



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM, )  
 )  
 Defendant Below, )  
 Appellant, )  
 )  
 v. ) No. 201, 2018  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

On June 22, 2015, Steven Kellam (“Kellam”), Rhamir Waples (“Waples”), Richard Robinson (“Robinson”), Damon Bethea (“Bethea”), Shamir Stratton (“Stratton”), Carlton Gibbs (“Gibbs”), Rachael Rentoul (“Rentoul”) and Jacquelin Heverin (“Heverin”) were charged together in an 81-count Indictment for their respective participation in five home invasions. (A20-55). The charges included Racketeering, two counts of Murder in the First Degree, Attempted Murder in the First Degree, Assault in the Second and Third Degree, Robbery in the First Degree, Attempted Robbery in the First Degree, Home Invasion, Wearing a Disguise During the Commission of a Felony, and numerous counts of Possession of a Firearm During the Commission of a Felony (“PFDCF”). Kellam, the leader, was the only defendant charged in every offense in the Indictment.

In December 2015, Vanvorst pled guilty to several counts of Drug Dealing and agreed to cooperate with the State. (A2003-04). He faced a maximum sentence of 47 years. *Id.* His sentencing was deferred pending his co-defendants’ trial. (A2003-04).

On January 19, 2016, Kellam filed a motion to declare the death penalty unconstitutional. (DI 42; A6). The Superior Court deferred scheduling trial while awaiting this Court’s decision in the pending certified case. (DI 48, 71; A7, 9-10).

On February 23, 2016, Kellam filed a motion to sever and a motion to

suppress all evidence obtained as a result of the wiretaps. (DI 50-52; A8). Kellam alleged that the wiretap did not sufficiently address the necessity of the wiretap; however, the Superior Court later denied his suppression motion.<sup>1</sup> The court also denied his motion to sever. (DI 74, 77; A10).

In May 2016, Heverin pled guilty to Home Invasion, Robbery in the First Degree, and Conspiracy in the Second Degree. (A650-51, 1995). She agreed to testify truthfully against her co-defendants. *Id.*

On August 20, 2016, Rentoul pled guilty to Home Invasion, Robbery in the First Degree, and Conspiracy in the Second Degree, and was sentenced to 15 years. (A549-51, 570, 1997-98). She agreed to testify truthfully against her co-defendants. *Id.*

On October 21, 2016, the Superior Court set the trial dates for the defendants who had not pled guilty. Robinson was scheduled first (January 2017), followed by Waples (February 2017), Bethea (April 2017), Gibbs and Kellam (May 2017), and then Stratton (June 2017).<sup>2</sup> (DI 75; A10).

On December 5, 2016, Robinson pled guilty to Racketeering, Murder in the Second Degree, Burglary in the First Degree, two counts of PFDCF, and

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<sup>1</sup> *State v. Kellam*, 2016 WL 3672241, at \*1 (Del. Super. June 29, 2016).

<sup>2</sup> In January 2017, the Superior Court moved Kellam's trial to September due to a conflict with another homicide trial. (DI 80; A10).

Conspiracy in the First Degree. (A1247, 1349, 2001-02). Robinson agreed to testify truthfully at his co-defendants' trials and to delay his sentencing until after the last trial. *Id.*

On December 8, 2016, Stratton pled guilty to Home Invasion, PFDCE, Robbery in the First Degree, and Conspiracy in the Second Degree. (A826-28, 1999-2000). Stratton also agreed to testify truthfully against his codefendants, and agreed to postpone his sentencing until the final trial was complete. *Id.* He faced a maximum penalty of 77 years. (A829).

On August 15, 2017, the State filed a motion in *limine* to admit evidence of Kellam's prison phone calls pursuant to Delaware Rule of Evidence ("D.R.E.") 404(b). (A146-55). Kellam filed a response opposing to the motion. (A156-66).

At Kellam's August 23, 2017, final case review. The judge granted the State's motion in *limine*. (A171-79). The State notified the court that it would sever the PFBPP charge, enter a *nolle prosequi* on one conspiracy charge, and potentially reduce the number of charges to approximately 56-58 counts, reflecting the three of five home invasions for which it was having difficulty securing witnesses for trial. (A179-81). The trial judge ordered the State to revise the Indictment to reflect only those charges the state was pursuing. (A179, 189-214). Kellam's trial counsel informed the Superior Court that Kellam was not interested in plea negotiations, which the court confirmed in person with Kellam. (A184-85).

The Superior Court held Kellam's jury trial from September 5-25, 2017. The jury acquitted Kellam of three counts of PFDCF, apparently finding that the defendants used only two weapons during the home invasion, robbery and assault of Milton Lofland on December 11, 2014; the jury convicted Kellam on all other counts. (A1645-38, 1847-61).

Kellam's sentencing was postponed several times from its initial November 17, 2017 date. (DI 115, 119, 121; A14). On December 28, 2017, Kellam filed a motion for a new trial. (DI 125; A14). After briefing and an evidentiary hearing, the Superior Court denied Kellam's motion. (DI 126, 132 139; A15-16).

On October 26, 2017, the Superior Court sentenced Stratton to a total of 47 years at Level V, with credit for 841 days served, suspended for two years at Level III probation. Stratton Mar. 27, 2018 Sent. Ord.

On March 16, 2018, the Superior Court sentenced Robinson to a total of 73 years at Level V, with credit for time served, to be suspended after 20 years for 10 years of Level III probation. Robinson Mod. Sent. Ord.

On March 23, 2018, the Superior Court sentenced Kellam. Kellam addressed the court, offered his condolences to the victims' families, claimed his innocence, stated his defense attorney failed to show evidence of his innocence, and claimed he had nothing to do with the crimes. (A1986-89). The Superior Court disagreed, stating that "the jury thought that you were guilty. And I think . .



. that you're guilty. . . . It appears to this judge that you were the kingpin.”  
(A1989-90). The Superior Court sentenced Kellam to the minimum two natural  
life sentences for the two murder convictions, plus several hundred years for the  
remaining counts. (A1990-92).

Kellam appealed, and on November 20, 2018, Kellam filed his Opening  
Brief on Appeal. This is the State's Answering Brief.

## SUMMARY OF ARGUMENT

**I. DENIED.** The Superior Court correctly found that the wiretap recordings provided additional evidence of Kellam's racketeering and conspiracy charges. Court's ruling granting the State's motion in limine correctly summarized the facts and provided a detailed analysis of the *Getz* and *Deshields* factors. Kellam's argument that the State had ample additional evidence to prove racketeering and conspiracy concedes that any error was harmless beyond a reasonable doubt. Kellam's argument that the Superior Court's limiting instruction was inadequate has no merit because he affirmatively waived the issue.

