a.m. on May 15, 2010, Larry Whye was confronted in the 800 block of N. Adams Street by Valentine and Taylor. (B-14-15; B-115; B-205-06). Not knowing them and assuming they were trying to rob him, Whye ran away. (B-114). Taylor, irrationally thinking that Whye had been following him, shot Whye, hitting him in the wrist. (B-108; B-126-27; B-175). Jenkins also witnessed this shooting and testified that Maleek, a little boy from the block, said that "Gunner" had shot someone. (B-15). Police found a 9-mm gun underneath a nearby car and six 9-mm shell casings in the block. (B-132).

On May 25 & 26, 2010, Fayson, Flowers and Terry Smith committed stranger robberies in Newark. (B-80-81; B-135-37; B-138).

On August 10, 2010, WPD was conducting surveillance in the 800 block of N. Adams Street and saw Taylor, who had an active no contact order with the area, engage in a hand to hand drug transaction. (B-16; B-18; B-21; B-207; B-215-16). As police moved in, Taylor threw a bag of cocaine and ran. (B-17; B-19). The large piece of cocaine found in the bag weighed 2.26 grams, had an approximate street value of $200, and was packaged for break-off sale. (B-20-21).

On September 17, 2010, WPD executed a search warrant at 189 Alton Avenue, Clayton, Delaware, where Rasin was living with his mother. (B-90). Located in Rasin's bedroom were a laptop and a striped sweatshirt matching the description of the one he wore when he killed Charriez. (*Id.*). Pictures of Rasin wearing the sweatshirt were on the laptop. (B-91).

DSP Firearm & Toolmark Examiner Carl Rone analyzed ballistic evidence collected from the crimes. (B-180-91). The same 9-mm gun Taylor hid in DeLeon's entertainment center on May 6, 2010 was used in the April 30th attempted murder of Smith and Swanson and the May 4th Charriez murder. (B-184-86). Both Fayson and Valentine confirmed that the 9-mm gun was shared among Valentine, Fayson, Rasin and Taylor. (B-169; 149-52; B-177-78).

I. The Gang Participation Statute codified in DEL. CODE ANN. tit. 11, § 616, is constitutional.

Question Presented

Is Delaware's Gang Participation Statute constitutional?

Standard and Scope of Review

Challenges to the constitutionality of a statute are reviewed *de novo*.[9]

Merits of Argument[10]

Count I of the indictments against Rasin and Taylor charged Gang Participation in violation of 11 *Del. C.* § 616. In pertinent part, section 616(b) states:

> Forbidden conduct. – A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law, shall be guilty of illegal gang participation.

A. Vagueness & Overbreadth Challenge

Rasin's pretrial motion, joined by Taylor, to dismiss Count I of the indictment asserting that § 616 was unconstitutionally vague was denied by the Superior Court. (A115-117). Here, they again claim the Gang Participation Statute is void for vagueness because although § 616(a) provides definitions for "criminal street gang" and "pattern of

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[9] *Thomas v. State*, 725 A.2d 424, 427 (Del. 1999) (citing *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997). *Accord Steckel v. State*, 882 A.2d 168, 170 (Del. 2005).

[10] This argument addresses argument I of Rasin's opening brief and argument II of Taylor's opening brief.

criminal activity," it does not define the phrase "active participation."[11]

"A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that its contemplated behavior is forbidden" or "if it encourages arbitrary or erratic enforcement."[12] This Court employs a two-step analysis to determine whether a criminal statute is unconstitutionally vague, considering: 1) whether the terms of the statute are sufficiently explicit to inform those subject to it of the prohibited conduct; and 2) whether the terms of the statute are so vague that persons of common intelligence must guess at the statute's meaning and would differ as to its applications.[13]

"Enactments of the Delaware General Assembly are presumed to be constitutional."[14] This Court's task is to "read statutory language so as to avoid constitutional questionability and patent absurdity and to give language its reasonable and suitable meaning."[15]

When examining the construction of a statute, this Court has held that "where the intent of the legislature is clearly reflected by

[11] DEL. CODE ANN. tit. 11, § 616(a)(1) & (2) (2009); Rasin Op. Brf. at 9. Taylor Op. Brf. at 13-21.

[12] *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008) (*citing State v. Baker*, 720 A.2d 1139, 1147 (Del. 1998)); *Sanders v. State*, 585 A.2d 117, 127 (Del. 1990).

[13] *Hoover,* 958 A.2d at 820-21.

[14] *Hoover*, 958 A.2d at 821; *Snell v. Engineered Systems & Designs, Inc.*, 669 A.2d 13, 17 (Del. 1995).

[15] *Hoover*, 958 A.2d at 821 (quoting *Moore v. Wilmington Hous. Auth.* 619 A.2d 1166, 1173 (Del. 1993).

unambiguous language in the statute, the language itself controls."[16] When the language is unmistakable, words are given their plain meaning.[17]

The State of California's street gang statute is substantially similar to Delaware's gang participation statute.[18] It has been upheld by the California Supreme Court and used effectively in multiple prosecutions.[19] In *People v. Castenada*, the California Supreme Court addressed the specific issue Appellants now raise – no statutory definition for the phrase "active participation."[20] In upholding the constitutionality of the statute, the California Supreme Court considered the usual and ordinary meaning of the words "actively" and "participates" found in the American Heritage Dictionary.[21] Based upon these definitions, the court decided that one "actively participates"

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[16] *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 20, 23 (Del. 1994) (quoting *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)); *see also Street v. State*, 669 A.2d 9, 12 (Del. 1995); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).

