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 REPLY BRIEF

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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.

In its answering brief, the State argues that "[w]ithout the Maryland shootings, the State simply had a drive-by shooting at a house where a police officer just happened to live." Ans. Br. at 14. The contention is misleading because it omits the testimony of Orin Joudrey that the Defendant shot at Officer Dempsey's house because the Defendant believed that a police officer who drove a Humvee lived there and that he had seen the officer driving around in the vehicle. A167-168. In addition, contrary to the State contention that the "[Defendant's] intention only becomes clear when viewed in the context of all three shootings," Ans. Br. at 14, if its witness Orin Joudrey was to be believed, it was in all clear that the Defendant intentionally shot at the house while

Joudrey was driving because the Defendant believed that a police officer lived there. Jourdrey's testimony alone addressed the State's pretextual concerns that similar crimes evidence in Maryland was necessary to prove the Defendant's "plan, motive, and intent," Ans. Br. at 14, to shoot at a police officer's home that night. Orin Joudrey testified directly as to the Defendant's alleged plan, motive, and intent. Under similar circumstances, the Court has 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). The State does not rebut the Defendant's contention that 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.

The State also argues that "the fact that Watson and Joudrey shot at police officers' homes on multiple occasions supported the State's argument that Watson's intent in firing at officer's houses was premeditated and more than recklessness." Ans. Br. at 15. Because there was already direct evidence from Orin Joudrey's testimony that the Defendant intended to shoot at a police

officer's home, there was no "evidential purpose [to be] served by proof that the defendant committed other intentional acts of the same type." *Id*. The issue in dispute was identity. To the extent that the State attempted to persuade the jury that the identity of the person who shot at Officer Dempsey's house was the Defendant, it did so by impermissible propensity evidence that the Defendant "had committed other similar acts of the same type." *Id*. That the State never asserted identity as a logical basis for independent relevance under D.R.E. 404(b) when it was the only disputed issue before the jury, necessarily demonstrates that the State "supported" through impermissible propensity evidence its argument that the identity of the individual who had committed the offense was the Defendant. The Defendant never argued to the jury that whoever had committed the offenses had a less culpable state of mind than the State contended or that shooting at a police officer's house had been a mistake or accident. He only argued that Orin Jourdrey's testimony that the Defendant had committed the offenses with him was not credible. (D.I. 99, 9/26/13, pp. D-293-313).

The State also argues, however, that merely because the Defendant "did not argue lack of intent or that his behavior was not reckless," Ans. Br. at 15, the State was still entitled to use other crimes evidence in its case-in-chief in order to prove its *prima facie* case alleging that the Defendant acted

intentionally and not recklessly. Ans. Br. at 15-16. The State's argument is the embodiment of a preemptive strike on a threat that never materialized. The State argues that the Defendant "misconstrues the holding in *Taylor*," Ans. Br. at 15, but it is the State that reads *Taylor* v. *State*[1] too selectively and fails to address its underlying rationale. The State contends that *Taylor* only stands that for the proposition that the State "may not preemptively offer evidence of acts in its case-in-chief in order to rebut an anticipated affirmative defense." Ans. Br. at 15-16. The State also contends that other crimes evidence is admissible "where that evidence is independently relevant to an issue of fact that the State must prove as part of its prima facie case." Ans. Br. at 16. Ergo, the State contends that so long as other crimes evidence is relevant to prove a part of its *prima facie* case, it does not matter that the element of the State's case which the claims was relevant was not disputed by the defendant. *Taylor* does not merely say this, however. Applying *Getz*,[2] *Taylor* states that "[i]n order to introduce evidence of other crimes in the State's case-in-chief, those crimes must be logically relevant not just to "an issue or ultimate fact in dispute in the case," but to "to an issue or ultimate fact to be proved in the State's case-in-chief." *Taylor*, 777 A.2d, at 764 (quoting *Getz*, 538 A.2d at 734). *Taylor* does not, as the State contends, permit a disjunctive basis for the admission of other

[1] 777 A.2d 759 (Del. 2001).
[2] 538 A.2d at 726.