## STATEMENT OF FACTS

### I. The Home Invasions

#### A. Harmon Hills Road – January 13, 2014

On January 13, 2014, Cletis Nelson (“Nelson”) and William Hopkins (“Hopkins”) were killed during a home invasion robbery. Nelson had been released from the prison work release program on Christmas Eve, December 24, 2013, and was living at his friend Edward Cannon’s (“Cannon”) mobile home on Harmon Hills Road. (A255, 412-13, 416-17). Cannon had walked away from work release and was wanted by the police. (A415). The three men sold drugs together. (A417-19).

Nelson met Racheal Rentoul after he was released from prison, and the two dated. (A501-03). Rentoul often drove for him. (A560). Rentoul was a prostitute who had a drug problem. She had been using cocaine daily for over 15 years, also used heroin, and sometimes used both at the same time. (A495-03). Rentoul became “friends” with Jackie Heverin (“Heverin”), whom Rentoul recruited into prostitution as a way for Heverin to fund her heroin and cocaine addictions. (A504, 620-32, 668-69). Rentoul was Heverin’s “pimp”—Rentoul collected the money up front, and paid Heverin in heroin. (A669-70). Nelson was their drug dealer. (A632). On the weekend of January 10-12, 2014, the two women stayed at a friend’s (Wes) home in Oak Orchard. (A504-05).

On January 10, 2014, Shamir Stratton and three of his cousins came to visit Stratton's cousin, Steven Kellam. Stratton and his cousin Damon Bethea ("Bethea") lived in Pennsauken, New Jersey. Stratton drove, and picked up Bethea and his two young cousins, Richard Robinson ("Robinson") and Rhamir Waples ("Waples"), from Philadelphia.<sup>3</sup> (A717-21). Robinson and Waples were brothers and they were young—18 and 17 years old, respectively. (A721-22, 1344).

The four New Jersey/Philadelphia men ended up in Delaware on Friday, January 10, 2014, because Stratton had called Kellam, and Kellam told him there was a party at the VFW in Millsboro. (A722-24, 727, 1357). Between the four of them, they only had enough money for gas to Delaware, so Stratton was prepared to do a "lick" (a robbery), and that is how he convinced the other cousins to go. (A724-25, 1358-59). They agreed to meet at the VFW. (A728). When Kellam arrived, they left with him and went to Pine Ridge trailer park, where Kellam lived with John Snead ("Snead"). (A728-30). The four men were staying there for the weekend. (A732-33). They got to the home at about midnight, hung out, drank beers, and went to bed. (A733).

The next morning, Kellam brought at least three handguns from his room, including a black .40, a silver .32 or .380, and a .22—all loaded. (A735-36, 919-

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<sup>3</sup> Kellam and Bethea were not related to Robinson and Waples—the two pairs were cousins of Stratton on opposite sides of Stratton's family. (A722).

22, 1377-79). Snead was in and out of the home all day. At some point, Kellam and the four men went to Kellam's sister's home on Mount Joy Road in Millsboro. (A738, 1364). Another cousin, Tom, came by and drove Stratton, Waples, Robinson and Bethea to the liquor store. (A741). Tom went inside and bought vodka while they waited in the car. *Id.*

A woman came out of the liquor store and started talking to the men. The woman was Rentoul. (A741). Stratton got her number. (A741). After the liquor store, Tom took them to McDonald's, and then went back to Kellam's sister's house. (A743).

That night, they went back to the VFW, along with Kellam and his sister. (A744). This time, the VFW was crowded. (A745, 1367). One of Stratton's cousins told Stratton there was a man bumping into him, trying to start something. (A1367-68). Stratton hit the man first, in the face, and Stratton ended up on the ground, twice. (A746-48, 13168). The second time, Stratton got up and went outside. (A1370). When he went back inside, the lights were on and another fight was starting. (A749).

When Stratton walked outside again, he saw a man holding a gun to Tom's brother, Jermichael "Jerry" Deshields ("Jerry"). Stratton tackled the gunman. (A750, 1594). Someone else punched Stratton in the neck. Someone fired a gun. (A1370). Police were coming, and Stratton, Jerry, Bethea, Waples and Robinson

drove away in Stratton's car. (A751-52).

Everyone went back to Kellam's house. (A752-55). Stratton noticed blood on his head. Someone had hit him with a bottle. (A755, 1372). Stratton went to Beebe Hospital and got seven staples. (A755-56, 1372). He went back to Kellam's.

The next day, Snead woke Stratton up, asking what happened the night before. (A760-61). Snead thought he may know who hit Stratton, and had Stratton walk down the road with him and up to two men sitting in a car. (A762-65, 1383). Snead asked Stratton if he recognized either of the men, one of whom was Hopkins. *Id.* Stratton did not. *Id.* They walked back to Stratton's house, and everyone else woke up. The men drank beer, watched TV and played music all day. Snead drank more than most of them and was acting "amped up." (A766, 1384).

Kellam and the four men left for Kellam's sister's house. (A705, 707, 712, 768, 1506). Before they reached the main road, they saw Snead and Hopkins fighting. (A770, 1383). They got out of the car. Stratton took Robinson's gun and waived it around, pointing it at Hopkins before Robinson took it back. (A1506-07, 1508). Robinson and Waples had guns in their hands. (A705, 712, 771-72, 1284-86).

Hopkins called a friend, Courtland Johnson ("Johnson") for help. (A707).

The call had a bad connection, but he understood where Hopkins was and that he needed help. Johnson had been playing basketball near Milton with a group of 8-10 men, and all of them went with Johnson. When they arrived, Hopkins had gone inside a home, and Snead was banging on the door, obviously under the influence. They asked that Hopkins and Snead fight one-on-one, and the men put the guns away. (A1386).

Hopkins fought Snead. (A705). Snead was so intoxicated he could barely stand up, so Hopkins roughed him up easily. (A709, 773-74). Johnson broke up the fight. (A706, 713). Snead told Hopkins, "You're a dead man. You're going to see the clouds." (A1509-10). Johnson told Snead to let it go. Snead told him "What, let it go tonight; kill him tomorrow?" (A713). Someone called the police and everyone left. (A707, 775).

Stratton, Waples, Richardson and Bethea all went to the Milford Wawa, and then Kellam talked with Snead briefly near a Milford apartment complex. (A779-89, 977, 1391). Kellam, Stratton, Bethea, Waples and Richardson went to Long Neck, to meet up with Gibbs. (A789-92, 1394).

Rentoul had spent the night with her boyfriend, Nelson, who was friends with Hopkins and stayed at Cannon's mobile home. In the morning, Nelson received several phone calls and texts that he did not answer. Finally, she looked at his phone and saw calls and texts from another woman. (A509). Rentoul was

angry. She had thought they were in an exclusive relationship. (A574-75).

Rentoul had a friend pick her up.

Rentoul then arranged a client for Heverin. The client, Carlton Gibbs, paid for a hotel room for the three of them at the Sea Esta Hotel in Long Neck. (A513-15, 519, 576-77, 580, 633-34). At the hotel, Rentoul ran out of heroin, and Gibbs gave her money to buy more. (A522). Rentoul went back to Cannon's mobile home, looking for Nelson. (A421, 517, 522). Nelson was not home, so Rentoul tried to get heroin from Cannon. (A423).