[17] *See Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

[18] *See* CAL. PEN. CODE § 186.22 – Street Gang. While Delaware's statute prohibits the "knowing" promotion, furtherance or assistance in gang members' felonious criminal conduct, California's law, prohibits the "willful" promotion, furtherance or assistance in such acts. *Compare* DEL. CODE ANN. tit. 11, § 616(b) (2009) *with* CAL. PEN. CODE § 186.22 (a). *See People v. Castenada*, 3 P.3d 278 (Cal. 2000).

[19] *See, e.g., Lobretto v. D.K. Sisto*, 2013 WL 509160, *30 (E.D. Cal. Feb. 12, 2013); *People v. Albillar*, 244 P.3d 1062, 1068-70 (Cal. 2010); *People v. Sanchez*, 2013 WL 500391, *9 (Cal. Ct. App. Feb. 11, 2013); *People v. Serrano*, 2013 WL 441960, *9 (Cal. Ct. App. Feb. 6, 2013); *Castaneda*, 3 P.3d at 285.

[20] *Castaneda,* 3 P.3d at 281.

[21] *Id*.

in some enterprise or activity by taking part in it in a manner that is not passive.[22] The court further acknowledged that the United States Supreme Court had already found that the distinction between "active" and "nominal" membership is well understood in "common parlance."[23] Thus, in the context of its street gang statute, the court defined "active participation" as "involvement with a criminal street gang that is more than nominal or passive."[24]

Here, like California's statute, the phrase "active participation" is unmistakably clear, meaning more than nominal or passive participation. Such meaning reflects the General Assembly's unambiguous intention to forbid such participation in a violent street gang, when that participation assists the gang in furthering activity which would constitute a felony under Delaware law."[25]

Employing this Court's two-part test, the plain language of section 616(b) sufficiently advises persons of the conduct which is prohibited. The statute's specific words do not lend themselves to disagreement and are understandable to the average person.[26] Appellants' claim that section 616 is unconstitutionally vague fails.

To the extent that Appellants claim that section 616 is unconstitutionally overbroad because it places limits upon their

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[22] *Id.*

[23] *See Scales v. United States*, 367 U.S. 203, 223 (1961).

[24] *Id.*

[25] *See* Sen. Bill No. 98, 142nd Gen. Ass. (Synopsis) (Del. 2003). (B-230-32).

[26] *Hoover,* 958 A.2d at 820-21.

freedom of association rights, they are mistaken. A statute is unconstitutionally overbroad if it "does not aim specifically at evils within the allowable area of government control, but sweeps within its ambit other activities that constitute an exercise of protected expressive or associational rights."[27]

When a statute faces an overbreadth challenge, the "threshold inquiry is whether the statutory reach encompasses a substantial category of constitutionally protected conduct."[28] Because section 616 does not restrict constitutionally protected conduct, Appellants' argument fails.

Section 616 forbids a person's non-passive participation in a street gang when that person has knowledge of the members' pattern of criminal activity and also "knowingly promotes, furthers or assists in any criminal conduct by members of the gang which would constitute a felony under Delaware law." No First Amendment right exists to associate or assemble for the purpose of promoting or conducting imminent criminal or delinquent acts.[29] In other words, whatever associational rights a criminal gang may have, such rights do not extend to knowingly promoting, furthering or assisting felonious criminal conduct by members of the gang.

Appellants' contention that section 616 is overbroad because it criminalizes non-criminal conduct also fails. None of the examples

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[27] *Wien v. State*, 882 A.2d 183, 186-87 (Del. 2005) (*citing State v. Baker*, 720 A.2d at 1144-45).

[28] *Id.*

[29] *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Cole v. Arkansas,* 338 U.S. 345, 352-54 (1949).

cited – a bar's rental of a party room where underage drinking or drug use takes place; the mere wearing of a Trapstars or Eagles shirt; being a member of an organization that employs felons or has illegal gambling on the premises; or a person assisting in the commission of misdemeanors or traffic offenses[30] – fall into the description of forbidden conduct as set forth in 11 *Del. C.* § 616(b). Section 616 does not criminalize membership in a group *per se*. What makes section 616 sufficiently narrow so as not to punish non-criminal conduct is the requirement of an illegal purpose: knowingly promoting, furthering or assisting in any felonious criminal conduct by members of the gang.[31]

B. Sufficient Evidence Presented Proving Taylor Guilty of Gang Participation

Part of Taylor's constitutional challenge to section 616 is his claim that the State presented insufficient evidence to support his gang participation conviction.[32] This Court reviews a sufficiency of the evidence claim *de novo* to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt."[33] Deference is given to the "trier of fact's factual findings, resolution of witness credibility, and drawing of inferences from proven facts."[34]

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[30] Rasin Op. Brf. at 12; Taylor Op. Brf. at 7-8 & 19-20.

[31] *See Lobretto*, 2013 WL 509160 at *30.

[32] Taylor Op. Brf. at 15-18.

[33] *Wright v. State*, 25 A.3d 747, 751 (Del. 2011) (quoting *Farmer v. State*, 844 A.2d 297, 300 (Del. 2004)).

[34] *Id.* (quoting *Morgan v. State,* 922 A.2d 395, 400 (Del. 2007)).

Taylor argues that the Trapstars do not fit the definition of a criminal street gang[35] and presumably, even if it did, Taylor was not part of the gang and was unaware of the members' criminal activities. Taylor further claims that the crimes in which he was involved, both as a victim and defendant, were unrelated to the Trapstars.[36] Taylor's arguments lack merit.

Obtaining a conviction under section 616 requires consideration of three factors. Under section 616(b), a person must be found to: 1) have actively participated in a criminal street gang; 2) while knowing that its members engaged in a "pattern of criminal gang activity" which is defined as "the commission of[,] attempted commission of, conspiracy to commit, solicitation of, or conviction of 2 or more of" offenses set forth in section 616(a)(2) by two or more persons or on separate occasions;[37] and 3) knowingly promotes, furthers or assists in

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[35] Criminal street gang is defined as "any ongoing organization, association, or group of 3 or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraph (a)(2) of this section, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." DEL. CODE ANN. tit. 11, § 616(a)(1) (2009).

