

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

STATE OF DELAWARE)	
)	
)	
v.)	ID NO. 0812020623
)	
JOSEPH M. TAYE)	
)	
Defendant)	

Submitted: September 3, 2009
Decided: September 23, 2009

MEMORANDUM OPINION

State's Motion in Limine to Admit Evidence of Prior Bad Acts Pursuant to D.R.E. 404(b)

GRANTED

Appearances:

Sean P. Lugg, Esquire, John W. Downs, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, attorneys for State of Delaware

Joseph Hurley, Esquire, Wilmington, Delaware, attorney for the defendant

HERLIHY, Judge

In December 2008, a silver BMW drove at a high rate of speed southbound on U.S. Route 13. The operator ignored flashing emergency lights from a parked police vehicle and an ambulance. The BMW struck the police car, the ambulance driver who was administering medical attention to an injured motorcyclist lying on the roadway, and that motorist. The ambulance attendant was killed.¹

The BMW continued on, eventually coming to rest on the shoulder. A car pulled up behind it and helped extricate the BMW's driver who could not use his legs. That second car with the BMW's driver in it then left the scene. The police later searched the BMW and recovered a large wooden stick near the passenger door and a wheelchair in the back seat.

The police traced the BMW to Tracey Young. Her boyfriend at the time was Joseph Taye, a paraplegic, the defendant in this case. He is charged with a number of offenses, including murder. Taye denies that he was operating the BMW.

The State seeks to introduce in its case-in-chief, evidence of a November 2007 incident in which Taye was driving the same BMW, ran a red light, collided with another vehicle and fled to a nearby neighborhood. Witnesses there at the scene reported seeing a man crawling away from the BMW before being pulled into a waiting car. Police found a long wooden stick and a wheelchair in the BMW.

¹ In this opinion, the Court uses the word ambulance attendant. That description is *not* to be taken as a ruling of any kind on a major issue to be resolved at trial concerning "firefighter." See *State v. Taye*, 2009 WL 2634719 (Del. Super. Aug. 27, 2009).

The issue before the Court is whether; using all the tests for the admissibility of prior bad acts, evidence of the November 2007 incident is admissible in Taye's upcoming trial on the charges stemming from the December 2008 events. The Court holds that the evidence is admissible to show identity, state of mind, and consciousness of guilt.

Factual Background²

On December 20, 2008, Edward Reiss ("Reiss") was operating a motorcycle southbound on U.S. Route 13 in New Castle County in the vicinity of the New Castle County Airport. He lost control of it and was injured when it slid along the highway.³

The Delaware City Fire Company was standing in for the Wilmington Manor Fire Company on December 20th. The latter's station was about one mile from Reiss' accident. Michelle Smith, a member of the Delaware City Fire Company, and her partner responded to the scene in an ambulance. Upon arrival, she parked the ambulance, still with emergency lights flashing, exited it and began to administer first aid to Reiss.

Shortly thereafter, a New Castle County Police officer came to the scene and parked his car at an angle behind the ambulance with its emergency lights flashing. Sometime after Smith left the Wilmington Manor fire station, several other firemen drove to the scene in a rescue truck with its emergency lights flashing as well. As it travelled southbound to the scene, a car came up on its left at a high rate of speed, passing the

² The "factual background" is a combination of the affidavit of probable cause attached to Taye's arrest warrant and the State's version of the events contained in the motion *in limine*. At this juncture, of course, the Court has heard no evidence and this recitation of the background is not indicative of the Court's view of the evidence.

³ Reiss' blood alcohol content was 0.14, in violation of 21 Del C. § 4177. Evidence of Reiss' B.A.C. is the subject of the State's second motion *in limine*.

truck. The car kept going, first striking the County Police car and then hitting Smith and running over Reiss. As a result, Smith was killed and Reiss was further injured.

Following the initial collision, the BMW continued down Route 13 and came to an uncontrolled and involuntary stop. Witnesses at the scene described the operator of the BMW as an African-American male who could not use his legs. Someone then drove up behind the BMW, pulled the driver from the passenger side of the BMW and dragged him to a waiting car which then fled the scene. The police searched the abandoned BMW and recovered a wheelchair⁴ in the back seat and also a wooden stick, approximately thirty-three inches long, in the base of the passenger side door. The corresponding investigation revealed that the BMW was owned by Tracey Young, Taye's girlfriend. Taye was later found and arrested at Young's residence. Taye has been a paraplegic since 2005.⁵

Taye has been indicted for Murder in the first degree,⁶ Murder in the second degree,⁷ Assault in the first degree,⁸ Reckless endangering in the first degree,⁹ and various motor vehicle offenses.

