EFiled: Aug 14 2014 11:48PM EDT
Filing ID 55894229
Case Number 665,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

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DATED: August 14, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in January 2013, and later indicted for the offenses of attempted murder, reckless endangering first degree (two counts), possession of a firearm during the commission of a felony (three counts), possession of ammunition and a firearm by a person prohibited, conspiracy first degree, and criminal mischief. (A1, A11-13). The possession by a person prohibited offense was severed before trial.

After a jury trial, he was convicted of three counts of reckless endangering first degree, three firearm offenses, the included offense of conspiracy second degree, and criminal mischief.

The Defendant was sentenced to, *inter alia*, a cumulative imprisonment term of 101 years imprisonment at Level 5. Exhibit B attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENTS

1. The Superior Court abused its discretion by admitting evidence concerning similar crimes committed in Maryland that were not independently and logically relevant to prove the identity of the individual who had committed the offense in Delaware for which the Defendant was charged and that were also unfairly prejudicial because the other crimes evidence primarily tended to show the alleged perpetrator's propensity towards violence and danger to the community thereby inviting the jury to decide the case on the basis of the accused's character and prejudicing the Defendant's right to a fair trial for the crime in Delaware with which he was charged.

2. The Defendant was unfairly predjudiced by the admission of character evidence concerning the meaning of tattoos on his arms which permitted the jury to consider the defendant's alleged character, not merely the offenses with which he was charged

STATEMENT OF FACTS

On December 27, 2012, at about 3:30 a.m., three shots were fired into the home of Clifford Dempsey, a Dewey Beach police officer living on Laurel Road outside of Laurel, Delaware. Officer Dempsey's marked take-home vehicle was parked outside the home. Officer Dempsey testified that he was asleep in his bedroom when he was awakened by two very loud crashes or snapping noises. He checked on his nine and four year old sons who slept in a nearby bedroom, but they were unharmed. His young daughter was sleeping overnight at her cousin's house nearby, but he also checked her bedroom. He observed damaged drywall in the front of her bedroom and also found a hole in her front bedroom window. He observed more damage in a center upstairs commons room where he found a bullet projectile on the floor. A second round entered through the bedroom window and eventually deflected into the second floor ceiling where it lodged in a ceiling rafter. A third round was discovered to have struck the foundation of the house's side chimney. (D.I. 95, 9/24/13, pp. B94-121). A Delaware State Police Evidence Detection Unit officer later processed the scene. Projectiles were determined to have struck the front second story siding, the window, and the chimney foundation. The projectile found on the floor was recovered, but the projectile lodged in the ceiling rafter could not be recovered and the projectile that struck the chimney foundation could not be

found. The projectile found on the floor appeared to be distinctive, a 7.62 mm high powered rifle bullet, and was retained and forwarded to Carl Rone, the Delaware State Police ballistics and ordinance examiner. (D.I. 95, 9/24/13, pp. B94-121).

Several days later, a white Mercury Mariner SUV operated by Orrin Joudrey was stopped at around midnight near Delmar, Delaware, just north of the Maryland border. The vehicle had been followed by a Wicomico County Sheriff Officer who had observed the vehicle speeding in Maryland near the Delaware and Maryland border and turned his patrol vehicle around to follow. When the vehicle turned north into Delaware from State Line Road, the Wicomico officer notified Delaware authorities and Delaware State Police stopped the vehicle that Jourdrey was operating just north of the border. (D.I. 95, 9/24/13, pp. B139-146). Joudrey was arrested for driving under the influence after field tests were conducted. During an inventory search of his vehicle, police found a live 7.62 mm rifle round in a storage pocket behind the driver's seat. Police knew that the same high-powered rifle ordinance had been used only several days before when shots were fired at Officer Cliff Dempsey's home several miles away and further questioned Joudrey after he was taken into custody. (D.I. 98, 9/25/13, pp. C17-24).

During his questioning, Joudrey informed police that he was on his way

to the Defendant's house in Delaware when he was arrested. After extensive questioning, Jourdrey eventually admitted later that day that he was involved in the shooting at Officer Dempsey's house. At first he denied that he had been involved, but eventually he admitted that he was because he felt that he was caught due to police telling him what they already knew. He had also initially denied that the Defendant had been involved in the shooting, but eventually he told his interrogators after extensive questioning that both of them were involved. A197-212.