[36] Taylor Op. Brf. at 15–20.

[37] The offenses contained in section 616(a)(2) include, but are not limited to: assault; murder; manslaughter; rape; unlawful sexual conduct; sexual extortion; continuous sexual abuse of a child; dangerous crimes against a child; sexual abuse of a child by a person in a position of trust, authority or supervision; unlawful imprisonment; kidnapping; arson; burglary; home invasion; robbery; theft of property; receiving stolen property; riot; hate crime; stalking; carrying a concealed deadly weapon; possession of a destructive weapon; possession of deadly weapon during commission of a felony; PFDCF; possession and purchase of a deadly weapon by a person

any felonious conduct by members of that gang.[38] The jury found Taylor guilty of gang participation and specifically found a "pattern of criminal activity" consisting of PFBPP on May 6, 2010, Assault Second Degree and PFDCF on May 15, 2010, and Possession of Cocaine on August 10, 2010, which are all offenses listed as possible predicate acts under section 616.[39]

At trial, the State presented evidence that the Trapstars, whose name stood for expert drug-dealers (B-27), not only performed rap songs but also sold drugs. (B-5; B-74). They had a "Traphouse," where the gang stashed common money, drugs and weapons. (A157; A167-68; B-74; B-77; B-86; B-95; B-153). In addition to selling drugs and writing and performing rap songs glorifying their criminal behavior, the Trapstars also had hoodies emblazoned with their logo that included their well known drug saying: "Trapstars trap hard." (B-6; B-150).

The Trapstars and Pope's Group were settling scores throughout the spring and summer of 2010. Testimony revealed that the Trapstars discussed reprisal against Pope's Group more than once; first, after the Traphouse burglary. (B-155). The Trapstars, including Taylor, again discussed reprisal after the April 4th shooting at Mill's house. (B-97; B-101). Similarly, Pope's Group discussed shooting the Trapstars on sight. (A162-63; A172-75).

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prohibited; various drug crimes defined in DEL. CODE ANN. tit. 16, ch. 47. DEL. CODE ANN. tit. 11, § 616(a)(2) (2009).

[38] DEL. CODE ANN. tit. 11, § 616(b) (2009).

[39] *See* Verdict Sheet for Mark Taylor (B-225-229).

While Taylor was not a founding member of the Trapstars, he did join them, after meeting Rasin in jail. He dealt drugs with Rasin and hung out together with the Trapstars. (B-7; B-82-83; B-94; B-119-20; B-149; B-161-62). Taylor held guns for the gang. (B-83). Fayson distinctly remembered that after the shooting at Mills' house, Taylor verbally expressed his commitment to Trapstars membership saying, "Man, I'm with you all," and he obtained a 9-mm gun for them. (B-161; B-169). Taylor was present in the area and armed when Butcher was killed, and he was with gang members, including Rasin, moments before and after Rasin killed Charriez on May 3, 2010. (B-7-8; B-14; B-71, B-84; B-98; B-101; B-122; B-163-64; B-179). Two days later, Taylor was shot on the same block and hid the shared 9-mm that had been originally obtained by him and used by Fayson on 4/30/10 and Rasin on 5/3/10. (B-169; B-184-86).

Taylor's DNA was linked to the gun almost conclusively through autosomal STR testing. (A217-18). The jury convicted Taylor, both independently and as a predicate act constituting part of the "pattern of criminal activity" under the gang participation statute, to possessing that gun while being prohibited.

Taylor told Fayson that he shot Whye on May 16, 2010, because he thought that Trapstar troubles were continuing and Whye was following him. (B-174-75). Valentine, who entered a guilty plea to conspiracy second degree for his part in Whye's shooting, confirmed that Taylor committed the shooting because he was paranoid about being followed. (B-117; B-126). Based upon evidence presented at trial, including witness identifications and Taylor's admission to Fayson, the jury

convicted Taylor of Assault Second Degree and PFDCF, both independently and as a predicate act under the gang-participation statute. (B-113; B-115; B-117; B-126; B-174-75).

On May 26, 2010, the police executed a search warrant at 816 N. Adams St., Apt. 2, where Taylor spent a majority of his time. (B-140). At that time, police found Taylor's cell phone screen-named "Sucka Free G." (B-141). Taylor's associated cell number of (302) 333-8071 was confirmed on June 9, 2010, through Fayson's sister, Shameca, who knew that Taylor, Rasin and Fayson hung out together. (B-211-13; B-217). Fayson's cell phone records from between March 28 and June 1, 2010 revealed that Fayson and Taylor contacted each other numerous times. (B-217). Rasin's cell phone records from April 5-6, 2010, revealed that Taylor and Rasin had called each other 17 times immediately surrounding the time Butcher was killed. (B-218).

Taylor also sold drugs at 8th and Adams Streets, the Trapstars' second known location. (A181; B-82-83; B-122). On August 10, 2010, Taylor was arrested for drug dealing in that area. The jury subsequently convicted him, both independently and as a predicate act under Count 1 – Gang Participation, of the lesser-included charge of possession of cocaine. Ample evidence was presented at trial for the jury to find Taylor guilty of the charges for which he was convicted.

II. The Superior Court properly denied Rasin's motion to sever the gang participation charge.

Question Presented

Did the Superior Court abuse its discretion in denying Rasin's motion to sever the gang participation charge?