⁴ According to the State, a witness later confirmed that this was Taye's "travel wheelchair."

⁵ The BMW has never been modified in any way to enable a paraplegic to operate it.

⁶ 11 Del. C. § 636(a)(4), the reckless killing of Smith, "a firefighter."

⁷ 11 Del. C. § 635.

⁸ 11 Del. C. § 613.

⁹ 11 Del. C. § 604.

During the investigation into the 2008 accident, the State secured information detailing another accident on November 30, 2007, in Elkton, Maryland.¹⁰ In that incident, the same BMW failed to stop at a red light and collided with another vehicle at the intersection of Augustine Herman Highway and Whitehall Road, just south of U.S. Route 40. The driver of the BMW then fled the scene. Shortly after, Elkton police located the BMW parked on the street in a nearby neighborhood. From it they recovered a wheelchair belonging to Taye and a long skinny wooden stick, about four feet long. During the ensuing investigation, a witness notified police that he observed an African American male dragging himself from the BMW. Then another witness approached police and stated that Taye was in her car and that he had called to arrange for her to pick him up because he had been in an accident. When the police questioned Taye, he informed them that he is paralyzed from the waist down and the officers observed Taye to have dirt marks all over his gray sweatpants.

The State wishes to call in its case-in-chief civilian and police witnesses to testify about what they observed and the items seized from the BMW during the 2007 accident. Taye opposes the motion, claiming that this evidence is inadmissible based on D.R.E. 404(b) and 403.

Parties Contentions

The State proffers the evidence of the 2007 incident for several purposes. They include; Taye's identity as the driver of the BMW in the 2008 incident, his state of mind

¹⁰ The November 30, 2007 accident will be referred to as the "2007 incident" throughout this opinion.

at that time, his pattern of activity and *modus operandi*. The State notes that Taye denies being the driver, and, of course, it must establish beyond a reasonable doubt Taye's identity as such. Further, since Taye is a paraplegic, the State must prove he was somehow capable of operating the BMW. In addition, the State contends the 2007 incident evidence goes to Taye's state of mind, in this instance to the element of recklessness which is must prove in the two counts of murder.

The State contends that the 2007 incident evidence passes all of the tests the Delaware Supreme Court has established for the admissibility of prior bad acts evidence. In addition, the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice.

Taye's response is that it is not clear that Taye was driving the BMW in 2007; he is certainly, at best, a passenger, and this uncertainty undermines the relevancy of the 2007 evidence. He asserts that other evidence is available from the 2008 evidence: (1) two witnesses who saw the BMW's driver dragged out of it and then into a waiting car. One witness gave a physical description of the person being dragged – a person who could not walk – which is “consistent” with Taye's description;¹¹ (2) a bottle of Hennessey Scotch which may be Taye's “drink of choice;” (3) one hundred forty-two one dollar bills outside the BMW which may link Taye through his preferred method of

¹¹ Def. Resp. to State's Mot. *in Limine* at 2.

tipping at an adult entertainment club; and, (4) other witnesses who saw Taye drive the BMW prior to December 20, 2008.¹²

Further, Taye claims the evidence of the 2007 is inflammatory. He concedes there is an “unmistakable” connection between the two incidents; but, a jury will just find that if he did it in 2007 then he did it again in 2008. Finally, Taye argues that no curative instruction can cure the prejudice that would come from this evidence.

Discussion

The State’s motion *in limine* seeks to admit during its case-in-chief, details of the 2007 incident and Taye’s subsequent flight.¹³ When a party seeks to introduce evidence of prior bad acts, this Court must evaluate the admissibility under D.R.E. 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The Supreme Court has set down a five factor test through its decision in *Getz v. State* to determine the admissibility of prior uncharged conduct or bad acts.¹⁴ These factors include: 1) whether the evidence is material to an issue or ultimate fact in dispute in the

¹² *Id.* at 6.

¹³ The Court appreciates that this motion was raised prior to the trial so that careful consideration could be given to the fourteen factors now to be employed in determining the admissibility of 404(b) evidence.