Nelson and Hopkins returned to the home while Rentoul was there. (A424). They told Cannon that Hopkins had been in a fight at the VFW the night before with "the Kellam guys, [and] somebody named Snead or something." (A425). Cannon helped Nelson count his drug money, about \$60,000.<sup>4</sup> (A426).

At about 9:30 p.m., Rentoul, Nelson and Cannon left to get some fast food. (A430, 523). Rentoul and Nelson then dropped Cannon off at a friend's house to get his hair cut. (A431-32, 523). By around 11 p.m., Rentoul called Cannon to see if she could pick him up. (A432). Cannon was not ready, so he told Rentoul he would find another ride. (A432).

Rentoul returned to the Sea Esta and used heroin with Heverin. (A525).

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<sup>4</sup> Rentoul remembered the total as \$5,862. (A518).



Gibbs had called friends to come to the hotel and hang out. (A525). Gibbs' friends happened to be the "Kellam boys." (A791-92). Stratton had been texting Rentoul during the day, and she had asked him to go to Long Neck, but he did not expect to see her there. (A525-26, 640, 792). They all started talking and drinking. (A793).

Rentoul brought up the VFW fight. (A1397). Rentoul told them Nelson "just got back from Wilmington and re-upped." (A528, 686). The men knew Nelson had helped Hopkins. (A680-82, 694-95). She told them about the drugs and money she saw in the mobile home. (A528, 597, 641-42, 1515-19, 1523). Kellam wanted them to go get the money and kill Hopkins. (A812, 912, 1398-99, 1404, 1547). The men were angry at Hopkins about the fight, (A528, 642), and Rentoul was angry at Nelson about the other woman. (A690). Kellam crafted the plan. (A529, 683-85, 794-96, 1400). Rentoul agreed that she would show them where the trailer was located. (A530, 1528).

When they left the hotel, they took three cars: (1) Heverin rode with Rentoul; (2) Kellam drove Robinson, Waples, Bethea and Stratton in his car; and (3) Carlton drove his truck. (A800-01).

Rentoul drove Heverin to the mobile home and parked in the back. (A531, 643). The men from the hotel followed her, but kept going when she pulled into the driveway. (A531). Rentoul went inside, bought heroin, and talked to Nelson.

(A532-33). He asked her to come back and stay with him, and she told him she would. (A533).

Rentoul and Heverin eventually went back to the hotel, packed up their belongings and left. (A534-36). They started to drive back to Nelson's, but they decided that the hotel was paid, so they should stay. (A538, 602). They used the rest of the heroin and went to sleep. (A538).

The men in Kellam's car parked behind Jerry's house and waited. Kellam got into Carlton's truck. (A802, 1401). Ten to fifteen minutes later, Snead pulled up in his car, with two other passengers. (A803). Kellam got into Snead's car for a while before Snead left. (A803-05). Kellam then walked to the driver's window of his car and handed Stratton, who was in the driver's seat, three guns—a .40, a .22 semi-automatic, and a .380. (A806-07, 1526-29).

Kellam told Stratton to ride with him, and they got into Gibbs' truck. (A808). Gibbs turned onto Mount Joy Road, made a few turns, and stopped in front of a Cannon and Nelson's mobile home, about half a mile from where they started. (A808-10). Kellam told Stratton, "This is where you all go," and Gibbs drove further and told them where to park. (A809).

Stratton went back to the car where his cousins were waiting. (A811). On speakerphone, Stratton asked Kellam what he wanted them to do with the people in the trailer, and Kellam said "kill them." (A812, 912, 1404, 1548, 1553).

Stratton drove the three men to Cannon's trailer, and parked where he was told to park. The three men got out of the car with the guns, and went to the trailer. They decided to avoid a possible shootout by sneaking in through a window. (A1405). Robinson told Bethea to get "one of the dudes" to open the door and let them in. (A1405). To make sure they knew the robbery was serious, Robinson gave Bethea the .40 and took the .22 revolver. (A1406). Robinson hoisted Bethea through the window, and waited with Waples behind the bushes. (A1407).

Bethea grabbed Hopkins by the dreadlocks and came to the back door to let the other two men inside. (A1409-09). Hopkins told them the money was in his jacket. (A1413). Robinson got the money and put it in his pocket. (A1414). They asked where he had the heroin, and Hopkins told them it was in the shed. (A1414). Robinson was not interested in the heroin, so Robinson and Waples started searching the trailer for more money. (A1415). Bethea just stood to the side. (A1416). After Robinson and Waples searched the couch, they hit Hopkins in the head with their guns a few times. (A1416). They asked him again where they could find money. Hopkins said there was no money in the house. (A1416). Robinson and Waples then started shooting Hopkins. (A1416). Robinson does not know how many times they shot him. (A1417). Robinson was drunk and high and just closed his eyes and kept shooting until he ran out of bullets. (A1535, 1539). Robinson killed Hopkins because Hopkins had beaten up Snead, and because

Kellam told him to. (A1419, 1427).

Bethea, who was standing to the side, looked in the other room and saw Nelson. (A1417). They made Nelson come into the living room and lay on the floor. (A1418, 1427). Nelson tried to look up, and Waples shot him point-blank in the head, and Bethea shot him in the back of the head. (A1418, 1427, 1533, 1537-38).

Stratton heard gunshots. (A814). Robinson and Waples came running out the front door of the trailer and got into the car. (A815, 1429). They said Bethea was right behind them, but Stratton was nervous and left. (A815, 1429, 1431). They heard more shots when Bethea was still in the house. (A1431). Stratton threw Robinson's and Waples' guns out of the car. (A1433, 1540, 1544).

They went back to Jerry's house. (A815-18, 1431). They told Kellam and Gibbs that they left Bethea. (A1433). Kellam and Gibbs went and got Bethea. (A1434). When they returned, Bethea handed Kellam the gun he used, and Kellam hid it under the trailer next door. (A822). Kellam then opened his trunk and asked for all the money. (A823). Robinson gave him the money he stole from Hopkins jacket, about \$2,500-3,500, which Kellam split among everyone involved, including Rentoul and Heverin. (A823). Each of the men got \$500-800, the women got \$500, and Kellam kept the rest.<sup>5</sup> (A824, 1440). Kellam told them they

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<sup>5</sup> When they were in the car, Robinson gave Waples \$1000 to pocket, so Waples

needed to get away. (A825). They drove back to Kellam's house, packed up their things, and headed north.<sup>6</sup> (A825, 831, 1444).

Cannon had a friend take him home. (A440). When Cannon got home, he noticed his back door was swinging open, which was odd, because it was "like five degrees outside." (A444). He went inside and found Nelson and Hopkins dead in the living room. (A445-47). Cannon did not call 911 because he was wanted for walking away from work release. (A447). Cannon went back to his cousin's house, but it was locked, so he went to the home of childhood friends who always take him in with "no questions asked." (A448-49). By now, it was around 2-2:30 a.m. (A449).