Standard and Scope of Review

This Court reviews the denial of a motion to sever for abuse of discretion.[40]

Merits of Argument[41]

Superior Court Criminal Rule 8 provides that two or more offenses may be charged in the same indictment if the offenses are of the same or similar character or are based on two or more transactions connected together or constituting parts of a common scheme or plan. Rule 8(a) is designed in part to promote judicial economy and efficiency, objectives which outweigh a defendant's unsubstantiated claim of prejudice.[42] However, if the defendant shows that he is substantially prejudiced by the joinder, the court may sever counts of an indictment.[43]

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[40] *Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990). *See also Burton v. State*, 149 A.2d 337, 339 (Del. 1959) (prejudice review will not be reversed except for clear abuse of discretion).

[41] This argument addresses argument II in Rasin's opening brief.

[42] *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974).

[43] SUPER. CT. CRIM. R. 14; *Skinner*, 575 A.2d at 1117–18.

The defendant has the burden of demonstrating such prejudice, and "mere hypothetical prejudice" is not sufficient.[44] Prejudice that the court considers includes that:

> 1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; 2) the jury may use evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crimes; and 3) the defendant may be subject to embarrassment or confusion by presenting different defenses to different charges.[45]

But, a defendant is not entitled to severance merely because he might stand a better chance of being acquitted of one or the other charges in separate trials.[46]

The Superior Court denied Rasin's motion to sever the gang participation charge after finding that there was no prejudice to Rasin. (A116-17). On appeal, Rasin claims that the court abused its discretion in denying severance of the gang participation charge. However, Rasin's claim is based on a fatally flawed premise. Rasin claims that, because he was facing murder charges, he was prejudiced by introduction of evidence regarding his drug dealing.[47] Rasin's argument presupposes that evidence of his drug dealing would not have been admissible in a trial of the remaining charges. However, evidence of gang participation, including the drug dealing predicate

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[44] *Skinner*, 575 A.2d at 1118 (citing *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978)).

[45] *Weist v. State*, 541 A.2d 1193, 1195 (Del. 1988).

[46] *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989).

[47] Rasin does not dispute that the charges were properly joined under Rule 8.

act, would have been admissible in a separate trial of the remaining charges.

"Although reciprocal admissibility is not a prerequisite for initial joinder, reciprocal admissibility is a pertinent factor for the trial court to consider."[48] "Where proof of more than one crime is 'so inextricably intertwined so as to make proof of one crime impossible without proof of the other,' the offenses should not be severed."[49] Indeed, "where evidence concerning one crime would be admissible in the trial of another crime ... there is no prejudicial effect in having a joint trial."[50]

Drug-dealing linked the Trapstars as a "criminal street gang" and was a "predicate act" of gang participation *and* was a cause of the dispute that culminated in the murders and attempted murders. The dispute between the Trapstars and Pope's Group began with a drug deal gone bad -- Brooks gave Mills $300 to buy marijuana for him, but Mills neither provided the marijuana nor returned the $300. Therefore, Rodriguez and Brooks burglarized the Trapstars' "Traphouse" and took what was owed and more. (B-1-2; B-153). When the Trapstars learned

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[48] *Skinner,* 575 A.2d at 1118 (finding evidence of 2 separate robberies could have been admissible in separate trial of third incident involving an attempted robbery/murder to establish defendants' intent at the time of the attempted robbery).

[49] *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *McDonald v. State*, 307 A.2d 796, 798 (Del. 1973)).

[50] *Bates*, 386 A.2d at 1142. *See also People v. Garcia,* 2009 WL 2902040, at *8 (Cal. Ct. App. Sept. 10, 2009) (affirming denial of motion to sever robbery and assault charges from street terrorism charge (same elements as 11 *Del. C.* § 616) where evidence of gang participation was cross-admissible to prove motive for the robbery and assault charges).

that members of Pope’s Group had committed the burglary, they started a fight with Pope’s Group. That fight was the first in a series of incidents that led to the murders of Butcher and Charriez and attempted murders of Swanson and Smith. Although making rap music may have been the impetus for the Trapstars’ association, the group then became linked by drug dealing, and decided as a group to retaliate against members of Pope’s Group because of a dispute begun by a drug debt. Thus, evidence of Rasin’s drug dealing, as well as the drug dealing of other Trapstars and the rivals in Pope’s Group, is integral to proving the conspiracy charges and the motive for the murders and attempted murders. Consequently, even if severance had been granted, evidence of Rasin’s drug dealing would have been admissible to prove that: Rasin was part of the Trapstars operating at 3rd and Harrison and then 8th and Adams; there was a “beef” between the Trapstars and Pope’s Group; Rasin was part of the conspiracy to retailiate; and, at bottom, the Trapstars’ drug dealing was the link without which the murders and attempted murders would not have occurred.

Further, there is no evidence that the jury either cumulated evidence among the counts or inferred a criminal disposition to find Rasin guilty. The trial judge instructed the jury that “the charges are separate and distinct offenses and must, therefore, be independently evaluated,”[51] and this Court presumes that the jury was competent and did comply with the instructions of the trial judge.[52] In this case, the jury did just that; the jury gave careful

[51] (B-173). *See Skinner*, 575 A.2d at 1118.

[52] *Burton v. State*, 149 A.2d at 340.

consideration to each charge in the indictment. If the jury had cumulated evidence or inferred a criminal disposition as Rasin alleges, the jury would have returned guilty verdicts on all of the charges, not, as happened here, finding Rasin guilty only of certain charges. "[T]he jury was able to distinguish the offenses and segregate the evidence."[53] Consequently, Rasin cannot prove a "reasonable probability of substantial prejudice."[54]

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[53] *Skinner,* 575 A.2d at 1119 (finding no abuse of discretion in denying severance where jury returned guilty verdicts on certain charges and not guilty verdicts on others).

[54] *Id.* at 1118 (citing *Bates v. State*, 386 A.2d at 1141).