¹⁴ 538 A.2d 726 (Del. 1988); *See also, Joynes v. State*, 797 A.2d 673, 675 (Del. 2002) (holding that a trial court must evaluate the evidence’s admissibility under *Getz* when, as in the case here, the State is attempting to introduce prior bad acts for reasons included in the exceptions to 404(b)’s general prohibition).

case; 2) whether the evidence is being introduced for a purpose sanctioned by Rule 404(b) or another purpose not inconsistent with the basic prohibition against bad character evidence or criminal disposition; 3) whether the evidence is proven by plain, clear and conclusive evidence; 4) whether evidence is too remote in time; and, 5) whether the evidence is admissible in light of a balancing test required by D.R.E. 403.¹⁵ *Getz* also requires the use of a limiting instruction to the jury as required by D.R.E. 105 should the evidence be admitted.¹⁶ The Court will address each of the five *Getz* factors individually.

The first factor requires that the evidence of other crimes or conduct be material to an issue or ultimate fact in dispute of the case.¹⁷ “Evidence is material if it is offered to prove a fact that is ‘of consequence’ to the action.”¹⁸ The State claims that the details of the 2007 incident will help identify the driver of the BMW during the 2008 accident and his criminal mental state. The State further contends that a material issue related to identification will be Taye’s physical ability to operate a car. It is a logical extension that the State must prove Taye, a paraplegic, was capable of driving a car, before it can prove that he was driving during the 2008 incident. The identity of the driver that hit Smith and Reiss, as well as the mental state of said driver before, during and after the accident are clearly “of consequence” to the trial as the State bears the burden of proving both elements.

¹⁵ *Getz*, 538 A.2d at 734

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Stickel v. State*, --- A.2d ----, 2009 WL 1676040 (Del. Jun. 16, 2009).

The State argues the following evidence from the 2007 incident helps prove that Taye was driving during the 2008 accident: The presence of Taye's wheelchair and a long wooden stick, similar in size to the wooden stick recovered at the scene of the 2008 incident; his flight from the accident scene; eyewitness testimony that stated an African American male who apparently could not use his legs had dragged himself away from the damaged BMW; another witness who advised police that Taye was involved in an accident and was in her vehicle; and the presence of dirt on Taye's pants.

The unique similarity in the evidence of both incidents is material to the question of who was driving, and the "capability" of the driver during the 2008 incident. Evidence that an individual matching Taye's description and physical handicap was observed fleeing the exact car involved in the 2008 accident that contained both a wheelchair and large wooden stick indicates that there is a strong possibility that the 2007 and 2008 incidents share the same driver. As to the first *Getz* prong, the evidence is material as it relates to the identity of the BMW's driver during the 2008 accident.¹⁹

Although the State does not explicitly argue this in its motion, the 2007 incident does in fact provide material evidence for another issue likely to be contested at trial; whether Taye's actions were reckless. "A person acts recklessly with respect to an element of an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the

¹⁹ The State also attempts to introduce evidence of the two crimes as a theory of *modus operandi* establishing a pattern of behavior as evidenced by the accidents' similarities. Both of these methods are different ways to establish identity and do not need to be separately considered.

conduct.”²⁰ A reckless state of mind is especially material in this case. In Count I charging Taye with murder in the first degree, he is accused of recklessly causing Smith’s death. In Count II charging murder in the second degree, there is an element of recklessness in that Count. In short, a reckless state of mind is a quintessential element to the two most serious counts Taye faces. To show recklessness, the State bears the burden of establishing that Taye was aware of, and consciously disregarded, the risk associated with his alleged method of driving an automobile.²¹ Evidence of a prior accident is material in establishing Taye’s comprehension of the risks associated with driving in the alleged manner, namely by using a stick. The fact that he had already been involved in one accident, presumably operating the BMW in the same way, indicates that he knows there are inherent risks associated with such activities.²² If the State seeks to introduce the evidence to prove recklessness, this meets the first *Getz* factor also.

The second *Getz* factor requires the Court to analyze whether the purpose for introducing the proffered evidence is sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.²³ The State is requesting to admit this evidence to show either identity or

²⁰ 11 Del. C. § 231(e); *see also*, 11 Del C. § 263 (“The element of reckless . . . causation is not established if the actual result is outside the risk of which the defendant is aware”).

²¹ It appears that the State is alleging Taye depressed the accelerator and brake using the wooden stick in lieu of his feet.

²² The State’s motion does not allege, nor will the Court assume, that any criminal charges or citations resulted from the 2007 incident.

²³ *Getz*, 538 A.2d at 734.

knowledge (as it relates to recklessness). Both of these justifications are explicitly noted in D.R.E. 404(b) and neither violates the general prohibition of introducing other crimes to show action in conformity therein. In addition, leaving the scene of the 2007 incident, as he allegedly did, shows consciousness of guilt, as flight from the 2008 accident shows. The State has met the second *Getz* standard.