Joudrey testified that in the early morning hours of that night he and the Defendant drove in his Mercury Mariner SUV by Officer Dempsey's house near Laurel, which had a police Humvee parked outside. He testified that he was driving about 40 to 45 miles per hour on the rural road and that the Defendant was located in the third row seat facing rearward where the Defendant held Jourdrey's vintage Russian 7.62 mm. high-powered rifle. He testified that the Defendant fired three shots at the Dempsey house. They then drove to the Defendant's house near Delmar where Joudrey's rifle was concealed in a crawl space above the garage. A167-174.

Jourdrey testified that he originally lied to the police about the Defendant's involvement after his arrest because the Defendant was his friend and that he had known him almost all his life. A88, 94. Joudrey also testified

that the Defendant had settled, negative views towards law enforcement. A97.

Jourdrey testified that he had bought the Russian rifle at a gun show in 2012 and that he and the Defendant had practiced firing it many times behind Joudrey's rural home. A108. Photographs showing the Defendant with 7.62 mm. ammunition taken from Joudrey's cellphone were introduced into evidence at trial. A116-117. Carl Rone, a firearm examiner for the Delaware State Police, testified that he visually compared under microscope the projectile round recovered from Officer Dempsey's home with a 7.62 mm. round from Joudrey's ammunition that he had test fired from Joudrey's rifle, and that he concluded that the recovered projectile was fired from Jourdrey's rifle. (D.I. 98, 9/25/13, pp. C102-104). During a search at the Defendant's home after Joudrey's arrest, police had found Joudrey's rifle in the crawl space over the Defendant's garage. (D.I. 95, 9/24/13, pp. B237-239).

After he had admitted his participation in the shooting at Officer Dempsey's home and had also implicated the Defendant in that shooting, Joudrey, facing prosecution, entered a plea agreement. He would have originally faced a potential maximum of more than one hundred years to life imprisonment if convicted, but in return for his no contest pleas to less than all of the offenses and his cooperation with the prosecution, the State recommended no more than nine years imprisonment although the Superior

Court later imposed fifteen years imprisonment. A215-216.

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE CONCERNING SIMILAR CRIMES COMMITTED IN MARYLAND THAT WERE NOT INDEPENDENTLY AND LOGICALLY RELEVANT TO PROVE THE IDENTITY OF THE INDIVIDUAL WHO HAD COMMITTED THE OFFENSE IN DELAWARE FOR WHICH THE DEFENDANT WAS CHARGED AND THAT WERE ALSO UNFAIRLY PREJUDICIAL BECAUSE THE OTHER CRIMES EVIDENCE PRIMARILY TENDED TO SHOW THE ALLEGED PERPETRATOR'S PROPENSITY TOWARDS VIOLENCE AND DANGER TO THE COMMUNITY THEREBY INVITING THE JURY TO DECIDE THE CASE ON THE BASIS OF THE ACCUSED'S CHARACTER AND PREJUDICING THE DEFENDANT'S RIGHT TO A FAIR TRIAL FOR THE CRIME IN DELAWARE WITH WHICH HE WAS CHARGED.

Question Presented

The question presented is whether the Superior Court erred by admitting evidence of the commission of two similar crimes in Maryland when the Maryland offenses were not independently and logically relevant to the issue that was in dispute at trial – the identity of the individual who had committed the crime in Delaware. The question was preserved by the Defendant's objections to the admission of the Maryland crimes evidence before his trial for the alleged Delaware crime. A23-37.

Standard and Scope of Review

A ruling admitting evidence under D.R.E. 404(b) is generally reviewed

on an abuse of discretion standard, but whether the evidence is independently relevant for some purpose other than proving propensity is a question of law which may be reviewed *de novo*. *Allen v. State*, 644 A.2d 982, 985 (Del. 1994).

Argument

At the Defendant's trial, the State did not merely try to prove that the Defendant had participated with Orrin Goudrey in shooting at Officer Dempsey's home near Laurel, Delaware, the offense with which he was charged and being prosecuted, but the State also attempted to prove that he had participated with Joudrey in shooting at two homes of police officers located across the border in Maryland although he could not be charged and prosecuted in Delaware with offenses that occurred in Maryland. In doing so, the State introduced all-encompassing proof of the Maryland offenses as if the Defendant were charged and being prosecuted for Maryland offenses in Delaware. (D.I. 95, 9/24/13, pp. B24-85); (D.I. 98, 9/25/13, pp. C41-64, 103-105); A (D.I. 99, 9/26/13, pp. D73-104). However, that proof of crimes committed in Maryland was not independently and logically relevant and was also unfairly prejudicial because the only issue that was disputed during the Defendant's trial was the identity of the perpetrator of the Delaware offense. Therefore, the proof of the Maryland offenses no more proved the identity of the perpetrator of the Delaware offense than it did the perpetrator of the Maryland offenses because

the proof for all of the offenses, singular or combined, stood or fell on the credibility of Orrin Joudrey as to the identity of the individual who committed either the Delaware offense or the Maryland offenses with him.[1]