When Rentoul and Heverin woke up in the hotel room, Gibbs and Kellam were there. (A539, 646). Nelson had stopped responding to Rentoul's texts in the middle of the night, and Rentoul asked Gibbs about what happened. (A692). Gibbs was acting very odd. (A692). He gave Rentoul money, told her to split it with Heverin, and he and Kellam left. (A539, 604, 612, 693). Rentoul and Heverin went across the street to have breakfast and then left. (A540). Cannon called Rentoul in a panic and asked for a ride. (A450-51, 540). Rentoul dropped

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and Robinson each received an extra \$500. (A1437-41).

<sup>6</sup> They stopped for gas in Ellendale, and Stratton found out Robinson and Waples kept more cash than they gave Kellam. (A832). Robinson gave Kellam another \$100. *Id.*

Heverin off at her house and picked up Cannon. (A544).

Cannon was wearing pajamas and needed clothes. He had Rentoul take him back to his house so he could get clothes and some money. (A451-55). Rentoul did not go inside. (A542). Cannon went inside and filled a trash bag with clothes. (A542-43). Cannon noticed the money was not in the kitchen where he left it and it looked as though someone had searched the house. (A454-56). When he came outside, Cannon told Rentoul what happened. (A543).

Cannon believed that, given his escape status, he would be the primary suspect in the death of his friends. (A457). Cannon, driving the green Jeep, with Rentoul as the passenger, met a relative to get cash and a new cell phone. (A456-57). They then stopped to buy drugs and Cannon gave money to Rentoul. (A456, 460,543-44). They went back to the home of the “no questions asked” friends, but could not stay there. (A544-45). Cannon drove the Jeep to Heverin’s mother’s house, where he showered. (A545, 655-56). A friend of Cannon’s picked him up. (A460-61, 545). Rentoul told Heverin about the murders. (A656). Heverin drove Rentoul to Rentoul’s mother’s house in Wilmington. (A546).

Nelson’s brother, Terrence Nelson (“Terrence”), called 911 to report the murders. (A255-59). While at work on January 13, 2014, Terrence had received texts from several people who told him they had not heard from Hopkins or Nelson. Later that night, Terrence went looking for them, eventually at Cannon’s

home. (A257-61, 310). He noticed someone had removed a screen from one of the windows. (A310). Through the front door window, he saw his brother lying on the floor. The door was unlocked, and when he went inside the living room, he discovered that Hopkins and his brother were both dead. (A263-65). Terrence's brother was lying face down on the floor, and Hopkins was sitting up on the sofa. (A264). He called his mother, a friend and another brother, and then police. (A266-69, 280). He made the report at about 1 a.m. on January 14th. (A273).

Four troopers arrived and cleared the trailer. (A296). There were shell casings all over the living room (twelve total, from two different weapons)<sup>7</sup> and some of the couch cushions had been tossed around. (A297, 327,328-29). A television in one of the bedrooms was on, with music from a video game blaring. (A297). The police secured the scene and waited for the detectives and evidence unit to arrive. (A299). The evidence unit lifted a fingerprint from the removed window screen, and located 650 bags of heroin in two boxes inside a concrete block behind a shed on the property. (A318-20, 324, 355). When police removed Nelson's body and the rugs from under him, they discovered five bullet holes in the plywood floor, indicating he had been shot five times while on the floor. (A341-42).

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<sup>7</sup> An evidence detective testified that, had a revolver been used, it would not eject casings. (A358).

The medical examiner determined that Hopkins suffered ten gunshot wounds—six to the left arm, three to the head, one to the left hip, one to the upper right arm and one to the left hand—and recovered eight bullets from the body. (A380-82). Each of the two shots to Hopkins' head and the two to his chest would have been fatal standing alone. (A385-87, 393). Nelson suffered two fatal gunshot wounds to his head--one to the right side of his forehead and one to his neck, which penetrated his brain—and six gunshot wounds concentrated in the mid- to lower-right side of his back, which exited his lower chest. (A394-99, 404, 410). The gunshot wound to Nelson's right forehead was accompanied by stippling, which indicate the shot was fired within 18 inches to two feet of Nelson's head. (A404). The medical examiner recovered 10 bullets from Nelson's body. (A406). The medical examiner recovered two different caliber bullets from each man. (A400).

Cannon heard on the news that his friends had been discovered; he called Detective Chambers to tell him he was not involved. (A461, 963). Police found Cannon and arrested him.<sup>8</sup> (A462).

After he returned to New Jersey, Stratton told another cousin that something

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<sup>8</sup> Cannon pled guilty to Escape in the Second Degree. (A467-70). He was released from prison four days before he testified, after serving three years, nine months on the escape conviction. (A469).



happened when he was in Delaware. That cousin and his girlfriend were confidential informants in Camden, New Jersey, and they told a New Jersey detective. About a week after the murders, a detective contacted Stratton. (A835-36).

#### B. Sandy Drive—December 11, 2014

In December 2014, Robinson, Waples and their cousin Tyreek “B-Hop” Waples (“B-Hop”) came down from Philadelphia to do another robbery. (A1446-48). At this time, Kellam was living in a house near the Delaware State Police Troop 4 in Georgetown. (A1261, 1448). Jackson Vanvorst (“Vanvorst”) (Kellam’s best friend and also a drug dealer) (A1322)), was at the house with Kellam, Robinson, Waples and B-Hop” when they planned to rob Milton “Fat Dice” Lofland (“Lofland), a known drug dealer. (A1118, 1262-63). Kellam gave Robinson and Waples handguns, and B-Hop had a shotgun.<sup>9</sup> (A1452). Kellam told them Lofland had money and drugs, and to kick the door in and take whatever was there. (A1262, 1459).

Lofland lived on Sandy Drive, in Millsboro, with his girlfriend, Connie Steward (“Steward”). (A1105, 1123-24). Steward worked as a house cleaner. (A1120). On December 11, 2014, at about 11:45 p.m., Steward and Lofland went

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<sup>9</sup> B-Hop did not take the shotgun to the Lofland robbery. (A1460-61).

to bed. (A1107-08). Lofland told Steward he heard someone trying to get in the front door. (A1107). The intruders ran around back and kicked in the back door. (A1108). By the time Steward got up, four black men, dressed in black, with black masks, gloves and boots, were coming down the hallway with guns, asking “where was it at.”<sup>10</sup> (A1108, 1121, 1124). Steward asked Lofland what they were talking about, and one of the men kicked or punched her in the face, told her to shut up, and then hit her in the head with a gun. (A1109, 1464). Lofland told them there was not any money in the house. (A1465). One of the men hit Lofland in the head with a gun three or four times. (A1109, 1464).