III. The Superior Court properly admitted evidence of Rasin's prior convictions.

Question Presented

Did the Superior Court abuse its discretion in admitting evidence of Rasin's prior convictions?

Standard and Scope of Review

This Court reviews evidentiary rulings for abuse of discretion.[55]

Merits of Argument[56]

Rasin claims that the Superior Court abused its discretion by admitting evidence of his prior drug convictions. The Superior Court allowed admission of evidence of Rasin's prior drug convictions because Count I of the indictment (gang participation) included the prior drug offenses as predicate offenses. (A24; A122). The crimes to which Rasin pled guilty were both necessary in proving the requisite "pattern of criminal activity" and highly probative to the existence of gang participation. The court noted that it had questioned the jury panel about possible bias if there was evidence of a prior conviction, and only 3 prospective jurors came forward with a concern.[57] (A122). Based on these considerations, the court concluded that the prior conviction evidence was "highly probative and it's not substantially outweighed by considerations of prejudice." (A123).

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[55] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009).

[56] This argument addresses argument III in Rasin's opening brief.

[57] The court asked the following voir dire question: "if the evidence were to show that a defendant had previously been convicted of a felony, would it in any way effect your ability to render a fair and impartial verdict as to the charges for which he is now [on] trial" (A122).

Although evidence of both of Rasin's prior drug offenses was introduced, it was later determined that the conviction for possession of marijuana in April 2008 could not serve as a predicate offense for gang participation. That conviction was thus stricken from the indictment, and the trial court instructed the jury to "disregard [it] entirely" and "give this evidence no weight or any consideration in your deliberations." (B-224). The jury is presumed to have followed the instruction.[58]

Rasin's current argument is confined to his contention that "the evidence of Rasin's prior convictions must have informed the jury's view of Rasin as an established drug dealer, unfairly prejudicing the presumption of innocence to which Rasin was entitled, and warranting grant of a new trial." (Rasin Op. Brf. at 16). Rasin's argument ignores that his conviction for maintaining a vehicle in October 2008 was alleged in the indictment to be a predicate offense for the gang participation charge. Thus, evidence of the conviction was direct and highly probative evidence of the predicate act. Moreover, Rasin fails to explain how introduction of the prior drug convictions unfairly prejudiced him when the jury was presented with other evidence that the Trapstars, including Rasin, were active in drug-dealing activities. Finally, Rasin's argument also ignores the fact that the jury acquitted Rasin of one count of attempted murder and its associated PFDCF count. Thus, "the jury was able to distinguish the offenses and segregate the evidence."[59] Although across-the-board

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[58] *See, e.g., Burton v. State*, 149 A.2d at 340.

[59] *Skinner,* 575 A.2d at 1119.

guilty verdicts against Rasin would not have demonstrated an abuse of discretion in admitting the prior convictions, the acquittals serve as hind-sight confirmation that there was no unfair prejudice. Accordingly, the Superior Court did not abuse its discretion.

IV. The Superior Court did not abuse its discretion when it allowed a Trapstar rap video to be played.

Question Presented

Did the Superior Court properly allow the State to play a Trapstar rap video as evidence of gang participation?

Standard and Scope of Review

Discretionary rulings on admissibility of evidence are reviewed for an abuse of discretion.[60]

Merits of Argument[61]

Rasin claims that the Superior Court erred in allowing a Trapstar rap video to be played because the "probative value was outweighed by the unfair prejudice of diminishing the presumption of innocence accorded Raisin and inviting easy judgment about his character...."[62] The Superior Court analyzed admissibility of the video under the six-part *Getz*[63] analysis, as amplified by the nine Rule 403 factors identified in *Deshields*.[64] The Superior Court correctly held that the Trapstar video was admissible.

Preliminarily, the Trapstar video was admissible irrespective of a Rule 404(b) analysis. The video was neither Rule 404(a) character evidence nor evidence of a Rule 404(b) "other crime, wrong or act."

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[60] *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006).

[61] This argument addressed argument IV in Rasin's opening brief.

[62] Rasin Op. Brf. at 20. Although Raisin was unclear about the rule of evidence upon which he was relying below and cites to no rule of evidence or other authority on appeal, Rasin appears to rely on Rule 403 and, perhaps, 404(a) and/or 404(b). *See* B-142-46 & Rasin Op. Brf. at 17-20.

[63] *Getz v. State*, 538 A.2d at 734.

[64] *Deshields v. State*, 706 A.2d at 506-07. *See* B-220-21.

Instead, the video was direct evidence of the crime charged – gang participation between January 1, 2008 and August 10, 2010. In order to prove gang participation, the State had to prove that Rasin and Taylor: 1) were part of a "criminal street gang;" 2) that members of the group engaged in a "pattern of criminal gang activity;" and 3) were intentionally part of the group, i.e., had a conscious object or purpose to participate in a criminal street gang.[65] To prove that they were part of a "criminal street gang," the State had to prove that there was an ongoing group or association of three or more persons that had the commission of criminal acts as one of its primary activities and that had a common name, identifying sign or symbol. Here, the video was a statement by one of Rasin's co-conspirators identifying "the Trapstars" as a group, identifying himself and two other members of the Trapstars, and identifying criminal activities in which the Trapstars were involved.[66] Because the video was evidence of the prohibited behaviors defined in section 616(a)(2), it was admissible.[67] The admission of the Trapstar video may be affirmed on this basis alone.[68]

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[65] DEL. CODE ANN. tit. 11, § 616 (2009); B-222-223.

[66] *See* Transcript of video (Rasin Op. Brf. at 17-19) and B-151 (Fayson testified that the rap video was "about what we live, everyday life, what we go through, our activities.").