crimes evidence, either to rebut an affirmative defense or as evidence to support one of the *prima facie* elements of the charged offense: "the State may offer evidence of the defendant's bad acts only if: (1) the evidence is independently relevant to an element of the State's prima facie case (for example, knowledge or intent) *and* (2) the State reasonably anticipates that the defendant will dispute that element of its case. *Taylor*, 777 A.2d at 764 (emphasis added). In this case, the Defendant did not dispute the state of mind element of the charged offense. Under *Taylor*, the State's argument that it was permitted to introduce other uncharged crimes evidence solely to prove its *prima facie* allegation as to the perpetrator's state of mind even when the Defendant did not dispute that allegation offers a pretext basis for admissibility and is not supported by either *Getz* or *Taylor*.[3]

The State also argues that the uncharged Maryland shootings were "inextricable intertwined" because "all three shootings together explained Watson's behavior and showed the pattern of the shootings." Ans. Br. at 16-17. Quoting *Pope*,[4] the State suggests that this is a proper basis for admissibility because 'it forms an integral and natural part of the witness's account of the

[3] The State also suggests that *Diaz v. State*, 508 A.2d 861, 865 (Del. 1986), suggests that the other crimes evidence in this case was independently relevant to support the State's *prima facie* allegation as to the element of perpetrator's state of mind. Ans. Br. at 14, n. 15. It does not. In *Diaz*, it was relevant to rebut the defendant's contention that the shooting was accidental.

[4] 632 A.2d at 76.

circumstances surrounding the offenses." However, the other crimes evidence was not an "integral" part of the circumstances because its exclusion would not have created 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. The State fails to describe or explain how a conceptual void would have been created if all of the Maryland crimes evidence had been excluded or even try to explain how the exclusion of one of the Maryland offenses created any void or confusion in the State's case. Even so, the State tacitly admits that the offenses being "inexplicable intertwined" was not a basis for admission at trial because the Superior Court "was merely referencing the doctrine." Ans. Br. at 17.

The State also argues that the limiting instruction given by the Superior Court cured any potential prejudice. Ans. Br. at 17-18. If the Superior Court's predicate ruling was incorrect and the other crimes evidence was not logically relevant and admissible for a purpose admitted under D.R.E. 404(b), however, the instruction that the jury could consider the other crimes evidence would not make the other crimes evidence admissible and would only invite further prejudicial attention to it. This would exacerbate, not, as the State contends, alleviate the potential prejudice. *See Turner v. State*, 929 So. 2d 1041, 1045 (Ala. Crim. App. 2005) ("Moreover, the limiting instruction given by the trial court to the jury did not negate the prejudicial effect of the erroneous

admission. In fact, the instruction contradicted itself and exacerbated the prejudice because the trial court told the jury that it could not consider the prior conviction as evidence that Turner committed the charged crime. However, the court charged the jury that the prior conviction could be considered as evidence that Turner had the knowledge and intent to possess the cocaine in the instant case"); *and Ex parte Casey*, 889 So. 2d 615, 622 (Ala. 2004) ("The "limiting" instruction given by the trial court to the jury did not ameliorate the prejudicial effect of the erroneous admission of the defendant's prior convictions. Indeed, the instruction contradicted itself and exacerbated the prejudice").

Finally, the State argues that even if the error in admitting the similar Maryland crimes evidence was error under D.R.E. 404(b), its admission was harmless because the Defendant was acquitted of murder although convicted of reckless endangering first degree and firearms offenses which resulted in sentences of almost one hundred years imprisonment. Ans. Br. at 18-19. This is a diversion. The perpetrator's state of mind was not a material issue in the case and the jury's verdict for a lesser included offense on a state of mind element was immaterial to the only issue that was disputed in the case – the identity of the perpetrator. The lesser included offense verdict reflected only the inherent deficiency with respect to the proof of the alleged actor's state of mind even when it was not disputed at trial. It is just as likely that the jury might have

acquitted based on a reasonable doubt as to the State's proof of identity at trial had it not heard the other crimes evidence as it is the jury would have convicted even if had not heard the evidence of Maryland crimes. The State's contention that the admission of this evidence was harmless error belies its determination to admit the other crimes evidence. The State knew it made a difference then and that difference has not evaporated since. The State also errs in suggesting that harmless error is determined by whether there is sufficient evidence to support a guilty verdict regardless of the inadmissible evidence. Ans. Br. at 19, n. 23. That it not the test of harmless error. Under harmless error analysis, the prosecution is required to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

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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