IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No.: 1109006066
	)	
JAMES M. SMITH,	)	
	)	
Defendant.	)	

ORDER

AND NOW, TO WIT, this 24th day of August, 2012, **IT IS HEREBY ORDERED** as follows:

Introduction

On July 17, 2012, an Order was issued granting in part and denying in part Defendant's motion *in limine* to submit evidence relating to a self-defense claim. Defendant filed a motion for reargument on July 20, 2012. The evidence that Defendant seeks to admit is inadmissible under *Getz v. State*.[1] Therefore, the motion is **DENIED**.

Discussion

Pursuant to Superior Court Civil Rule 59(e), a motion for reargument "shall be served and filed within 5 days after the filing of the Court's opinion or decision

[1] 538 A.2d 726 (Del. 1988).

. . . and shall briefly and distinctly state the grounds"[2] for reargument. This Court will only grant reargument when it "has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[3] "A motion for reargument should not be used merely to rehash the arguments already decided by the [C]ourt."[4]

The basis of the Defendant's motion is (1) the evidence about an alleged stabbing committed by the victim's friend is admissible because the defendant subjectively believed this information to be true;[5] and (2) evidence that people in the neighborhood warned the Defendant that the victim and Mr. Russo were going to "rob and kidnap" him is also admissible.

Defendant's First Argument: The Alleged Stabbing that Never Occurred.

Defendant's first argument fails because evidence of an alleged robbery committed by the victim's friend, Mr. Russo, who also happens to be the defendant's tenant, is inadmissible under *Getz*. The State submitted in its response to the Defendant's motion *in limine* that evidence of an alleged stabbing during the same month as the crime was inaccurate information because there was no

[2] Super. Ct. Civ. R. 59(e).
[3] *State Farm Fire and Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super. June 15, 2011) (citing *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006)).
[4] *Wilm. Trust Co. v. Nix*, 2002 WL 356371, at *1 (Del. Super. Feb. 21, 2002).
[5] A recitation of the facts is available in the Court's July 17, 2012 Order granting in part and denying in part Defendant's motion *in limine*.

indication in DELJIS that a stabbing took place. While the Court recognizes that with a self-defense claim, evidence of the Defendant's state of mind at the time of the crime is relevant, such evidence is only admissible if all factors set forth in *Getz* are satisfied. To be admissible under *Getz*, the following six guidelines must be met:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive." *Renzi v. State,* Del.Supr., 320 A.2d 711, 712 (1974).
> (4) The other crimes must not be too remote in time from the charged offense.
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.[6]
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[7]

Not all of the *Getz* factors have been satisfied by the Defendant. First, while evidence that the victim himself was accused of a stabbing during the same month as the commission of the crime may be material to why deadly force was used,

[6] D.R.E. 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."
[7] *Getz*, 538 A.2d at 734.

whether or not the victim's friend committed a stabbing is not material to why the Defendant used deadly force against the victim. Secondly, evidence of an alleged stabbing that never occurred has not been proved by evidence which is plain, clear and conclusive.

In *Kelly v. State*, the Supreme Court of Delaware held that evidence of the victim's prior Rape First Degree conviction was plain, clear and conclusive where the "prior conviction could be proven conclusively through Court records."[8] Similarly, in *Zickgraf v. State*, the Supreme Court of Delaware held that evidence was plain, clear and conclusive when offered from the direct testimony of an eyewitness to a crime.[9]

Here, there is nothing in the record besides the Defendant's false subjective belief that Mr. Russo committed a stabbing near the time of the crime. Unlike in *Kelly* where evidence of a prior conviction could have been established through Court records, here, that is impossible because DELJIS indicates that Mr. Russo was not charged with anything relating to a stabbing. Also, unlike in *Zickgraf*, the Defendant has not presented any evidence that there were eyewitnesses to a stabbing that never occurred. The Defendant's belief alone cannot pass the plain, clear and conclusive prong of *Getz*. Therefore, the Court properly held that the evidence of a stabbing which never occurred is inadmissible.

[8] 981 A.2d 547, 551 (Del. 2009).
[9] 615 A.2d 532, at *2 (Del. 1992).

Additionally, the Defendant relies on *Anderson v. State*[10] for the proposition that even though the information about the stabbing was not accurate, it is nonetheless admissible to show the Defendant's state of mind at the time of the crime. In *Anderson*, Joe Travis was involved in an argument with the victim when the victim revealed what appeared to be a handgun, but was actually a BB gun.[11] As the victim fired two shots at Travis, the pistol made a "popping sound."[12] The defendant chased after the victim and struck him repeatedly in the skull with a baseball bat.[13] The defendant testified that he believed the pistol was real and therefore, acted in self-defense.[14] The defendant argued on appeal that this Court abused its discretion in excluding expert testimony about the deadly effects of a BB gun.[15] The Supreme Court of Delaware held that this Court properly concluded that the expert testimony was irrelevant because, "given the subjective nature of the defense, an offer of expert testimony to prove that a pistol in question was capable in fact of causing bodily injury or harm is irrelevant."[16]