[67] *See United States v. Williams,* 203 F. App'x. 976, 980-81 & 987-88 (11th Cir. Oct. 31, 2006) (affirming admission of rap music and lyrics in a RICO case against a gang "enterprise" that sold drugs, robbed drug dealers, and made rap music where a witness testified the lyrics described the gangs' actual activities); *Bryant v. State*, 802 N.E.2d 486, 498-500 (Ind. Ct. App. 2004) (finding defendant failed to prove lyrics were evidence of a prior crime or bad act instead of evidence of the murder, but regardless, the danger of unfair prejudice did not substantially outweigh the probative value of the lyric's reference to

Moreover, out of an abundance of caution, the trial court properly analyzed the issue under *Getz*.[69] First, it was "pretty obvious" that the rap video was material to an issue or ultimate fact in dispute in the case – the existence of the Trapstars gang, its members, and its criminal acts. (B-147). Second, the video was introduced for purposes sanctioned by Rule 404(b), namely to prove motive, intent, plan, knowledge of gang membership, identity, and absence of mistake or accident. (*Id.*; B-224). Third, the other crimes were proved by evidence which is "plain, clear and conclusive." (B-147). Fourth, the other crimes were not too remote in time from the charged offense. (*Id.*). Fifth, the trial judge provided the jury a limiting instruction. (B-224).

Finally, and most importantly in this case, in balancing the probative versus the prejudicial value of the video under Rule 403, the trial judge considered all of the *Deshields* factors and ultimately concluded that the "very, very high" probative value or "strong probative force" was not substantially outweighed by the "relatively high prejudicial impact." (B-147). "The mere fact the lyrics might be interpreted as reflective of a generally violent attitude could not

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factual aspects of the murder); *People v. Olguin,* 31 Cal. App. 4th 1355, 1372-73 (Cal. Ct. App. 1994) (affirming admission of rap that demonstrated "membership in [the criminal gang], his loyalty to it, his familiarity with gang culture, and inferentially, his motive and intent on the day of the killing").

[68] *See Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (judgment may be affirmed on the basis of a different rationale than that articulated by the trial court).

[69] This Court has recognized that, although "writing a rap song is not a bad act," the contents of a song may make a *Getz* analysis an appropriate framework to determine admissibility. *Joynes v. State*, 797 A.2d 673, 677 (Del. 2002).

be said ‘substantially’ to outweigh their considerable probative value.”[70] Consequently, the Superior Court did not abuse its discretion in allowing the video to be played.[71]

[70] *Olguin,* 31 Cal. App. 4th at 1373.

[71] *See Joynes,* 797 A.2d at 677 (affirming admission of rap song in aggravated menacing case where lyrics stated victim was on defendant’s “hit list” and defendant was going to put the heads of his enemies on a shelf); *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991) (affirming admission of defendant’s rap lyrics discussing drug dealing to show defendant “was familiar with drug code words and, to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs”); *Greene v. Com.*, 197 S.W.3d 76, 87 (Ky. 2006) (rap video depicting defendant rapping about killing his wife admissible under Rules 403 and 404(b) in murder trial to show premeditation, motive, and mental state after killing).

V. The Superior Court did not abuse its discretion in allowing expert testimony regarding the results of the DNA testing on a gun used in the shootings.

Question Presented

Did the Superior Court abuse its discretion in admitting as relevant an expert report and testimony that the Y-STR DNA test showed that Rasin could not be excluded as a contributor to the DNA on the gun used in the April 30 and May 3 shootings?

Standard and Scope of Review

This Court reviews evidentiary rulings for an abuse of discretion.[72]

Merits of Argument[73]

Evidence is relevant under Rule 401 when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[74] Relevancy determinations under Rule 401 require consideration of both materiality and probative value.[75] Evidence is material if the fact it is offered to prove is "of consequence" to the action and has probative value if it "advances the probability" that the fact is as the party offering the evidence asserts it to be.[76]

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[72] *Stickel v. State*, 975 A.2d at 782.

[73] This argument addresses argument V in Rasin's opening brief.

[74] DEL. R. EVID. 401.

[75] *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994) (citing *Getz v. State*, 538 A.2d at 731 (citing C. McCormick, Evidence, § 185, at 541 (Cleary 3d ed. 1984))).

[76] *Id.*

Rasin does not dispute that the challenged DNA evidence was material. Nor could he. Because other evidence showed that the Hi-Point pistol was the gun used in the murder of Charriez and the attempted murders of Swanson and Smith (B-184-86), the expert testimony and report about who did, possibly could have, or did not handle the gun was "of consequence" to identifying who committed the murder/attempted murders. Moreover, the evidence was "of consequence" to the gang participation charge. Because there was testimony that the Trapstars shared guns (B-177), the fact that Rasin, Taylor, Fayson, possibly Valentine, and other unknown males could not be excluded as contributors of the DNA found on the gun was "of consequence" to proving that there was a group or association of three or more persons that had the commission of criminal acts as one of its primary activities.

Rasin claims that the Superior Court abused its discretion in admitting DNA evidence because "[t]he fact that the [Y-STR DNA] testing showed that Rasin could not be excluded [as a contributor to the DNA found on the gun] (along with a sizeable portion of the American male population) was not probative under Rule 401." (Rasin Op. Brf. at 28). However, testimony that Rasin could not be excluded as a person whose DNA was on the gun has probative value because it "advances the probability" that Rasin actually committed the murder of Jose Charriez and the attempted murders of Kenneth Swanson and Jazmon Smith. The Superior Court commented on this relevance in its decision, stating, "It's not enormously probative, but it's somewhat probative.... So I think the objection goes to the weight rather than

its admissibility." (A110). Thus, the court correctly concluded that the DNA evidence met the Rule 401 requirement of having "*any* tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence."[77]

Rasin's attempt to cite *Nelson v. State*[78] as support for his claim fails.[79] In *Nelson*, this Court examined Restriction Fragment Length Polymorphism DNA analysis of autosomal chromosomes ("RFLP analysis"). The Court held that expert testimony about a RFLP analysis "match" between a suspect's DNA and DNA found at a crime scene is admissible only when accompanied by testimony about the statistical significance of the match.[80]

The science of DNA has progressed in the twenty years since *Nelson*, and no RFLP DNA analysis was presented here. Instead, the expert testified about her polymerase chain reaction ("PCR") short tandem repeat ("STR") DNA analysis of samples obtained from the gun.[81]

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[77] DEL. R. EVID. 401 (emphasis added).