The third factor under *Getz* requires that the evidence sought to be admitted be “plain, clear and conclusive.”²⁴ Evidence of uncharged criminal activity or bad acts must meet a threshold question of reliability before it can be admitted.²⁵ The State seeks to introduce evidence through witness testimony detailing the 2007 incident and flight. Also, the State wishes to introduce police witnesses’ testimony concerning the details of the accident and the items recovered from the BMW. In *Diaz v. State*, the Supreme Court held that eyewitness testimony meets the “plain clear and conclusive” test and is admissible as evidence of uncharged conduct.²⁶ Under the *Diaz* standard, the witness testimony is admissible and satisfies the third *Getz* standard.

The fourth factor under *Getz*, is whether the other incident is or is not too remote. The 2007 incident occurred thirteen months prior to the 2008 accident. “Evidence is too remote in time ‘only when there is no visible, plain or necessary connection between it

²⁴ *Id.*

²⁵ *State v. Cohen*, 634 A.2d 380, 391 (Del. Super. 1992).

²⁶ 508 A.2d 861, 865 (Del. 1986).

and the proposition eventually to be proved.”²⁷ The prior incident was only thirteen months before. It has a “plain and necessary connection” to the 2008 incident for all the reasons discussed. In short, it is not too remote.

The fifth *Getz* factor requires the most attention. Evidence of uncharged crimes or bad acts is admissible only after this Court balances the probative value of such evidence against its danger of an unfairly prejudicial effect, as required by D.R.E. 403.²⁸ D.R.E. 403 allows for exclusion of relevant evidence if its probative value is substantially outweighed by its dangers of unfair prejudice, confusion, delay or waste.²⁹ “Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be.”³⁰ The Supreme Court in *DeShields v. State* articulated nine factors that should be considered when determining the admissibility of evidence through Rules 404(b) and 403:³¹

(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would prolong the proceedings.³²

²⁷ *Kendall v. State*, 726 A.2d 1191, 1195 (Del. 1999) (citing *Lloyd v. State*, 1991 WL 247737, at *3 (Del. Nov. 6, 1991)).

²⁸ *Getz*, 538 A.2d at 734.

²⁹ D.R.E. 403

³⁰ *Stickel*, 2009 WL 1676040 at *3.

³¹ 706 A.2d 502, 506-07 (Del. 1998).

³² *Id.*

Addressing the first factor, “The extent to which the point to be proved is disputed,” balances in favor of admitting the evidence. Taye denies that he was driving the BMW during the 2008 accident.³³ When the Court considers the “adequacy of proof of the prior conduct,” the second *DeShields* factor, it also balances in favor of admission. The State’s prospective witnesses will testify that they observed Taye exit the BMW shortly after the 2007 collision and the police will testify that Taye’s personal belongings were left in the BMW after it had been disabled due to the accident. This is similar to the third prong in *Getz* which requires the evidence presented be “plain, clear and conclusive.”

The third *DeShields* factor focuses on the probative value of the proffered testimony. The 2007 incident evidence is highly probative of not only Taye’s identity as the driver during the 2008 incident and his ability to operate the BMW, but also to Taye’s mental state at that time and his consciousness of guilt.

The eyewitness testimony that Taye was likely driving the BMW immediately after the 2007 incident and physical evidence relating to personal items left in the BMW makes it more probable that Taye was driving the same BMW containing very similar personal items during the 2008 accident. Furthermore, Taye is charged with two counts of murder where an element of each is recklessness, proof of which requires the State to establish Taye’s awareness and conscious disregard of a substantial and unjustifiable risk that an accident will occur from his actions. Evidence of a previous incident, under

³³ Def. Resp. to State’s Mot. *in Limine* at ¶ 21(d).

similar conditions, is probative in showing the Taye knew his method of operation by utilizing a stick to push the accelerator and brake was dangerous. Finally, evidence of Taye's flight after the initial collision in 2007 is admissible to show consciousness of guilt. The consciousness of guilt arises from evidence that he ran a red light, feared arrest and discovery that he should not have been operating the vehicle at all. Allegedly that same consciousness of guilt manifested itself here.³⁴ In 2008, it is alleged after striking the County Police car, hitting Smith and Reiss, he fled the scene. In both cases he sought or received help in fleeing. The third *DeShields* factor balances toward admitting the evidence of the accident.

The fourth and fifth *DeShields* factors are related and can be discussed together. The Court must factor the State's need for the evidence and the availability of less prejudicial proof in determining admissibility under Rule 403. Taye argues that the State does not need to offer this evidence as it relates to identity because of physical and testimonial evidence collected during the investigation.