Two men, Robinson and Waples, stayed in the back with Steward and Lofland, and searched her room. (A1110-11, 1263-64). One heard a noise and told her to be quiet, pointing the gun directly in her face. (A1110-11). Two men, B-Hop and Snead’s friend, ransacked the house, including tearing open her Christmas presents. (A1110, 1113-14). The men stayed about 15-20 minutes. (A1121). They did not find any money. (A1118, 1264, 1467, 1469). They went back to Kellam’s house and “chilled out; maybe watched TV.” (A1468). Steward

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<sup>10</sup> Steward testified four men entered her home. (A1108-10, 1323). Kellam told Vanvorst that Richardson, Waples and B-Hop went into the house while he watched from outside. (A1108-10, 1323). Robinson testified that B-Hop and Snead’s friend participated in both December 2015 robberies. Robinson initially left B-Hop out of one of the robberies, to “help him out” but by the time of Kellam’s trial, B-Hop was deceased. (A1573).

called police. The men had stolen Steward's watch and two would-be Christmas gifts—a DVD player and a pair of sneakers. (A1119-20).

C. Cordrey Road – December 14, 2014

Kellam told Robinson he wanted to rob Azel Foster (“Foster”), a purported drug dealer. (A1264-65, 1295, 1474-75). Kellam said there would be drugs and money in the house, and that they should be careful, because Foster owned a gun. (A1264, 1475).

Foster had been a well-known drug dealer during his teens and twenties, until he was convicted and went to jail. (A1043). Foster knew Kellam from when he was “in the game.” (A1066). In December 2014, Foster was living on Cordrey Road in Sussex County, with his fiancé and his two children, 10 and 4 years old. (A1040).<sup>11</sup> Tamika Turlington (“Turlington”), Kellam's friend/sometimes girlfriend, had lived near Foster, and went on a ride with Kellam, Snead and Vanvorst to show Kellam where Foster lived. (A1302).

The first night they tried to rob Foster, the door was latched and they saw a light come on, so they left. (A1266). Kellam had Vanvorst buy a gun for Snead's

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<sup>11</sup> Foster testified that he had been out of the drug business for 10-12 years. (A1063, 1065). He co-owned a very busy barbershop at the Laurel flea market and also worked as a highway safety supervisor. (A1040, 1056). His barber shop was cash-only, with over 100 customers a day. He did not keep cash at home. *Id.* (A1064).

brother/friend to use in the robbery. (A1266, 1277). Vanvorst purchased a .32 revolver that opened at the top, had no ammunition and did not work, and gave it to Kellam. (A1266-67, 1479).

On Sunday, December 14, 2014, Kellam, Turlington, Vanvorst, Robinson, Waples, Snead, B-Hop and Snead's brother/friend were at Kellam's house. (A935, 937, 951, 1270, 1297, 1475). They again planned to rob Foster. (A938-39, 1270). This time, Snead's brother/friend had the non-working .32 revolver. (1297-98, 1304, 1477-78). Kellam, Robinson, Waples, B-Hop and Snead's friend went to Foster's. Turlington and Vanvorst stayed behind. (A939, 1271). Vanvorst went home. (A1271).

At about 10:30 p.m., Foster was putting his younger child to bed when he heard a noise at the front door. (A1044). He looked down the hallway toward the door and saw figures outside. (A1045). He grabbed his pistol from his nightstand and told his fiancé to grab his daughter and get under the bed. (A1045). Foster went into the hallway, and the intruders kicked open his front door. Robinson, Waples, B-Hop and Snead's brother/friend were wearing all black, including masks and hoods, and were yelling "State Police." (A1047). Foster went into his bedroom and closed the door behind him. (A1049). The man kicked his bedroom door and Foster heard a "pop." (A1045). Foster fired four shots and Robinson fired back five times, emptying his revolver. (A1045, 1049, 1482-83). Robinson

ran, with the others following, while Foster reloaded. (A1046, 1482). Foster ran after them out the front door, and saw them run through a wooded area. (A1046).

Foster had been struck in the shoulder by one of the bullets, which went through his body and out his back. (A1046, 1052). His fiancé called 911.<sup>12</sup> (A1052). On one of his porch steps, he found a roll of duct tape, and in his driveway, he located a .33-caliber revolver—the gun Vanvorst bought for Kellam. (A1053-54, 1084). Foster threw his .38 Smith and Wesson revolver in a debris pile by an old shed at the edge of his property, and police never located it. They did find ammunition in his trash. (A1055). He picked up his shell casings before police arrived and thought he saw 9mm casings on the floor from the intruders' gun(s). (A1063-64).

The men went back to Kellam's house. (A939-40). Turlington was in Kellam's bedroom when Kellam told her that he watched the Foster robbery from a church across the street, and things had not gone as planned. (A934-35, 941-42). Robinson went into walked into Kellam's bedroom and talked to Kellam for a couple of minutes. (A942). Robinson had been holding a gun. *Id.* After Robinson left, Kellam told Turlington, "if I told him to shoot [you], he would

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<sup>12</sup> Foster was arrested and charged with Possession of a Firearm by a Person Prohibited and Possession of Ammunition by a Person Prohibited. (A1040-41). He agreed to cooperate with the investigation, and pled guilty to the ammunition charge and was sentenced to a year of Level II probation. (A1041).

have.” (A943). Turlington interpreted that statement as a threat. (A943, 953-54). She stayed a while longer and, once she left, never went back to Kellam’s house again. (A954).

At about 5 a.m., Kellam went to Vanvorst’s house and told Vanvorst that Foster was dead. (A1271-722). The next morning, Vanvorst went to Kellam’s house. (A1272). Robinson, Waples and B-Hop were there, talking about the robbery and bragging about the baby crying. (A1273). They did not find any money at Foster’s. (A1273).

Police collected eight projectiles from Foster’s home, but no casings. (A1070-76). Gunpowder residue on both sides of the door through which bullets travelled indicated that Foster and the intruder both used revolvers. *Id.* Ballistic testing of the projectiles recovered showed that they were .32 Smith & Wesson long bullets fired from the bedroom, and .38 special/.357 magnum bullets fired into the bedroom. (A1088-89, 1096-1100, 1102). The revolver found in the driveway was inoperable. (A1088). No prints were found on the duct tape. (A1089).

## II. The Wiretaps

In July 2014, Turlington had been arrested and charged with possession with intent to deliver heroin. (A932-33). In January 2015, she offered police information about Kellam in an attempt to obtain a better plea offer. (A945-56).

In February 2015, Latroya Burton drove Kellam to the State Police troop.

(A1328-35). On the way, Kellam told her to tell police he was with her the night Nelson and Cannon were murdered, and she did lie for him initially. *Id.*

Ultimately, Turlington provided police two cell phone numbers for Kellam. Using that and additional information obtained in the investigation, on March 13, 2015, Police obtained a wiretap order to monitor Kellam's communications on those two lines. (A1129-30). The wiretaps began March 17, 2015.<sup>13</sup> (A1239). Within the first week, they developed probable cause to obtain a wiretap order for one of Vanvorst's phone lines, and soon thereafter, for two other men. (A1140-42).