The State posited before trial that similar Maryland offenses were relevant to "establish motive, opportunity, intent, preparation, plan, knowledge and absence of mistake [and] the specific purpose of the alleged conduct."[2] A17-18.

The Superior Court ruled that the Maryland offenses were admissible at the Defendant's Delaware trial. Essentially, the Superior Court offered three reasons supporting the admission of the Maryland crimes evidence: 1) it was

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[1] An analogy for this dynamic lies in the field of forensic science and DNA comparison. Sometimes an unknown suspect's DNA evidence is so minute that it cannot be compared with a known individual's DNA sample. Through a chemical process known as polymerase chain reaction, the unknown suspect's DNA evidence can be amplified or replicated indefinitely so as to provide a DNA quantity sufficient for comparison. Once that is done and a positive comparison is obtained, however, a liter or kilogram of the suspect's DNA does not make the suspect more guilty than if only a nanoliter or nanogram were originally available. Likewise, if a positive comparison did not eventually result, the fact that a liter or kilogram of the suspect's DNA were originally available, does not make the result more exculpatory for a defendant than if only a nanoliter or nanogram of the suspect's DNA were originally available.
See http://nij.gov/topics/forensics/evidence/dna/basics/pages/analyzing.aspx (last viewed Aug. 14, 2014) ("After isolating the DNA from its cells, specific regions are copied with a technique known as the polymerase chain reaction, or PCR. PCR produces millions of copies for each DNA segment of interest and thus permits very minute amounts of DNA to be examined").

Similarly, ten copies of an appellate brief are no more logically persuasive than the original brief.

[2] The language is drawn nearly verbatim from D.R.E. 404(b). Notably, the State did not assert identity as a basis for independent relevance, which was the only issue in dispute at trial.

relevant to prove the Defendant's state of mind for the commission of the Delaware offense; 2) it was relevant to prove a common scheme or ongoing conspiracy; 3) it was "inextricably intertwined" with the Delaware offense. A24, 33-36, 80.

The Superior Court's allowance into evidence of the Maryland crimes evidence is inconsistent, however, with the evidentiary principles previously explained by this Court concerning the relevance and admissibility of other uncharged crimes evidence at a defendant's criminal trial.

In *Getz*, the Court stated: "where, as here, the State presents direct evidence, through the testimony of the alleged victim, that an attack occurred, no evidential purpose is served by proof that the defendant committed other intentional acts of the same type." *Getz v. State*, 538 A.2d 726, 733 (Del. 1988). In this case too, the State had all of the evidence it needed at trial to prove the elements of the charged crimes and convict the Defendant of the Delaware offense based on the direct evidence provided by Orrin Goudrey and the supporting circumstantial evidence in support of that offense. No "evidential purpose" was served by proof that the Defendant committed other similar crimes in Maryland.[3]

[3] The Superior Court did not attempt to tie in or explain the relevance of the Maryland crimes evidence with the issue that was actually relevant and in dispute at the

State of Mind

The Superior Court explained that the Maryland crimes evidence was relevant to prove the Defendant's state of mind and his lack of mistake or accident in shooting at the residence of a Delaware police officer, surmising that the Defendant might argue that he did not know that Joudrey would commit the offense or mistakenly did not know that they were shooting at a police officer's residence. The shortcoming with this rationale as a basis for the admission of the Maryland crimes evidence is that the Defendant did not argue at trial that he did not intend or was not reckless in shooting at a police officer's residence in Delaware. Evidence does not have independent, logical relevance because it might rebut or be relevant to a contested issue at trial unless it actually becomes an issue at trial. The pre-emptive basis for the Superior Court's premature admission of the Maryland crimes evidence was therefore an abuse of discretion.[4]

Furthermore, the State's evidence of the perpetrator's intent, whoever that was, and the absence of mistake of accident was uncontroverted at trial and Jourdrey's testimony about the Delaware crime provided all that was necessary for conviction. The Maryland crimes evidence was not relevant to prove the

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Defendant's trial: whether someone participated with Orrin Goudrey in the commission of the Delaware offense, and, if so, the identity of that individual.