[78] 628 A.2d 69 (Del. 1993).

[79] Rasin did not cite *Nelson* as authority purportedly supporting exclusion of the DNA evidence until filing a motion for reargument the evening before the DNA expert was scheduled to testify. A186 & 188. The trial court denied that motion as untimely and as improperly raising authority that could have been cited in the initial motion. A188-89. *See Frank G.W. v. Carol M.W.*, 457 A.2d 715, 719 (Del. 1983) ("A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change in the law, or manifest injustice."). This Court could affirm the admission of the DNA testimony on that basis alone. Nonetheless, as discussed above, *Nelson* does not support a claim of error here.

[80] *Nelson,* 628 A.2d at 74-76.

[81] A215-16. *See State v. Calleia*, 997 A.2d 1051, 1057-65 (N.J. Super. App. Div. 2010), rev'd on other grounds, 20 A.3d 402 (N.J. 2011) (explaining PCR, STR & Y-STR).

"PCR/STR typing is generally accepted within the scientific community of forensic geneticists,"[82] and Rasin does not dispute the reliability of the scientific procedures used.[83]

The expert performed STR analysis of autosomal chromosomes, which "are the DNA that makes each individual unique." (A215-16). "Because autosomal STR DNA testing provides a high probability of identifying an individual as the DNA source, it is the preferred method of analysis.... Autosomal STR DNA analysis is problematic, however, when forensic scientists are confronted with a mixed DNA sample."[84] Although autosomal STR analysis of one sample from the gun revealed that Taylor could not be excluded as a contributor and that "99.999 plus percent" of the U.S. population was excluded from the autosomal DNA profile, (A215 & 217-18), the rest of the samples provided inconclusive autosomal STR results because the samples contained a mixture of at least three contributors. (A61, 218 & 221).

Therefore, the expert performed STR analysis of the Y sex chromosome, which is "specific only to males" and is identical along a paternal line. (A215 & 221). Although Y-STR analysis cannot positively identify an individual, it can exclude an individual.[85] If

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[82] *United States v. Trala,* 162 F. Supp. 2d 336, 348 (D. Del. 2001) (holding STR DNA evidence admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). *See also Calleia*, 997 A.2d at 1065 ("the Y-STR technique has been generally accepted in the scientific community").

[83] A188 & Rasin Op. Brf. at 21-28.

[84] *Calleia*, 997 A.2d at 1063.

[85] *Id.* at 1064.

the individual's profile and the profile being examined match, then the conclusion is that the individual and any paternally linked relatives "cannot be excluded" as a contributor to the DNA.

The expert compared the Y-STR profiles obtained from four samples from the gun to the profiles of Rasin, Taylor, Fayson, Valentine and Ortiz. (A213-14). Y-STR analysis of a gun swab sample the police provided to the expert was a mixture of at least 4 people and showed that Rasin, Taylor, Fayson, two unknown males, and possibly Valentine could not be excluded as contributors of DNA, but that Ortiz could be excluded as a contributor.[86] The Y-STR test from the gun's grip and the trigger was a mixture of at least 3 people -- Taylor could not be excluded as a contributor, Rasin could not conclusively be excluded as a contributor, and there was an unknown contributor, but Valentine, Fayson and Ortiz were all excluded.[87] The Y-STR test of a sample from the grips was inconclusive.[88] The Y-STR test of a sample from the gun slide was a mixture of at least 4 people and Rasin, Taylor, Fayson, 2 unknown males, and possibly Valentine could not be excluded as a contributor, but Ortiz was excluded.[89] Thus, the Y-STR DNA testing of the gun as a whole excluded Ortiz as a contributor, but could not exclude Rasin, Taylor, Fayson and possibly Valentine as contributors.

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[86] A102-03 (Item HL#1, Y-STR DNA Summary); A216.

[87] A104 (EXKB#10.1-1, Y-STR DNA Summary); A217-18.

[88] A104 (EXKB#10.1-2, Y-STR DNA Summary); A214-15 & 218.

[89] A104-05 (EXKB#10.1-3, Y-STR DNA Summary); A218.

The expert explained that there is a difference in the ability to calculate statistics for autosomal and Y chromosome STR testing.[90] While combined probability of exclusion statistics was calculated for the Taylor autosomal STR match, such statistics could not be calculated for the Y-STR results. (A218 & 220-21). Indeed, because of the number of contributors to the mixture of DNA, no statistical analysis was possible. (A220).

Nevertheless, the expert *did* explain the import of the Y-STR conclusions. With respect to the conclusion that Rasin could not be excluded as a contributor to the DNA on the gun, the expert explained that Rasin or anyone in his family line could possibly be a contributor or it could possibly have been coincidental that Rasin's reference sample matched the questioned samples. (A223). She further explained a significant portion of the male population could not be excluded as contributors to the DNA on the gun. (*Id.*). Rasin's counsel thoroughly and effectively cross-examined the expert on the meaning of the Y-STR results. (A218- 23). Statistical evidence is not necessary for the jury to understand and weigh the import of the Y-STR evidence where the expert did not purport to use the Y-STR results to identify a person to a near certainty.