In March 2015, police intercepted phone calls between Kellam and three different participants in the home invasions:

- 1) On March 18, Robinson told Kellam someone stole the gun he received from Vanvorst, that Robinson. He was scared to tell Waples, and asked Kellam to tell Waples for him. (A1211-13, 2006-30). In another call, Kellam told Waples about the missing gun. (A1219, 2031). Then Kellam followed up with Robinson. (A1216-17, 2034-36). Kellam then called Vanvorst to tell him about the lost gun. (A1218, 2038).
- 2) On March 26, 2015, Waples told Kellam he is going to work with Snead, and Kellam warned him to keep an eye on Snead, who may try to cheat him. (A1219, 2039).
- 3) On March 28, Kellam talked to Vanvorst. Vanvorst tells him he can get a snub nose in exchange for "a sixteenth," and Kellam tells him "we need that." (A1221-22, 2040).

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<sup>13</sup> The State entered a *nolle prosequi* in Turlington's case in March 2015. (A947).

On April 18, 2015, Vanvorst told Kellam he lost money gambling again, which Kellam called stupid and commented about what he could have done if he had the same sum that Vanvorst lost. (A1223-24, 2041-42). After the call, the two exchange text messages. (A1224-26, 2043-45). Vanvorst texted Kellam that he was “going to run his truck into a tree.” (A1225). Kellam told him to go ahead, that maybe it would “knock some sense into you.” *Id.* Then Kellam wrote, “I know where to send the goons the next time they come through; fuck it, you throw it away anyway.” (A1225; 2043). Vanvorst testified that he knew the “goons” were Robinson and Waples. (A1274).

On April 21, 2015, two detectives went to Philadelphia to try to speak to Waples and Robinson. (A1226-28). They visited the last known address of each—Waples’ grandmother’s home and Robinson’s mother’s home. *Id.* They gave each of the women Detective Chambers’ business card, with the Delaware State Police Homicide Unit, and asked them to have Waples and Robinson call Detective Chambers as soon as possible. *Id.*

Before the detectives left the city, Kellam received a call from Snead. (A1228-29). Snead told Kellam, “Yo, bro, we have a serious . . . problem,” because his nephew just called and Delaware State Police had been at his door. (A1241). There was another call moments later. (A1229). Police obtained approval to place a wiretap on Snead’s phone.



Detective Chambers and Lieutenant Windish interviewed Waples on April 24, 2015. (A1232). Just after that interview, police intercepted several calls between Snead and Waples about the interview. (1241-33, 2048-52).

On May 1, 2015, the wiretap ended and police conducted a sweep to arrest those who had been charged as a result of the investigation. (A1234, 1276).

Among them, Vanvorst was arrested and charged with a total of 55 counts in two Indictments. (A1280). Police interviewed Vanvorst on May 1, May 15 and June 15, 2015. (A1285, 1287).

Robinson was arrested in Philadelphia on July 3, 2015, and was brought to Delaware on July 15, where he ultimately told police what happened. (A1352).

### III. Kellam's Defense at Trial

Kellam did not call any witnesses at trial. (A1596-98). His defense was to put the State to its burden of proof, particularly with respect to whether Kellam was the leader of the group. *Id.* Kellam attempted to create reasonable doubt by arguing that the police were out to get him, in particular, and the statements of the others were not credible because they had the opportunity to add facts that they learned through their individual discovery (for example, police reports), and each was seeking plea offers to save themselves. (A1487-1505, 1549).

## I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXCERPTS FROM THE WIRETAP RECORDINGS.

### Question Presented

Whether the Superior Court abused its discretion in granting the State's motion *in limine* to admit limited excerpts from months of wiretap recordings.

### Scope and Standard of Review

The trial court's decision on the admissibility of evidence is reviewed for abuse of discretion.<sup>14</sup> "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."<sup>15</sup> The Court reviews *de novo* the decision to instruct the jury on a particular theory of law, and it reviews the determination "to give a 'particular' instruction (that is, an instruction is given but not with the exact form, content or language requested) for an abuse of discretion."<sup>16</sup> "This Court generally declines to review contentions neither raised nor fairly presented to the trial court for decision. 'Accordingly, the failure to object at trial usually constitutes a waiver of the defendant's right to raise the issue

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<sup>14</sup> *Longfellow v. State*, 688 A.2d 1370, 1372 (1997).

<sup>15</sup> *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

<sup>16</sup> *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

on appeal unless the error is plain.”<sup>17</sup>

### Argument

Kellam argues that the Superior Court abused its discretion by allowing the State to introduce the wiretap recordings because: (1) the recordings were irrelevant; and (2) there was ample other evidence to find Kellam guilty of racketeering. The Superior Court did not err in finding that the evidence was admissible, but in any event, Kellam’s argument concedes that any error was harmless beyond a reasonable doubt. Kellam’s argument that the Superior Court’s limiting instruction was inadequate has no merit because he affirmatively waived the issue.

On August 15, 2017, over a year prior to Kellam’s trial, the State filed a motion *in limine* to admit, *inter alia*, certain excerpts from wiretap recordings at Kellam’s trial. (A149-54). The State argued that the phone calls were admissible under *Getz*<sup>18</sup> and showed Kellam’s role as leader of the organization and “implicit acknowledgement of the enterprise’s activities.” (A149-50). In his response (A156-66), Kellam argued that the recordings failed the *Getz* analysis, that they proved nothing, and that there was ample evidence against Kellam without them. At Kellam’s August 23, 2017 office conference and final case review, the Superior

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<sup>17</sup> *Harris v. State*, 695 A.2d 34, 40 (Del. 1997); *see* Supr. Ct. R. 8.

<sup>18</sup> *Getz v. State*, 538 A.2d 726 (Del. 1988).

Court ruled:

I have studied the State's motion, I have studied your response, and if there is nothing further, I am prepared to rule . . . .

All right. This is what the State is arguing as to its support: There were five alleged home invasions, all suspected drug dealers, alleged that they all involved the taking of drugs and money by way of a home invasion, and it is all part of their alleged criminal enterprise.

The alleged home invasions; get easy money from competitors; impacting competition; and that if the dealer is a victim, it's less likely to be reported. I think that's a truism.

There's no specific drug evidence as to Kellam as to specific charges, but the whole enterprise was about getting money and drugs to sell to get more money.

So having sat through one trial and the benefit of that, the whole enterprise is about violent conduct, home invasions in order to supplement the drug business, the enterprise that they are in.

. . . .

Phone calls. March 28th, Kellam to Vanvorst: Vanvorst tells Kellam he's got a .38-caliber for exchange for some drugs, and Kellam reportedly says, "Yeah, we need that."