[4] *Taylor v. State*, 777 A.2d 759, 766 (Del. 2001); *Cobb v. State*, 765 A.2d 1252, 1255 (Del. 2001); *Milligan v. State*, 761 A.2d 6, 8-9 (Del. 2000).

identity of the perpetrator of the Delaware offense – which the Superior Court tacitly recognized by not relying on identity as a basis for admission of the Maryland crimes evidence – and thus failed to be logically relevant to the issue that was actually in dispute at trial – the identity of Joudrey's collaborator on the evening in question. "The key to whether or not evidence of other acts is admissible under the enumerated purposes of Rule 404(b) lies in the relationship that such evidence has to the ultimate fact or issue in the trial." *Brett v. Berkowitz*, 706 A.2d 509, 516 (Del. 1998).

Moreover, to the extent that the Superior Court relied on the alleged perpetrator's intent to shoot at the residence of a police officer as a basis for the admission of the Maryland crimes – an *animus* toward police officers as proof of a perpetrator's intention or reckless state of mind in shooting at the residence of a police officer – that also has no independent logical relevance where the State has direct evidence of a perpetrator's state of mind through the only eyewitness to that crime, and particularly where that state of mind evidence is uncontroverted at trial. *Getz*, 538 A.2d., at 733; *see also Allen v. State*, 644 A.2d, at 987 ("[A] inclination toward violence against women … is evidence of propensity or disposition of a general nature which is clearly outside the ambit of admissibility under Rule 404(b)"). Given the eyewitness testimony of Joudrey at trial concerning his alleged confederate's state of mind and the

supporting circumstantial evidence, other similar crimes against police officers "had no independent logical relevance to a material issue in dispute." *Deshields v. State*, 706 A.2d 502, 508 (Del. 1998).

Common Plan, Scheme, or Conspiracy

The Superior Court also relied on a common plan, scheme, or conspiracy as a basis under D.R.E. 404(b) for admission of the Maryland crimes evidence. A24, 34. Again, this was in error for several reasons. First, the Defendant was charged with conspiracy in Delaware with Orrin Joudrey to commit the alleged Delaware offenses with which he was charged. A13. Joudrey's testimony, along with the supporting circumstantial evidence, provided all that was necessary to prove the Delaware offense. Proof of a conspiracy to commit similar crimes in Maryland was not logically relevant to prove the Delaware conspiracy other than to show a propensity to commit offenses of this character or that it was the Defendant's character to conspire to commit such offenses. *Getz*, 538 A.2d, at 733. A conspiracy to commit offenses in Maryland or the commission of similar offenses in Maryland is not logically relevant to prove a conspiracy, plan or scheme in Delaware. The Delaware evidence provided that proof under *Getz* and more proof than that is merely proof of criminal disposition or propensity. "For prior acts to form part of a common plan, they must be so related to the present conduct as to be crucial to a full understanding of that conduct." *Brett v.*

Berkowitz, 706 A.2d, at 509. Evidence of Maryland offenses was not "crucial to a full understanding" of the Delaware offense unless propensity or criminal disposition is relevant for proof. *Id*. "Mere repetition of [criminal conduct] is not evidence of a plan or scheme and may not be admitted under [D.R.E. 404(b)]." *Id*., at 516.

Inextricably Intertwined

The Superior Court also relied on as a basis for the admission of the Maryland crimes evidence that the Maryland crimes were "inextricably intertwined" with the Delaware offense. A33-36. However, the Court has already described the "inextricably intertwined" exception to the admissibility of other crimes evidence as a "carefully circumscribed" exception. *Pope v. State*, 632 A.2d 73, 76 (Del. 1993). At trial below, the Superior Court did not sufficiently circumscribe the Maryland crimes evidence although it could have. Under *Pope*, one offense is "inextricable intertwined" with another offense only when exclusion of the other crimes evidence "would create a 'chronological and conceptual void' in the State's presentation of its case to the jury that would have resulted in significant confusion." *Id*., at 76. Had the Maryland crimes evidence been excluded under D.R.E. 404(b) at trial below, hardly difficult for the Superior Court to do, there would have been no 'chronological and conceptual void" that would have resulted in "significant confusion" to the jury.