In cataloging the State's evidence, Taye acknowledges that witnesses observed a handicapped African-American man being dragged away from the BMW immediately after the 2008 accident and into a waiting car. Taye also argues that a bottle of Hennessy brand scotch found on the floorboard of the BMW and a wad of 142 one dollar bills, found outside of the BMW, identify Taye as the BMW's driver. Also, Taye

³⁴ The Court has no intention of giving a flight instruction, however.

argues that because his wheelchair was present in the BMW it indicates he was in it, but he does not argue that it means he was *driving* it.

Taye's argument misses the point, which starts from his denial that he was driving. No witness, to the Court's knowledge, has identified Taye as the driver, particularly the two who saw someone drag him from the BMW. The Court is unaware that, contrary to the 2007 incident where he told someone he was in an accident, there is an equivalent witness to the events of 2008. The 142 dollar bills,³⁵ the Hennessey and wheelchair may be probative of Taye's *presence* in the BMW in 2008. But their probative value is not so great as to hold that such evidence means it rises to the same level of relevance as the 2007 evidence. It is "available" in the broadest sense of the word, but clearly that sense does not make it so much more important that the State cannot present the 2007 evidence. Within bounds, the State must be allowed to prove its case. The evidence from the 2007 incident aids the State in proving that Taye drove the BMW during the 2008 accident. Although there is other inculpatory evidence, the 2007 incident evidence is not excluded because of the remaining State's evidence.

The sixth *DeShields* factor is the degree of unfair prejudice. The emphasis is on "unfair." Any evidence averse to an opponent is prejudicial. The Court has exhaustively reviewed the evidence. Under the *Getz* analysis alone³⁶ the Court determined there was

³⁵ The Court is concerned that linking Taye as the driver of the BMW to his tipping habits at adult entertainment establishments has its own 404(b) implications.

³⁶ *See supra.* p. 6.

no unfair prejudice with regard to the proffered evidence. The Court sees no reason to repeat that analysis for this sixth factor.

The seventh factor is the similarity between the two incidents. As indicated above, the two incidents share many unique common traits. A leading hornbook explains the significance of these similarities:

If the purpose [of admitting the evidence] is to pinpoint identity by showing that on another occasion the defendant followed a *modus operandi* strikingly similar to the one apparently followed by the perpetrator of the charged offense, the key probative worth is the degree of similarity between the charged offense and the previous offense.³⁷

As described above, the two accidents share many particularities. Given that the State's purpose for seeking the evidence's admission is to identify Taye as the driver during the 2008 accident, the similarity between the two is highly probative and favors admission.

DeShields' eighth factor is the effectiveness of any limiting instruction. Taye argues no limiting instruction can cure what he claims is the prejudice from the 2007 evidence. This argument recognizes something experienced trial counsel know, limiting instructions can reinforce the evidence they do not like. Nevertheless, the Court is duty bound to give one. The use of the evidence goes to essential factors in this case, identity, state of mind and consciousness of guilt. These are the reasons the court would inform

³⁷1 CHRISTOPHER B. MUELLER & LAIRD C. KILPATRICK, FEDERAL EVIDENCE § 108 (2d. ed. 1994).

the jury the State offers the evidence. As the Supreme Court has said, this Court assumes the jury will follow such instruction.³⁸

Taye agrees that the 2007 incident evidence will not prolong the proceedings; therefore, it is not a salient factor and does not weigh into the analysis.

After weighing the factors articulated in *DeShields*, the Court finds that testimony detailing the 2007 incident and Taye's identification and flight do not warrant exclusion under D.R.E. 403. Ultimately the evidence of the accident passes the fifth and final *Getz* factor.

Getz and D.R.E. 105 require that the Court instruct the jury with an appropriate limiting instruction describing its permissible use. When the time is appropriate, the Court will entertain arguments by counsel describing an appropriate limiting instruction which will be given prior to the introduction of the evidence.

Conclusion

State's motion *in limine* to admit evidence of the 2007 incident is **GRANTED**. The State may introduce evidence that indicates Taye was involved in an automobile collision while driving the BMW identified in the 2008 New Castle County accident and his flight from that incident.

/s/ Jerome O. Herlihy
J.

³⁸ See *Fuller v. State*, 860 A.2d 324, 328-29 (Del. 2004)(citing *Claudio v. State*, 585 A.2d 1278, 1280 (Del. 1991); *Kornbluth v. State*, 580 A.2d 556, 560 (Del. 1990)).