March 18th phone conversation: Robinson tells Kellam the gun that Kellam gave Robinson and Waples was stolen. We have several conversations back and forth on that.

Robinson is worried about others, including Vanvorst's reaction to the fact that the gun was lost or stolen. That relevance would be that Kellam is the boss and can make peace within the group.

Again, it's guns, conspiracy, enterprise; Kellam the leader.

March 26th, Waples to Kellam, and Waples is saying put Johnny Snead to work. The question arises as to why putting Johnny Snead to work.

That seems to support the argument that Kellam is boss, and if you want something done, Kellam is the man that gets things done.

Can Johnny Snead get to work?

March 30th, Waples calls Kellam wanting to go into business, and Kellam tells him where he can go into business, Dover, which basically; again, is okay; your territory will be Dover.

Inferentially, he's the boss man.

Vanvorst gambling losses. Those discussions about Kellam telling him to quit, but he won't, et cetera, will still be the same, show the relationship between the enterprise and the business between Kellam and Vanvorst; that he'll just re-up, reload and lose that money, too.

That, as I understand, is the specific thing the State wants in. The bottom line is I think that goes in.

*Getz* is our case. Some of the language that the *Getz* Court uses, the Supreme Court is warned of the need for the trial court to carefully examine offers of proof to insure that the acts of prior misconduct have independent logical relevance and do not further the purpose of showing a predisposition to commit a crime charged.

Why the rule? The defendant is presumed innocent of these charges, so the trial is for what he did or did not do, not who he is.

It is a bar to show that the defendant is predisposed to criminal behavior and has a propensity to commit certain crimes.

This case is not a case where the prior act, prior alleged bad act, precedes the charged conduct. It is interwoven with the charged conduct and it does have a strong flavor of inextricably intertwined as to what it is all about; the world of the drug trade.

Specifically, whether its inextricably intertwined or a straight 404(b), the test is still the same.

I am satisfied the evidence is material to the issue and the ultimate fact in dispute. It is relevant as to motive, identifying Kellam as the alleged boss man; putting Kellam as the alleged boss man in a position of why would these other people do crimes.

I do not think Kellam is charged with going into any of these houses. I think his allegations are these are his minions, he puts them to work and they do his bidding; and that it is a common scheme and essentially a lack of mistake. I don't know what they were doing in there.

It must be proven by evidence which is plain, clear and conclusive.

You are going to have testimony of not only words coming out of Kellam's mouth, allegedly, per the wiretaps, you are going to have other sworn testimony presumably that will be subject to cross-examination. I think it meets that test, too.

It's not remote in time, it's interwoven.

Limiting instruction is mandatory. . . .I will give a limiting instruction unless you say I don't want that . . . .

Then you have the 403 analysis that must be done, and the *Deshields* analysis. And also look at if the State wants this in their case in chief.

. . . . I am satisfied. . . that this is relevant evidence in the case in chief. . . .

Under 403, I am satisfied that the prejudice [does not] substantially outweigh[] the relevance, applying the *Deshields* factor.

It's a tough case, as I said. [I]n 28 years, I have not figured out what jurors really think is important and not important. I have seen them come down on all sides. I did not try that one that was a not guilty in April. I do not know anything about that. But I think this is fair evidence, and I think the prejudice is not as bad . . . because . . . this jury is going to hear in another format . . . the fact that there [are] drugs and guns and home invasions, it's going to get in. So the prejudicial aspect is diluted significantly because of that. Also, the charge is racketeering. The racketeering must be proven as an association in fact. . . . [T]his, I think, is relevant evidence. It is not going to be a trial within a trial; it is not going to materially lengthen the trial. A lot of it is based on words out of his own mouth.

The Superior Court correctly summarized the facts and then, starting with “Getz is our case . . .” provided a detailed analysis of the *Getz* and *Deshields* factors, and granted the motion. (A179). There was no abuse of discretion.<sup>19</sup>

The wiretaps provide evidence of the Racketeering and Conspiracy counts in the Indictment. (A1623-24, 1633, 1638, 1642). Kellam's argument to the contrary is incorrect. Racketeering is addressed in sections 1501-1511 of Title 11. This Court has explained:

Section 1503 of Title 11 makes it unlawful for “any person employed by, or associated with, any enterprise to conduct or participate in the conduct of the affairs of the enterprise *through a pattern of*

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<sup>19</sup> See *Kendall v. State*, 726 A.2d 1191, 1195-96 (Del. 1999).

*racketeering activity. . . .*” A “pattern of racketeering” may be established by “2 or more incidents of conduct . . . [t]hat . . . constitute racketeering activity. . . .” In order to show a pattern of racketeering, the State must prove that “the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.”<sup>20</sup> The State may establish the threat of continued criminal activity by showing that “the predicate acts themselves involve threats of long-term racketeering activity, or . . . [that] the predicate acts are part of an entity's regular way of doing business.”<sup>20</sup>

Section 512 of Title 11 addresses conspiracy:

A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

(1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or

(2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.<sup>21</sup>

D.R.E. 401 defines “relevant evidence” as “evidence having 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.” D.R.E. 402 generally states that all relevant evidence is admissible. D.R.E. 403 excludes even relevant evidence where the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by

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<sup>20</sup> *Id.* at 1194 (Del. 1999) (quoting 11 *Del. C.* § 1503, 11 *Del. C.* § 1502(5), *Stroik v. State*, 671 A.2d 1335, 1342 (Del. 1996) and *United States v. Pelullo*, 964 F.2d 193, 208 (3d Cir. 1992)).

<sup>21</sup> 11 *Del. C.* § 512.

considerations of undue delay, waste of time or needless presentation of cumulative evidence.” The danger of “‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged” where this “improper basis, commonly, though not necessarily, [is] an emotional one.”<sup>22</sup> D.R.E. 404 provides that character evidence is generally not admissible to prove conduct; however, evidence of prior acts may “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”<sup>23</sup>

Kellam argues that the wiretap calls prove nothing other than Kellam is someone to whom people tell their problems. Op. Br. at 45-46. This argument has no merit. In *Kendall v. State*, this Court found that the defendant’s “misconduct in Maryland was direct proof of his pattern of racketeering because it showed that Kendall’s unlawful activities in Delaware were part of his ‘regular way of doing business.’”<sup>24</sup> The wiretap calls here served the same purpose, they showed how Kellam’s criminal enterprise worked, and that it was ongoing. The Superior Court correctly found that the phone calls provided evidence of racketeering.

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<sup>22</sup> *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quotations omitted).

<sup>23</sup> DRE 404(b).

<sup>24</sup> *Kendall*, 726 A.2d at 1194.



In any event, Kellam concedes that even if the Superior Court had erred in admitting the evidence, which it did not, the error was harmless. Kendall states, “the State had no need for additional and gratuitous evidence about the Racketeering charge; there was plenty of available proof,” and “[t]here was ample available other proof of the charged offenses.” Op. Br. at 46. Kellam’s claim is unavailing and he is not entitled to relief.