The facts in *Anderson* are distinguishable from the instant case. Here, unlike in *Anderson*, there is nothing in the facts to support a mistaken belief about a direct threat imposed on the defendant such as a gun or deadly weapon. What the Court

[10] 625 A.2d 278 (Del. 1993).
[11] *Id*. at *1.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at *2.
[16] *Id*.

is faced with in the instant case is false information about a stabbing that never occurred. The Court declines to hold that based on this belief alone, the evidence of the pseudo stabbing is admissible. Such a holding would stand for the proposition that any defendant could come into Court and claim mistaken beliefs for a self-defense claim. Additionally, the Court's holding in *Anderson* narrowly applied the irrelevancy of using expert testimony to prove whether a BB gun is a deadly weapon, which is not the issue here. Therefore, based on the facts presented to the Court, the evidence of the mistaken stabbing is inadmissible at trial to substantiate a self-defense claim.

Defendant's Second Argument: Evidence that the Victim Allegedly Threatened to "Rob and Kidnap" the Defendant.

The Defendant argues that the information about the victim and Mr. Russo plotting to "rob and kidnap" the Defendant is admissible for two reasons. First, the Defendant submits that this information is not hearsay and in the alternative, if it is hearsay, it is admissible under D.R.E. 803(3). The Defendant next contends that, (1) it is apparent why the Defendant would fear the victim based on the threats; (2) the information would be used to prove the Defendant's response to the victim's acts of violence against the Defendant; (3) that "[t]he submission was not intended

to substitute for an *in limine* hearing or a *voir dire* on the proffer;"[17] and (4) the Court does not adequately explain how the evidence is unfairly prejudicial.

As a preliminary matter, the Court notes that the Defendant did not engage in the necessary analysis in seeking to admit evidence of a self-defense claim at trial. Instead, the Defendant is focused on the subjectivity of the evidence rather than looking at both the subjectively and satisfaction of the factors set forth in *Getz*. Defendant fails to even cite *Getz* in both its original motion *in limine* and its motion for reargument.

The Court previously held in its July 17, 2012 Order that the information pertaining to the "rob and kidnap" testimony was inadmissible as hearsay. Upon review of the motion for reargument, it appears that this information is admissible hearsay. In Delaware, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[18] The testimony about the victim and Mr. Russo "robbing and kidnapping" the Defendant would be hearsay because it is an out of court statement offered to prove future harm directed at the Defendant. However, this evidence would be admissible hearsay under D.R.E. 803(3).[19] In *Jones v.*

[17] Deft. Mot. for Reargument, at p. 4.
[18] D.R.E. 801(c).
[19] D.R.E. 803(3) states that hearsay is admissible if it is a "statement of the declarant's then existing state of mind, emotion sensation or physical condition (such as intent, plan, motive, mental feeling, pain and bodily health), but not including a statement of memory or belief to

State, the Supreme Court of Delaware held that a victim's hearsay statements were admissible under D.R.E. 803(3), "if they express the victim's then existing state of mind or intended future conduct and are relevant to proving the defendant's motive. . . ."[20] Therefore, like in *Jones*, the victim's statement about his intended future actions towards the Defendant is admissible hearsay under D.R.E. 803(3).

While the information would be admissible hearsay, it is not admissible under *Getz*. First, Defendant claims that it is apparent why the Defendant would fear the victim who was plotting to rob and kidnap him. However, such information is not apparent because not withstanding the information about the "robbing and kidnapping", there is no information suggesting that deadly force was necessary on the day of the confrontation. Secondly, even though the Defendant explains that the information would be used to prove his response to the victim's statements, all of the factors of *Getz* must be met for the evidence to be admissible at trial. Thirdly, on the issue of remoteness, the Defendant submits that the motion *in limine* was not meant to substitute an *in limine* hearing. On June 5, 2012, the day of trial, the Defendant filed the motion as a motion *in limine* to submit evidence on a self-defense claim. The Court has discretion to evaluate the motion and decide the issues without a hearing. In both motions, the Defendant fails to

---

prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will."

[20] *Jones v. State*, 798 A.2d 1013, 1015 (Del. 2002).

state when these accusations were communicated to him in relation to the confrontation with the victim.

Lastly, the Defendant argues that the Court did not adequately explain why this information was unfairly prejudicial under D.R.E. 403.[21] This Court has the discretion to determine whether or not the probative value of evidence is substantially outweighed by the danger of unfair prejudice.[22] Here, the information is unfairly prejudicial because there is no evidence that the information is reliable. The other factors of *Getz* have not been met and the Court finds that there is a danger of unfair prejudice of the jury believing the self-defense claim based merely on the alleged statements made by the victim to the Defendant. Thus, the Court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

[21] D.R.E. 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."
[22] *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

Conclusion

The Defendant has failed to establish that (1) the Court overlooked a precedent or legal principle that would have a controlling effect; or (2) the Court has misapprehended the law or the facts which would affect the outcome of the decision.

Based on the foregoing, Defendant's Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

/S/ CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.