Moreover, the fact that a significant portion of the male population could not be excluded as a contributor to the DNA on the gun does not mean the evidence has no probative value. The probative value of the Y-STR evidence is similar to that of a crime victim testifying that an assailant had brown eyes, but she cannot identify a

[90] A218. *See also Calleia*, 997 A.2d at 1064.

brown-eyed defendant as her attacker. Although a significant portion of the population has brown eyes, the fact that there is a match between the defendant's eye-color and that of the assailant "advances the probability" that the defendant was the assailant.

The probative value of Y-STR evidence is also similar to "evidence connecting shoe imprints found at a crime scene with shoes found in a defendant's possession, despite the fact that any number of persons might own identical pairs of shoes."[91] Statistical certainty is not necessary. Rather, the level of certainty of a properly qualified expert's testimony goes to the weight to be assigned to the testimony not to its admissibility.[92]

The State's Y-STR DNA evidence is based on sound scientific principles, was meaningful and understandable to the jury,[93] and advanced the probability that Rasin committed the murder of Charriez, attempted murder of Swanson and Smith, and gang participation. It was up to the jury to decide the weight to be given to this evidence.[94] Consequently, the trial judge's decision has not "exceeded the bounds

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[91] *Calleia*, 997 A.2d at 1066.

[92] *Id.* See also *United States v. Martinez,* 144 F.3d 189 (1st Cir. 1998); *United States v. Santiago*, 156 F. Supp. 2d 145, 151 (D.P.R. 2001).

[93] *See United States v. Mitchell,* 502 F.3d 931, 970 (9th Cir. 2007) (testimony that a suspect cannot be excluded as a contributor to Y-STR DNA can "tell a lot, and can increase the probability that the person's DNA is present"). *Accord United States v. Kent*, 531 F. 3d 642 (8th Cir. 2008).

[94] *Taylor v. State,* 679 A.2d 449, 452 (Del. 1996) ("fundamental tenet of American jurisprudence" is that the jury is the sole trier of fact responsible for assessing the credibility of witnesses, resolving conflicting testimony and drawing inferences from proven facts).

of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice."[95]

[95] *Lilly v. State*, 649 A.2d at 1059 (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567 (Del. 1988)).

VI. Superior Court properly denied Taylor's hearsay objection.

Question Presented

Did the Superior Court abuse its discretion in admitting under Delaware Rule of Evidence 803(1) a witness's testimony that a neighborhood boy told her "Gunner shot him" immediately following a shooting?

Standard and Scope of Review

Evidentiary rulings are reviewed for abuse of discretion.[96]

Merits of Argument[97]

Erica Jenkins testified that she was walking from a liquor store on 10th Street to her apartment at 8th and Adams Streets when she heard gunshots. (B-14-15). Although she could not see who was shot, she saw the victim grab his hand and then run down 8th Street. (B-15). She arrived home within 3-4 minutes. (*Id.*). Maleek, a boy from the neighborhood, was outside and told her "Gunner shot him, Gunner shot him." (*Id.*). Taylor's nickname was Gunner.

The Superior Court admitted Maleek's "Gunner shot him" statement under Rule 803(1), the present sense impression exception to the hearsay rule. (B-3). This exception allows the admission of a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter."[98] The exception rests on the theory that spontaneous statements describing an event are reliable: a spontaneous statement

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[96] *Warren v. State*, 774 A.2d 246, 251 (Del. 2001).

[97] This argument addresses argument I in Taylor's opening brief.

[98] DEL. R. EVID. 803(1). *See, e.g., Warren*, 774 A.2d at 251-52.

made contemporaneously with the event is less likely to have been fabricated and less likely to reflect any memory flaws.[99] Moreover, "independent corroboration of the statement is not a prerequisite for admission under the present sense impression exception."[100] Here, Maleek was present on the block where the shooting occurred and, when he saw Ms. Jenkins within 3-4 minutes of the shooting, described what had happened. (B-15). His statement falls squarely under the 803(1) hearsay exception and, as such, the trial court did not abuse its discretion by allowing its admission.[101]

Moreover, should this Court determine that the admission of the "Gunner shot him" statement was erroneous, any such error was harmless.[102] The hearsay testimony was not the only evidence identifying Taylor as the person who shot Whye. Whye identified Taylor as the shooter both at trial and in a pretrial photo lineup. (B-113). Taylor ignores Whye's trial testimony and instead claims Whye "was unable to identify Taylor." (Taylor Op. Brf. at 9). Although Whye did not initially want to cooperate with the police, (B-112; B-115-16), Whye testified he was certain of his identification of Taylor. (B-115). Further, Fayson testified that Taylor admitted to him that he shot Whye. (B-175). Valentine, Taylor's co-defendant who

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[99] *Warren,* 774 A.2d 252.

[100] *Id.*

[101] *Compare Wheeler v. State,* 36 A.3d 310, 314 (Del. 2012) (noting that statements made within 10-20 minutes of the incident are typically found to be sufficiently contemporaneous) (collecting cases).

[102] *See Van Arsdall v. State*, 524 A.2d 3, 10 (Del. 1987) ("this Court has consistently refused to reverse convictions for errors found to be harmless") (collecting cases).

pled guilty to conspiracy for the Whye shooting, also identified Taylor as Whye’s shooter. (B-117; B-126). Thus, any error was harmless.

CONCLUSION

For the foregoing reasons, the Superior Court judgments against Rasin and Taylor should be affirmed.

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Dated: March 1, 2013

CERTIFICATE OF SERVICE

I, Maria T. Knoll, Esquire, do hereby certify that on March 1, 2013, I caused a copy of the State's Consolidated Answering Brief to be served electronically upon James J. Haley, Jr., Esquire and Michael C. Heyden, Esquire.

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