Kellam argues that the wiretap phone were too removed in time from the charged acts to be admissible. He claims the calls establish “an irrelevant association because it occurred months after the association was alleged to have occurred.” Op. Br. at 47. Under *Getz*, “Evidence is too remote in time ‘only where there is no visible, plain, or necessary connection between it and the proposition eventually to be proved. . . . [T]his Court in the past has analogized the ‘too-remote’ factor in *Getz* to the ten-year time limit contained in D.R.E. 609(b) governing impeachment by evidence of conviction of a crime.”<sup>25</sup> Here, the wiretaps clearly connected to the charged enterprise, involving the same people, referencing the past conduct and establishing its ongoing nature, and were well within the ten-year guideline.

Kellam argues that “[v]ouching for flawed witnesses is not a permissible use

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<sup>25</sup> *Id.*, at 1195 (Del. 1999) (quoting *Trowbridge v. State*, 647 A.2d 1076, 1078 (Del. 1984)).

of other acts evidence under the *Getz/Deshields* rubric.” Op. Br. at 47. This argument has no merit. This Court has “defined improper vouching as a prosecutor’s comment implying personal knowledge of the truth of a witness’ statement ‘beyond that logically inferred from the evidence presented at trial.’ The . . . Court was particularly concerned that such remarks amount to an official endorsement of the witness’ testimony.”<sup>26</sup> The recordings at issue did not express any opinion about another witness’s testimony and therefore, Kellam’s claim is unavailing.

Kellam argues that it was improper for the Superior Court to consider the fact that one of Kellam’s co-defendants had been found guilty, and another had been acquitted. Op. Br. at 47. Kellam cites no cases supporting this argument. The past acquittal underscored that the State’s witnesses had credibility issues, a fact that Kellam highlighted throughout this trial. DRE 403 acknowledges that cumulative evidence may be excluded if it “substantially outweighs” its probative value. The trial judge was, *inter alia*, conducting a Rule 403 analysis when he mentioned the prior acquittal of a co-defendant: “I have seen them come down on all sides. I did not try that one that was a not guilty in April.” (A177-78). In that analysis, it was not inappropriate for the trial judge to consider the credibility

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<sup>26</sup> *Clayton v. State*, 765 A.2d 940, 943-44 (Del. 2001).

issues of the various witnesses to determine whether the evidence was unduly cumulative. The past acquittal supports the trial judge's conclusion that the evidence was not impermissibly cumulative.

Finally, for the first time on appeal, Kellam raises an issue with the limiting instruction given to the jury for the wiretap evidence. Kellam argues that the Superior Court erred because the limiting instruction was poorly worded or otherwise insufficient. This argument is meritless because Kellam affirmatively waived any issue with the instruction before it was given.<sup>27</sup> Just after the State presented the wiretap evidence, and before the court took a break, the trial judge called the parties to sidebar and the following exchange occurred:

THE COURT: I am about ready to give a *Getz* instruction. Yesterday, there were communications which were captured in the record and a discussion about *Getz*. And I worked up a *Getz* [instruction] after counsel left chambers. And that was sent to counsel by way of attachment from my secretary. I heard from the defense that, other than my ruling, which he is preserving, the *Getz* language that I have worked up was satisfactory to him. I haven't heard from the State.

PROSECUTOR: That is fine, Your Honor.

THE COURT: I am going to ad lib slightly leading into it because this is structured to be given in the middle of a whole bunch of instructions. It will be given again, unless you do not want it to be. I am prefacing it because they would have heard the Indictment dates.

I am just going to say, preface that the allegations in the indictment are between January 2014 and January 2015. You have heard—then I will go into like this. You have heard evidence of

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<sup>27</sup> See *King v. State*, 239 A.2d 707, 708 (Del. 1968) (explaining the difference between the failure to object and an affirmative waiver).

wiretap conversations that occurred after the specific conduct alleged in the indictment. I am just going to frame those dates first. All right. Thank you.

(A1243-44). The Court then instructed the jury:

THE COURT: All right. Ladies and gentlemen, I am going to give you an instruction on wiretap testimony and the other evidence you just heard.

The accusations in the indictment the State alleges is that the criminal conduct alleged occurred between January 2014 and January 2015. You have heard evidence now of wiretap conversations allegedly occurring after January 2015. The specific conduct that is in the indictment. I call this subsequent wiretap recordings. You may not use this evidence as proof that the defendant is a bad person and, therefore, probably committed the indicted offenses. You may use the subsequent wiretap recordings *only to help you in deciding whether they are evidence of a common scheme supporting the State's allegations of racketeering occurring between January of 2014 and January 2015. You may also consider the subsequent wiretap evidence in helping you decide the allegations of Mr. Kellam's culpability in directing others to commit the charged crimes.*

I repeat to you: You may not use this evidence as proof that the defendant is a bad person, and therefore, committed the charged offenses. You may only use the wiretap evidence occurring after January 2015 in considering whether the evidence supports or does not support the State's claims of a common scheme and accomplice liability in directing the co-defendants. You, the jury, decide the weight and value of the evidence.

(A1244-45) (emphasis added). The trial judge then allowed the jury to leave for a lunch break, after which the attorneys remained until the judge recessed for lunch.

(A1246-47). Kellam did not raise any issue with the instruction given after the judge delivered the instruction to the jury, nor did he raise any issue when the court reconvened, even though he addressed other issues from the podium as soon as the

judge took the bench. (A1247). Kellam affirmatively waived any issue with the form of the instruction, and cannot raise it now. Even if the Court considers the argument, the jury's verdict established that they followed the instruction, and did not use the wiretap phone calls for an impermissible purpose—had they used the evidence to find that Kellam is just a bad person who probably committed all of these crimes, they would not have acquitted him on the two firearm charges. (A1853-54).

The Superior Court correctly found that the wiretap recordings provided admissible evidence of the Kellam's racketeering and conspiracy charges. The Superior Court's ruling granting the State's motion *in limine* correctly summarized the facts and provided a detailed analysis of the *Getz* and *Deshields* factors. Kellam's argument that the State had ample additional evidence to prove racketeering and conspiracy concedes that error, if any, was harmless beyond a reasonable doubt. Kellam's argument that the Superior Court's limiting instruction was inadequate has no merit because he affirmatively waived the issue, the instruction was sufficient, and his acquittal on three counts evidences he was not unduly prejudiced.

## CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: January 24, 2019

## CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on January 24, 2019, I caused the attached document to be served by File and Serve to:

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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**STEVEN KELLAM,** )  
 )  
Defendant Below, )  
Appellant, )  
 )  
v. ) No. 201, 2018  
 )  
**STATE OF DELAWARE,** )  
 )  
Plaintiff Below, )  
Appellee. )

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT  
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,980 words, which were counted by Microsoft Word 2016.

Dated: January 24, 2019

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