In fact, the Statement of Facts in this Opening Brief does not recite any of the Maryland crimes evidence, and, the Defendant submits, presents a clear, complete and straightforward account of the Delaware offense that would not have confused the jury had only that evidence been presented to it. The Maryland crimes introduced into evidence at trial below were only "inextricably intertwined" because the Superior Court insufficiently attempted to untwine them. To illustrate, to the State's disappointment, the Superior Court successfully untwined one of the three similar Maryland crimes that the State originally sought to introduce into evidence at the Defendant's trial. A36-37, 81-83. It could have just as easily done so with the remaining two similar Maryland crimes and not left a "chronological or conceptual void" in the State's prosecution.

Unfair Prejudice

Based on these reasons, the admission of the evidence concerning similar crimes committed in Maryland was also substantially outweighed by the danger of unfair prejudice because the other crimes evidence primarily tended to show the alleged perpetrator's propensity towards violence and danger to the community thereby inviting the jury to decide the case on the basis of the accused's character and prejudicing the Defendant's right to a fair trial for the crime in Delaware with which he was charged. D.R.E. 403.

II. THE DEFENDANT WAS UNFAIRLY PREDJUDICED BY THE ADMISSION OF CHARACTER EVIDENCE CONCERNING THE MEANING OF TATTOOS ON HIS ARMS WHICH PERMITTED THE JURY TO CONSIDER THE DEFENDANT'S ALLEGED CHARACTER, NOT MERELY THE OFFENSES WITH WHICH HE WAS CHARGED.

Question Presented

The question presented is whether the Superior Court abused its discretion by allowing depictions of the number "187," including tattoos appearing on the Defendant's arm, to be admitted into evidence, and permitting Orrin Joudrey to testify that the Defendant had told him that "187" meant murder of a cop. The issue was preserved by the Defendant's objection to admission of the evidence at trial. (D.I. 98, 9/25/13, pp. C150-152); A100.

Standard and Scope of Review

The standard and scope of review is abuse of discretion. *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999).

Merits of Argument

When executing a search warrant, police seized a posterboard from the Defendant's basement with the number "187" painted on it. State Exhibit #53. Over the Defendant's objection, it was admitted into evidence. (D.I. 95, 9/24/13, pp. B225-228). The Defendant also objected to the admission of

photographs of tattoos on his arms that depicted the number "187." St. Ex. #81 & 82. (D.I. 98, 9/25/13, pp. C150-152). Orrin Joudrey testified that that the number "187" and the tattoos on the Defendant's arms meant "officer down" under the California Penal Code. He testified that it meant something to the Defendant and that the Defendant said it meant "murder on a cop." A100-102. When shown a photograph depicting the "187" tattoo on the Defendant's arm, St. Ex. 81, Jourdrey testified that he was present in the Defendant's house when the Defendant imprinted on his own arm at about the age of seventeen. A118-119. On cross-examination, Jourdrey admitted that he did not know that "187" was the section of the California Penal Code that defined the crime of murder and that it did not specifically refer to the murder of a law enforcement officer. A247-248.[5]

The probative value of these tattoos was substantially outweighed by the danger of unfair prejudice. Like the evidence of the Defendant's teardrop tattoos which the Superior Court excluded, this evidence permitted the jury to speculate about gang membership thereby inviting the jury to consider and judge the Defendant on the basis of a character embracing other unknown, criminal objectives. The evidence was inflammatory in nature and carried the potential of distracting the jury from deciding guilt based solely on the

[5] *See* http://en.wikipedia.org/wiki/187_(slang) (last viewed Aug. 14, 2014).

evidence. The trial court's duty to balance evidence under D.R.E. 403 is particularly important when the evidence is potentially inflammatory because the evidence of the Defendant's abstract beliefs may create a bias against the defendant that is impermissible under D.R.E. 403. *Floudiotis v. State*, 726 A.2d, at 1202.

Further the potential for bias and unfair prejudice was exacerbated because the Superior Court did not provide the jury a limiting instruction concerning any relevance and permissible use of this potentially inflammatory evidence. (D.I. 99, 9/26/13, pp. D220-263).

CONCLUSION

For the reasons and authorities cited herein, the Defendant's conviction and sentences should be reversed, or in the alternative, at least one of those convictions and sentences vacated.

Respectfully submitted,

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DATED: August 14, 2014